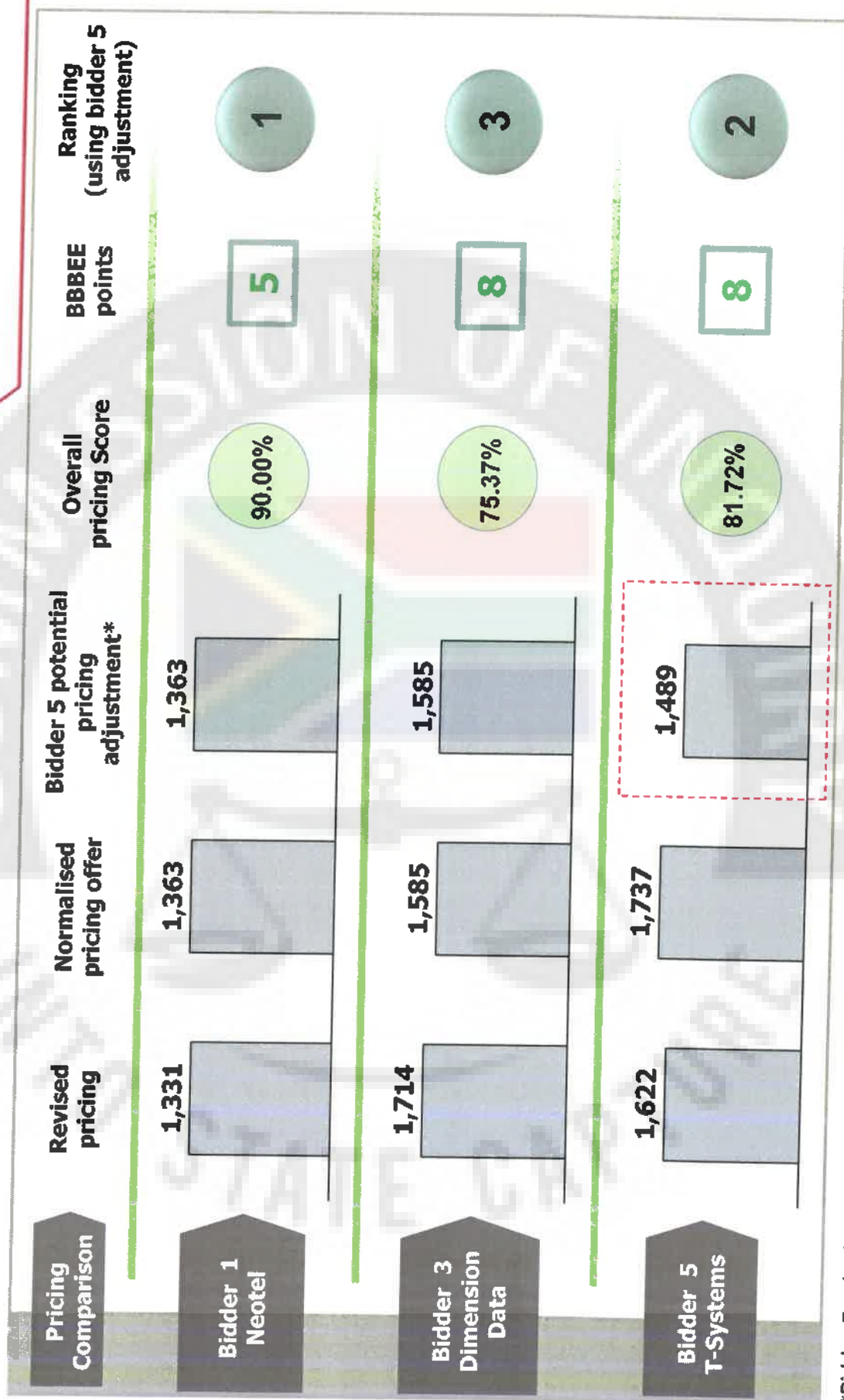


# Pricing considered from bidder 5 is shown but not included in the recommendation process

TRANSNEF



Price in R' mil



\*Bidder 5 submitted a pricing proposal post the closing date of the revised pricing. This pricing was not taken into consideration as the closing date had been passed. The new price proposal for bidder 5 was reduced by R248 million

# Contents

TRANSNET



delivering freight roundly

A

Background and Context

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Clarification

Site visit and Reference assessments

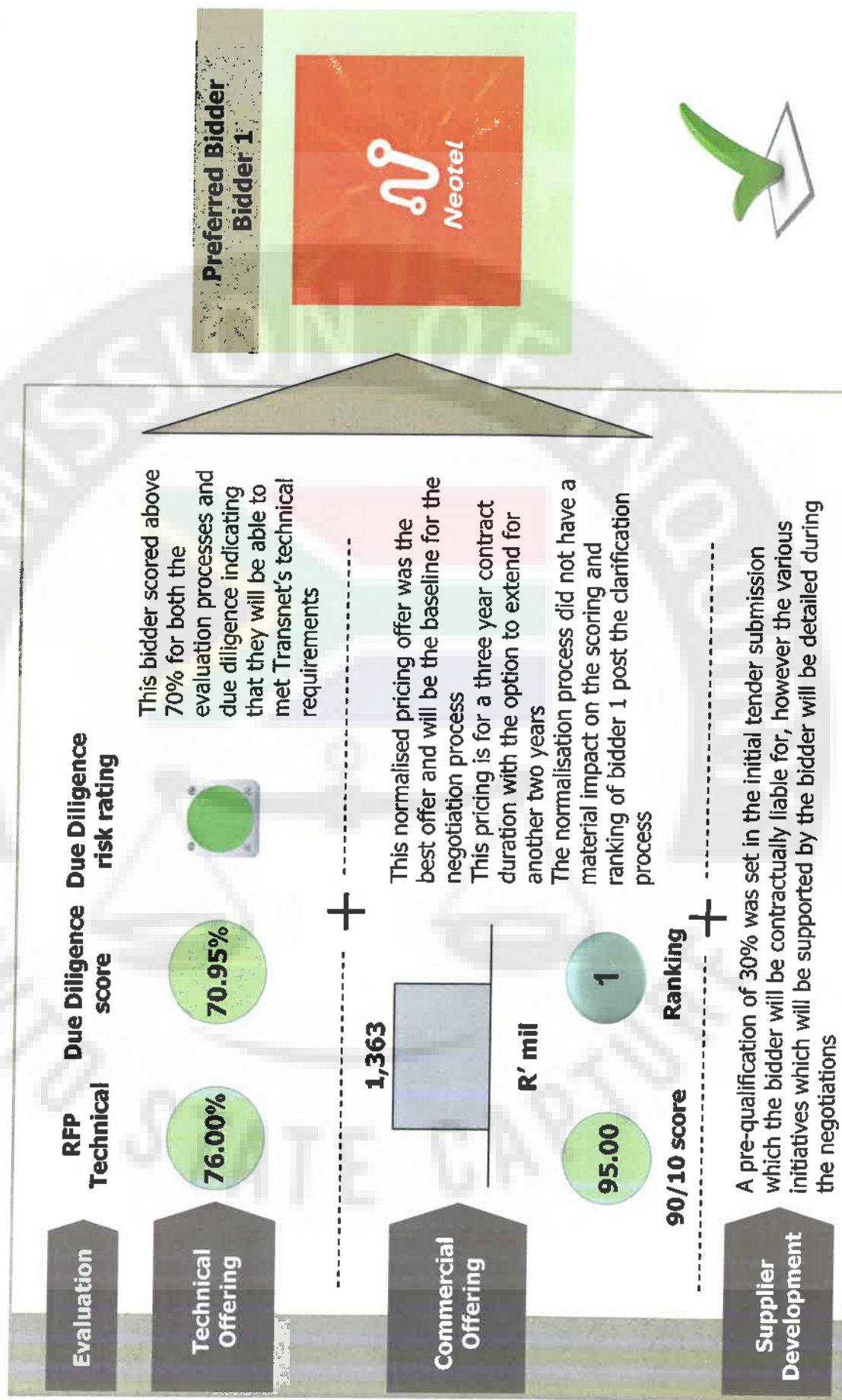
Revised and Normalised pricing

D

Recommendation and Next Steps

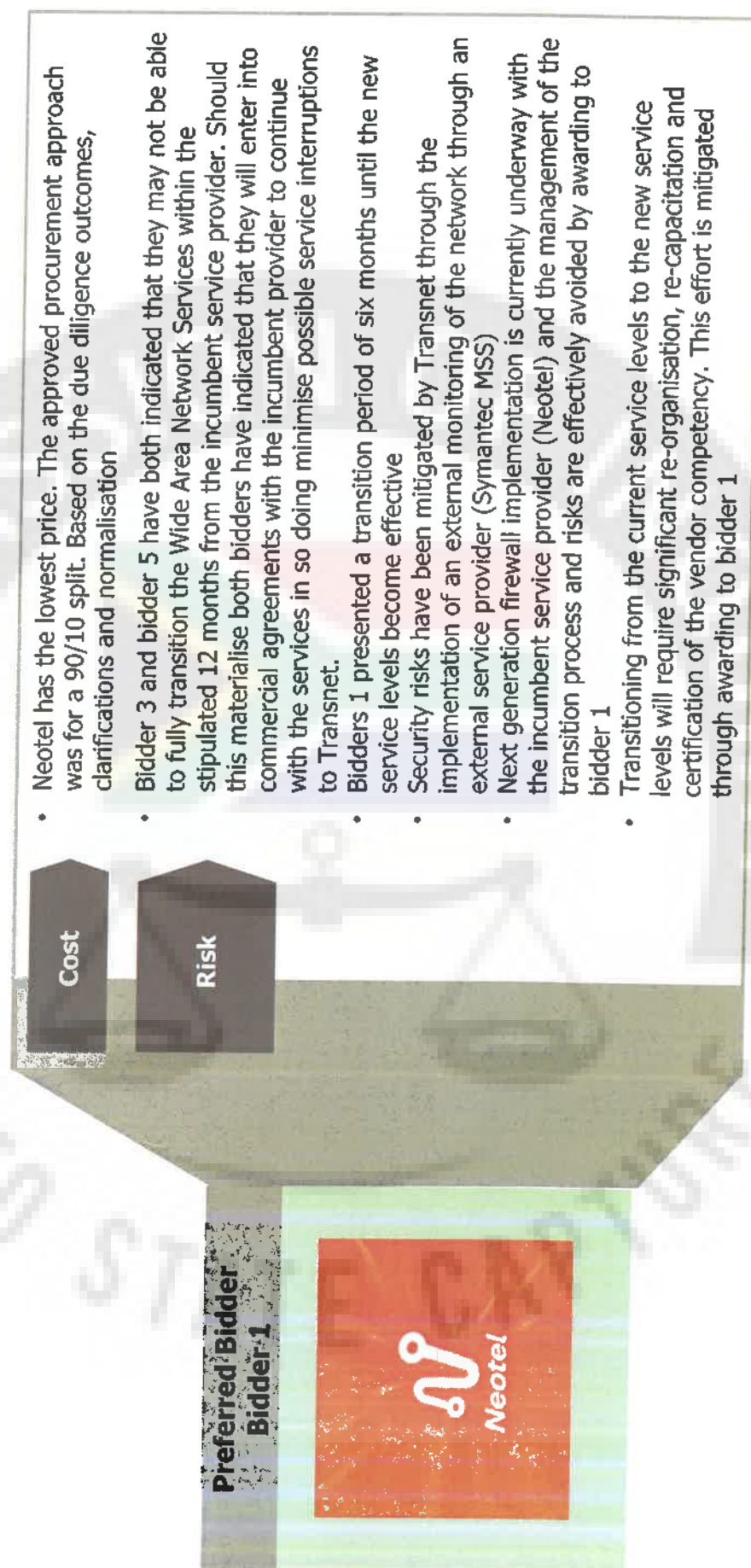
Based on the due diligence, the revised pricing evaluation and the normalised pricing, bidder 1 has been recommended as the preferred bidder

### Summary of the preferred bidder's offering



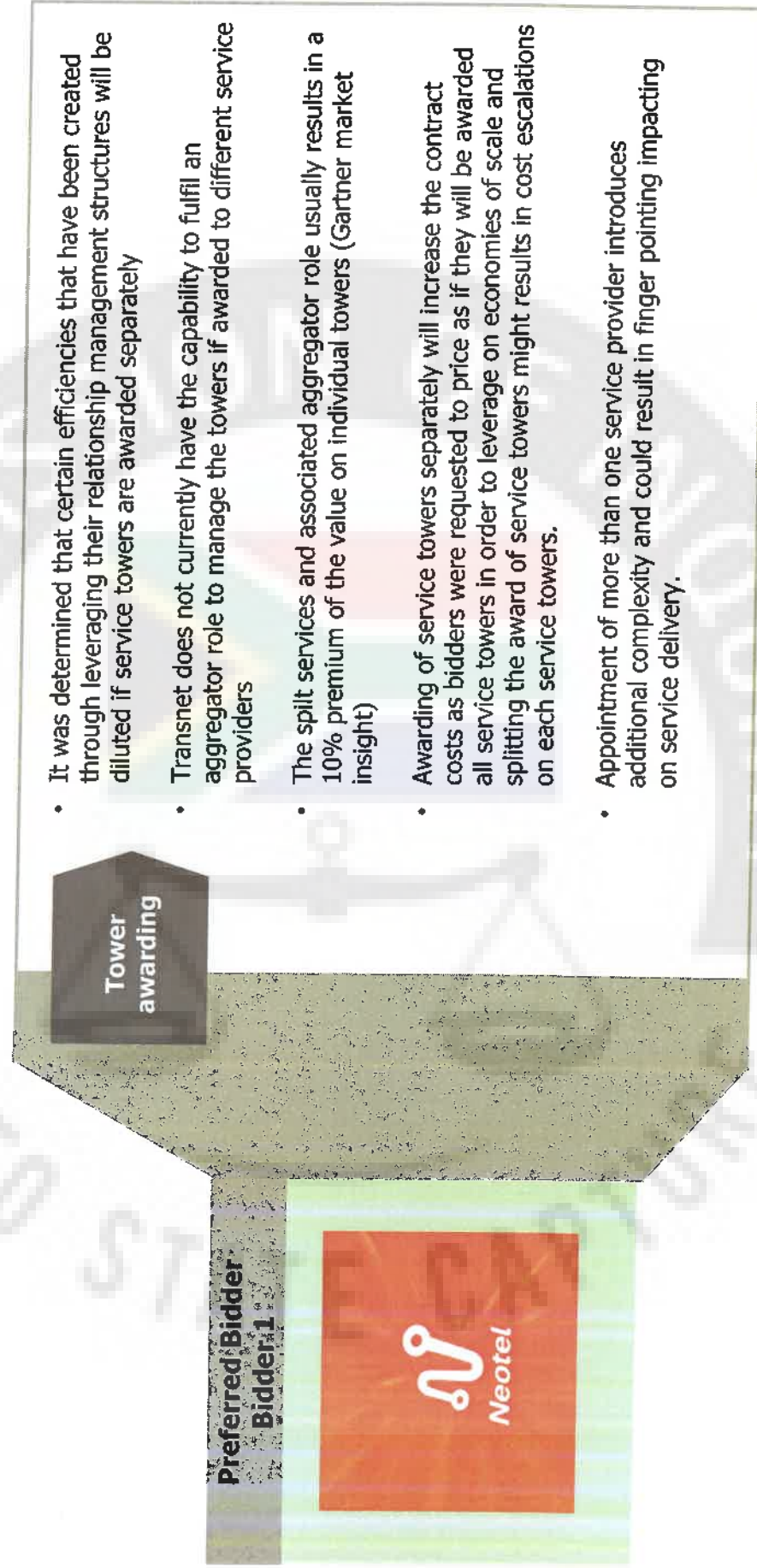
A pre-qualification of 30% was set in the initial tender submission which the bidder will be contractually liable for, however the various initiatives which will be supported by the bidder will be detailed during the negotiations

# Further motivation for recommending bidder 1 as the preferred bidder





## Further motivation for recommending bidder 1 as the preferred bidder and for awarding all towers to a single bidder



## Request for approval

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delivering freight reliability

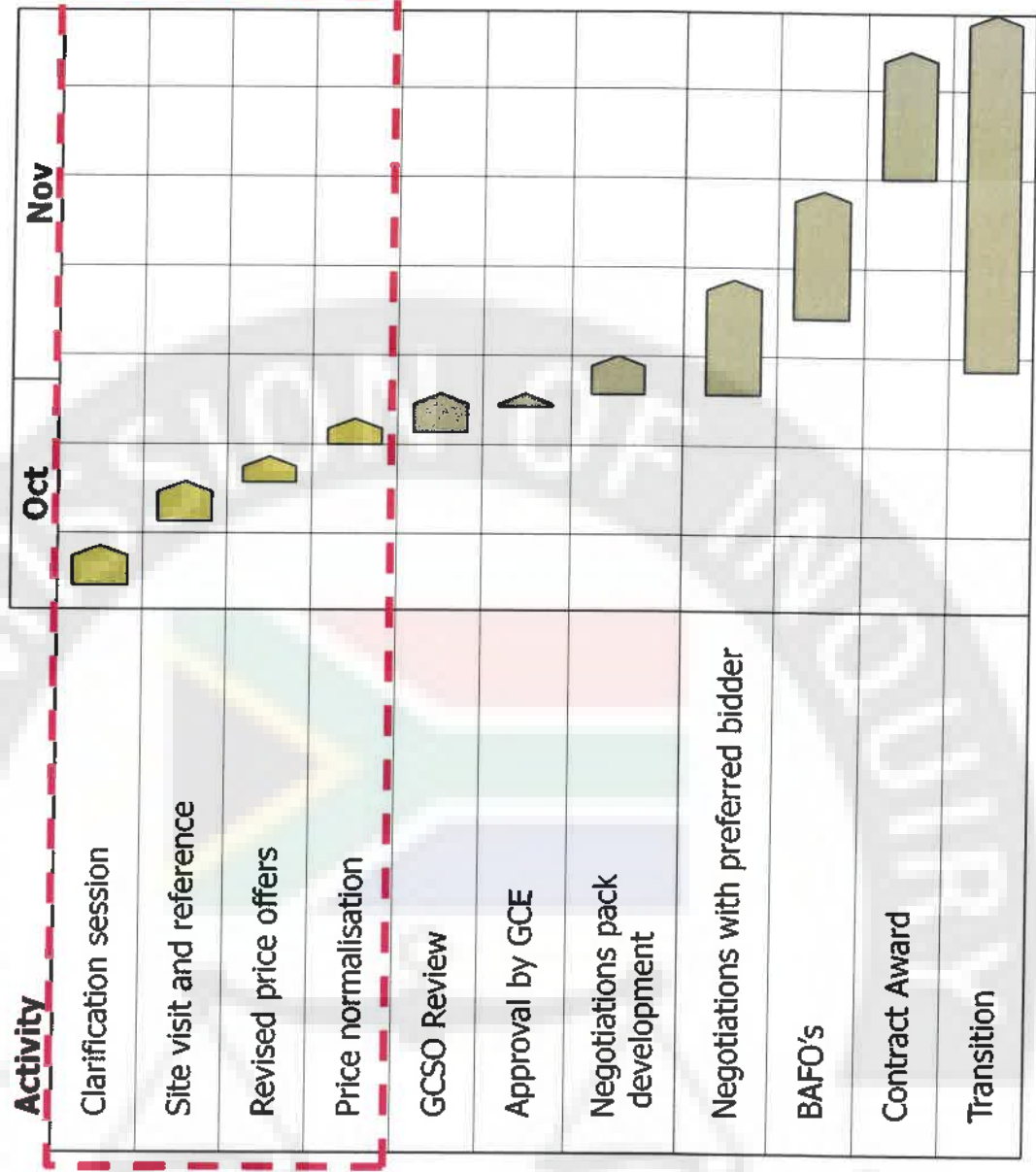
**This presentation verifies that the stakeholder engagement process has been followed and contains the request for the GCE to:**

- a. Approval of the procurement process and award of business to Neotel (Pty Ltd) ;
- b. Sign the Letter of Intent (LOI) for the preferred bidder;
- c. Sign letters of regret for the four (4) unsuccessful bidders.

1

## Next steps

 Executed



## ANNEXURE PV 14





PV14

**Transnet Group ISCM**  
**Tender Evaluation And Recommendation Report**  
**Description of Goods /Service: Provision of Network Services**  
**RFP No. GSM 13/04/0722**



Date: 30 October 2013

**TENDER EVALUATION AND RECOMMENDATION REPORT**

**DESCRIPTION OF GOODS /SERVICE: Provision of Network Services**

**RFP No. GSM 13/04/0722**

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## Transnet Group ISCM Tender Evaluation And Recommendation Report

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### 1. EXECUTIVE SUMMARY

#### 1.1 Project Background

Transnet currently procures Network Services from Neotel (Pty) Ltd since 2008 as a result of the sale agreement for Transnet to Neotel as a going concern. The current agreement with Neotel is due to expire on 31 October 2013 and Transnet went out on open tender in order to test the market. The successful service provider for the services sought on this RFP will be awarded a three-year outsourcing agreement with an option to extend for two (2) years at Transnet's discretion.

The need for a Network Services RFP came about as a result of the eminent expiry of the current agreement with Neotel. The Network Services outsourcing strategy was developed with the assistance of an International ICT Consulting Company (Detecon Consulting) which was contracted for a period of three (3) months to assist with Due Diligence on the current agreement and advise Transnet on the available sourcing strategy options based on the Due Diligence findings (See Annexure A). The intention of the RFP process was to partner with a single primary service provider that would best support the achievement of Transnet's current and future Network Infrastructure Services requirements. It was however clearly stated in the RFP that Transnet will reserve the right to award each service tower to more than one service provider.

The Cross Functional Sourcing team (CFST) completed all preparation work to go out to market after the following approvals were obtained:

- EXCO, BADC and Board approval on the sourcing strategy to go out on an open tender for a period of 3 years with an option to extend for 2 years;
- Sourcing Strategy, RFP and Advertisement approval by the GCE as delegated by the BADC and Board (See Annexure B).

All the above-mentioned approvals have already been obtained and are available on request.

#### 1.2 Project Details & Deliverables

##### Sourcing Strategy

The objective of the Network Services RFP is to source all services through a Preferred Service Provider capable of servicing all Transnet Operating Divisions in their locations around the country. Should this service provider not be able to provide the full complement of the required services, they will need to partner with other service providers to fill these service gaps. This partnering can be via creation of a Consortium or a Joint Venture. The nominated senior service provider within the Joint Venture or Consortium will be the Prime Contractor with whom Transnet will contract for the full complement of services. The Prime Contractor will take full responsibility for end to end delivery of the services and relationship with Transnet.

## Transnet Group ISCM Tender Evaluation And Recommendation Report

Based on the advice of the ICT Outsource Partner (Datscon) and internal analysis and review of the available sourcing options, the following four (4) sourcing options were identified:

- In-Sourcing with external service delivery (Option 1)
- In-Sourcing with Internal service delivery (Option 2)
- Multi-Sourcing model with each OD appointing their own Network Services SP (Option 3)
- Single Sourcing (Managed Services Model) where one primary SP is appointed to provision Network Services to all Transnet ODs. This is the recommended option which was approved with the Network Services sourcing strategy.

### 1.3 Approvals already granted by the Group Chief Executive are as follows:

All the approvals listed below have already been achieved and are available on request.

- Approval to go out to the open market on a Request for Proposal (RFP) for the Provision of Network Services for a period of three (3) years with an option to extend for two (2) years;
- Approval to Shortlist, Conduct Due Diligence and Negotiations on the Network Services RFP (See Annexure C).

### 1.4 Request for Proposals (RFP)

The RFP was drafted with Transnet's terms and conditions, and requested the market to respond on specific Technical, Supplier Development (SD), B-BBEE, and Pricing criteria. The templates on which the bidders were required to respond on and submit to Transnet were included as part of the RFP. This was to ensure that Transnet's RFP is fair, transparent, equitable, competitive and cost effective in line with the PPPFA guidelines. Furthermore the templates would allow Transnet to evaluate the received bid documents using the standard evaluation methodology consistently across all bidders.

Cross Functional Sourcing Team (CFST) team meetings were held to develop the Sourcing Strategy, RFP and all Annexures. Each Transnet Operating Division was represented in the CFST.

The Network Services RFP was issued to the market on 14 June 2013 and closed on 13 August 2013. The above closing date was extended twice by a period of two (2) weeks as a result of extension requests that were received from the potential bidders. The RFP extensions mentioned above were duly approved by the GCE and copies of the approved documents are available on request.

A five stage evaluation process as stipulated in the RFP was employed with the following evaluation stages:

- Stage 1 – Administrative Responsiveness
- Stage 2 – Substantive Responsiveness (Technical Critical Criteria and Supplier Development Initiatives of 30% of overall bid price set as a Prequalification)
- Stage 3 – Technical Evaluation (Minimum threshold of 70%)

## Transnet Group ISCM Tender Evaluation And Recommendation Report

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- Stage 4 – Final Score proportioned by:
  - Price - 90%
  - B-BBEE (Scorecard) - 10%
- Stage 5 – Post Tender Negotiations (including Pricing, Technical, SD & B-BBEE Improvement Plans)

Group Strategic Sourcing aligned with the required High Value Tender processes, which included the following:

- The establishment of a Cross Functional Sourcing Team (consisting of representative from all Operating Divisions, Commercial, Integrated Supply Chain Management and Supplier Development).
- Presentation and approval of the Sourcing Strategy and RFP by the delegated authority.
- Transnet Internal Audit representatives included in the strategy and RFP reviewing, tender briefing session, all evaluations stages, Post Tender Negotiations and reviewing of the TEAR report before being presented to the delegated authority for approval.

### 1.5 DISCUSSION:

Prior to expiry of the current contract, a request for an extension was submitted to EXCO, BADC and Board for approval of the extension and approval of delegation of authority to the GCE to approve the issuing and award of the Network Services RFP. The Board approved a five (5) months extension of the Network Services contract with Neotel effective from 01 April until 31 August 2013. A further two (2) months extension from 01 September 2013 until 31 October 2013 was approved by the Board in August 2013 in order to give the Cross Functional Sourcing Team (CFST) time to finalise the Network Services RFP. As part of the two months extension approval, the Board also approved a twelve (12) months transition period to migrate provisioning of services from the current contract to the new contract. Refer to Annexure D for the two months extension letter which was duly signed by both parties.

### 1.6 Contract period of the new contract

Start Date: 01 November 2013

Expiry Date: 31 October 2016

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TNA








## Transnet Group ISCM Tender Evaluation And Recommendation Report

### 1.7 Tender Details and Tenders Received

<b>RFP Number</b>	GSM/13/04/0722
<b>RFP Issue Date</b>	Friday, 14 June 2013
<b>RFP Closing Date</b>	Tuesday, 13 August 2013
<b>RFP Validity Period</b>	120 days
<b>Extended RFP Validity Period</b>	0 days
<b>Procurement Procedure</b>	RFP - Open Market
<b>Purchase price of RFP</b>	R 5000.00
<b>Date of Advertisement</b>	14 June 2013
<b>Place where Advertised</b>	The Star, Citizen, Cape Argus, Natal Mercury, Sowetan, Daily Dispatch, EP Herald, Volksblad, Business Day, New Age, Sunday Times and City Press
<b>Method of RFP Evaluation</b>	<b>Method 1:</b> Stage 1 – Administrative Responsiveness Stage 2 – Substantive Responsiveness Stage 3 – Technical & Functionality (70% Threshold) Stage 4 – Consolidation Evaluation Price - 90% B-BBEE - 10% Stage 5 – Post Tender Negotiations (PTN)
<b>Number of Bids Received</b>	5
<b>Number of Responsive Bids</b>	4
<b>Number of Non Responsive Bids</b>	1
<b>Scheduled Award Date</b>	31 October 2013
<b>Revised Scheduled Award Date</b>	31 October 2013

### 1.8 Evaluation team

The CFST team identified potential evaluators and a request was sent to all OD's to make the people available to participate. The teams were confirmed before the tender closed and the details are discussed in this section. The table below details the individuals who evaluated the tenders per stage:



  
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 nan

## Transnet Group ISCM Tender Evaluation And Recommendation Report

### Stage 1: Administrative Evaluations

Name of Evaluator	Moderator
Amukelani Mokoena	Gregg Daniels
Ntsutle Motaung	

### Stage 2: Substantive Evaluations

Name of Evaluator	Moderator
Martin Lotz (Technical)	Yusuf Loonat
Alwyn Botha (Technical)	
Amukelani Mokoena	Gregg Daniels
Ntsutle Motaung	
Nkanyiso Ndlovu (SD)	Gomolemo Mahange
Mzamo Manzini (SD)	

### Stage 3: Technical Evaluation

Name of Evaluator	Moderator
Yusuf Loonat	Elon Gibson (Gartner Africa)
Gerrit van der Westhuizen	Jack Matthews (Gartner Africa)
Brenda Mhlo	
Justin Williams	
Hilton Martin	
Kevin Govender	

# **Transnet Group ISCM Tender Evaluation And Recommendation Report**

Phillip Phiri	
Mogau Seema	
Trevi Jooste	
Riaan Oothulzen	
Karen Ferreira	
Veni Kannigan	
Ian du Preez	
Warren Pretorius	
Winston Rossouw	
Louis Hutton	
Thabo Nkopeng	
Sibusiso Mabaso	
Barbara Magongoa	

## **Stage 4: Commercial Evaluation**

Name of Evaluator	Moderator
Vuyani Mbethe	Anthony Petrus
Tshepiso Mahloane	
Johan Veldman	

## Transnet Group ISCM Tender Evaluation And Recommendation Report

### Stage 4: B-BBEE Evaluation

Name of Evaluator	Moderator
Lerato Tseke & Nkanyiso Ndlovu	Gomolemo Mahange/Nkanyiso Ndlovu
Nthuseg Motloung & Mzamo Manzini	

### TIA Team

Name	
Zandile Jele	Practise Desai
Thamile Vorster	

### 1.9 Commercial Summary

A total of 19 vendors purchased the RFP documents, as listed below.

Number	Bidder
Bidder 1	Dimension Data
Bidder 2	Wipro Technologies South Africa (Pty) Ltd
Bidder 3	T-Systems
Bidder 4	Neotel (Pty) Ltd
Bidder 5	Business Connexion (Pty) Ltd
Bidder 6	Telkom Ltd
Bidder 7	Vodacom
Bidder 8	Pricewaterhouse Coopers (PWC)
Bidder 9	HCL Axon (Pty) Ltd
Bidder 10	Huawei Technologies SA (Pty) Ltd
Bidder 11	BT Communications South Africa (Pty) Ltd
Bidder 12	Broadband Infraco (SOC)
Bidder 13	Datacentrix (Pty) Ltd
Bidder 14	Xuma Technologies
Bidder 15	AE Software Solutions
Bidder 16	Bytes Systems Integrated



## Transnet Group ISCM Tender Evaluation And Recommendation Report

Bidder 17	Cisco Systems
Bidder 18	Altech Autopage Cellular
Bidder 19	Nashua Communications

Refer to Annexure E for a list of bidders who purchased the Network Services RFP.

### 1.10 Briefing Session

A total of 20 prospective bidders attended the compulsory briefing sessions that was held on 27 June 2013. The 20<sup>th</sup> bidder was later removed from the bidders' roll as they failed to pay the full purchase price of R5000 for the bid document as they have only paid R500 when they were allowed into the compulsory briefing session as they claimed to have confused the Network Services RFP with the Financial Services RFP which was sold for R500. The Network Services and Financial Services RFPs were advertised through a joint advertisement in the interest of cost savings for Transnet SOC Limited.

The Network Services RFP briefing session was open to all potential bidders who have already purchased the RFP document as attendance was compulsory in order to be allowed to submit your RFP. This session was conducted to advise the prospective bidders about Transnet's network services requirements and how to complete various sections and templates of the RFP document.

A CFST meeting was held after the briefing session to discuss the outcome of the briefing sessions and for preparation and answering all questions that were posed by the prospective bidders during the session.

All questions that were raised at the briefing session and afterwards were answered by the relevant Transnet subject matter experts and forwarded to the Governance Department first for vetting before being sent out to all the bidders that purchased the RFP document.

### 1.11 Proposal

The following bidders submitted their proposals on or before the extended closing date of 13 August 2013 at 12:00. Refer to Annexure F for a list of all bidders that submitted RFPs. (No late submissions were received)

Number	Bidder
1	Nectel (Pty) Ltd, Midrand
2	Telkom SA SOC, Centurion
3	Dimension Data, Bryanston
4	Vodacom (Pty) Ltd, Midrand
5	T-Systems South Africa (Pty) Ltd, Midrand in collaboration with Broadband Infraco SOC Ltd, Woodmead

## Transnet Group ISCM Tender Evaluation And Recommendation Report

### 1.12 Tender communication:

The process followed for tender clarifications and communications was as follows:

- a) The bidders sent the questions to Transnet through a nominated Strategic Sourcing representative as stipulated on the RFP;
- b) The Transnet subject matter experts drafted a response to the questions;
- c) Questions and Answers from bidders were vetted by Governance;
- d) Input from Governance was incorporated on the responses; and
- e) Questions and Answers were sent out to all bidders who purchased the RFP.

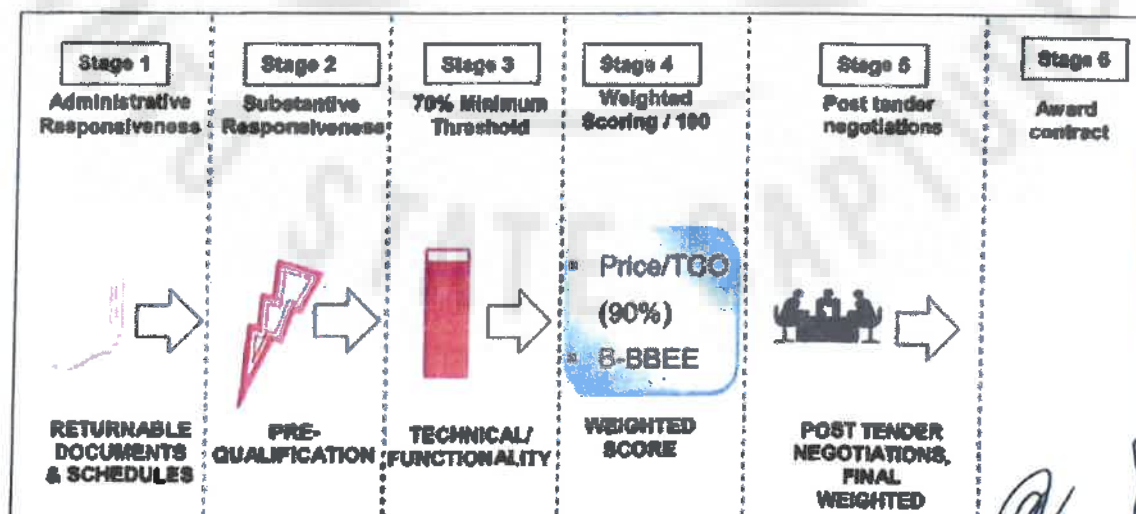
Adequate time was given to bidders to respond to the clarification questions per occurrence (See Annexure G for the TAC Secretariat Permission). A summary of the key clarification events and dates are listed below:

Authority to communicate	Authority to communicate granted by the Secretariat of the Transnet Acquisition Council (TAC) and communication vetted by Governance before issuing.
Date authority granted	01 July 2013 – Briefing Clarification.
Nature and outcome of authorized communication	A communication was sent to all bidders: Clarification questions and answers.
Authority to communicate	Authority to communicate granted by the Secretariat of the Transnet Acquisition Council (TAC) and communication vetted by Governance before issuing.
Date authority granted	21 August 2013 – Substantive Clarification with 4 of the 5 bidders
Nature and outcome of authorized communication	Bidder 2 to 5 were requested to indicate where the supporting information for the technical critical criteria can be found on their RFP submissions. The bidders responded by providing Annexure numbers of where the information can be found on the files
Authority to communicate	Authority to communicate granted by the Secretariat of the Transnet Acquisition Council (TAC) and communication vetted by Governance before issuing.
Date authority granted	09 September 2013 – Commercial Clarification with Dimension Data

## Transnet Group ISCM Tender Evaluation And Recommendation Report

Nature and outcome of authorized communication	Before the test for Commercial responsiveness, the evaluation team picked up that Bidder 3 submitted four (4) different pricing sheets and then requested the Bidder to clarify which one should be used as Transnet can only consider one (1) pricing sheet. The Bidder responded that Transnet can use the price list for the AYAVA solution.
Authority to communicate	Authority to communicate granted by the Secretariat of the Transnet Acquisition Council (TAC) and communication vetted by Governance before Issuing.
Date authority granted	10 September 2013 -- Relationship clarification between T-Systems and Detecon Consulting
Nature and outcome of authorized communication	It was brought to Group Strategic Sourcing's attention that there is a possible conflict of interest between T-Systems and Detecon Consulting who did the Due Diligence project which was regarded as stage 1 of the Network Services RFP. In terms of the LOI, Detecon and its related parties were not allowed to tender for the Network Services RFP (stage 2) if they have participated in stage 1. T-Systems has since provided a signed Affidavit indicating that there was no information sharing between them and Detecon Consulting and that they will welcome any action which Transnet might take should it later emerge that there was information sharing between them and Detecon Consulting

### 2. RFP EVALUATION



## **Transnet Group ISCM Tender Evaluation And Recommendation Report**

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### **2.1 Stage One – Test for Administrative Responsiveness**

A checklist of Returnable Documents that were requested from the bidders was included in the Network Services RFP. All five (5) bidders proceeded to Stage 2. See Annexure H for the administrative consolidated score sheets.

### **2.2 Stage Two – Test for Substantive Responsiveness to RFP**

The test for substantive responsiveness was conducted based on criteria detailed in the RFP. This stage focused on compliance to technical critical criteria, commitment to SD pre-qualification, attendance of compulsory briefing session and submission of a priced offer. This stage of the evaluation was to ensure that only compliant tender submissions were evaluated.

Templates were used to capture the responsiveness of each tender submission. Governance and TIA was consulted to ensure that the process was consistent and fair to all bidders that submitted the RFP.

The substantive stage was conducted after the administrative evaluations followed by the technical evaluation as this RFP is not exempted from the PPPFA and the SD will be negotiated on stage 5 (Post Tender Negotiations), however SD was set as a pre-qualification.

One bidder (Bidder 4) failed to pass substantive evaluations as they failed to produce proof of five (5) years' experience on Wide Area Networks (WAN) services as requested on the technical critical criteria. TIA concurred that the submitted information failed to meet the stipulated minimum technical requirements.

Initially all 5 bidders proceeded to stage 3 and were evaluated on technical while the evaluation team was waiting for the four (4) bidders to provide evidence of their WAN experience and Contact Centre footprint experience as requested on the RFP.

After receiving the outstanding evidence, Bidder 4 was disqualified and the remaining four (4) bidders proceeded to stage 3 (Technical evaluation). See Annexure I for the consolidated substantive score sheet.

### **2.3 STAGE THREE – TECHNICAL THRESHOLD (70%)**

Prior the commencement of evaluations of the tender, standard evaluation templates were developed and reviewed by the CFST team and TIA. Sessions were conducted to ensure that there is alignment on the Network Services strategy, evaluation templates and the scoring methodology.

During the development of the Strategy it was decided by the CFST that Transnet will request the bidders to respond to all technical questionnaires using the response templates that were issued with the Network Services RFP.

A summary of the technical evaluation results for Bidder 1, 2, 3 & 5 are indicated on the below table and the summary technical evaluation sheets are included as Annexure J of this report.



## Transnet Group ISCM Tender Evaluation And Recommendation Report

	BIDDER 1	BIDDER 2	BIDDER 3	BIDDER 5
Technical Evaluation	Final Scores	Final Scores	Final Scores	Final Scores
Initial Technical Scores	76.30%	67.20%	74.00%	69.70%

After completion of Stage Four evaluations, a recommendation for approval of due diligence and negotiations was presented to Management for review and approval. During review of the submission, Management picked up a discrepancy around the moderation methodology that was used by the Cross Functional Evaluation Team (CFET) on functionality/technical evaluation which resulted in scoring discrepancies. Management established that the moderation methodology that was used by the CFET was not in line with the prescripts of the PPM and referred the submission back to the CFET for re-moderation. A re-moderation session was held on 04 October 2013 with all technical evaluators from all ODs and the results of that final moderation session are as indicated below:

	BIDDER 1	BIDDER 2	BIDDER 3	BIDDER 5
Technical Evaluation	Final Scores	Final Scores	Final Scores	Final Scores
Final Technical Scores	76.42%	66.80%	73.71%	69.93%

Based on the above technical re-moderation results, only Bidder 1 and 3 passed the technical threshold of 70%. Bidder 5 obtained a total technical score of 69.93% which was 0.07 less than the technical threshold of 70%. Transnet requested the National Treasury to provide guidance on whether the final technical scores can be rounded off to a whole number which Transnet believed the PPPFA allows for and which will allow the third bidder to also go through in support of an open and competitive tender process. The National Treasury provided confirmation that rounding-off on functionality/technical is indeed possible and this resulted in Bidder 5 also making the technical threshold of 70% on this RFP. The confirmation letter from the National Treasury is included as Annexure K of this TEAR report. The final rounded technical scores after obtaining Treasury's guidance is as follows:

	BIDDER 1	BIDDER 2	BIDDER 3	BIDDER 5
Technical Evaluation	Final Scores	Final Scores	Final Scores	Final Scores
Final Technical Scores	76%	67%	74%	70%



## Transnet Group ISCM Tender Evaluation And Recommendation Report

### 2.4 Stage Four – Commercial Evaluation

The successful bidders on stage 1, 2, 3 and 4 were evaluated on Price and B-BBEE. The table below shows the weightings in line with the PPM.

Stage Four Evaluation – Final	Weighting
Price	90%
B-BBEE	10%
<b>Total</b>	<b>100%</b>

During the Commercial evaluations it became evident that the pricing that was offered by the three (3) shortlisted bidders made it difficult to conduct a "like for like" price comparison as it was subject to certain assumptions which would have a huge impact on pricing once unpacked. The below commercial evaluation results were based solely on the submitted pricing without taking into account assumptions which were stipulated by the various bidders which might result in major changes in pricing once discussed with the shortlisted bidders. Below is a summary of the first commercial evaluation results based on the pricing template that was submitted with the RFP without taking assumptions into account:

#### First Price Evaluation for Network Services RFP (Pre-Due Diligence)

Bidder Name	Price	Points
Bidder 1	R1 389 306 796.00	24.85
Bidder 3	R805 934 857.67	90.00
Bidder 5	R1 330 117 974.48	31.46

To ensure that Transnet is able to conduct a "like for like" comparison a second pricing assessment was done after the CFET met with the shortlisted bidders to clarify their assumptions and requested them to submit their revised commercial proposals. This said assessment was done in line with the Due Diligence and Negotiations approval which was granted by the GCE on 14 October 2013. The GCE approved Due Diligence and negotiations letters that were issued to the shortlisted bidders are included as Annexure L of this TEAR report.

Below are the revised commercial evaluation results after the final commercial proposals were received and evaluated by the commercial team. A summary of the initial and the final commercial evaluation results after Due Diligence is included as Annexure M of this report:

## Transnet Group ISCM Tender Evaluation And Recommendation Report

### Second Price Evaluation for Network Services RFP (Post Due Diligence)

Bidder Name	Price	Points
Bidder 1	R1 330 876 516.32	90.00
Bidder 3	R1 714 300 055.26	64.07
Bidder 5	R1 622 157 146.03	70.30

After receipt of the final commercial proposals from the bidders, Transnet did a normalization exercise on the received pricing in order to ensure that the bidders were quoting for similar services and there were no pricing omissions on the quoted service towers that can inflate the quoted pricing post contract award. Below are the results of the pricing results of the bidders after the normalization process.

### Third Price Evaluation for Network Services RFP (Post Normalisation)

Bidder Name	Price	Points
Bidder 1	R1 363 407 228.40	90.00
Bidder 3	R1 584 967 883.26	75.37
Bidder 5	R1 736 894 366.39	65.35

After conclusion of the normalization process, a final clarification session was held with the three bidders to double check if they have not omitted anything on their pricing. Bidders 5 indicated during discussions that their Joint Venture partner might be able to negotiate optimization with its shareholders which will result in an overall reduction of R248 million on their tendered pricing. Bidder 1 and 3 also indicated minor possible price changes which would have resulted in slight adjustments in the final commercial proposals. Below is an indication of the pricing changes if the R248 million possible price reductions were to be taken into account on this project even though this is not possible since the final pricing has already been submitted.

### Fourth Price Evaluation for Network Services RFP (Post Normalisation and after Inclusion of the R248m possible price reduction for Bidder 5)

Bidder Name	Price	Points
Bidder 1	R1 363 407 228.40	90.00
Bidder 3	R1 584 967 883.26	75.37
Bidder 5	R1 488 894 366.39	81.72

*[Handwritten signatures and initials]*  
17/07/17

## Transnet Group iSCM Tender Evaluation And Recommendation Report

### 2.5 Supplier Development (SD)

In addition to the Transnet request for the Bidders to submit a 30% commitment on SD initiatives, bidders were also requested to provide Transnet with their valid B-BBEE Verification Certificates for evaluation of their scorecards based on the 90/10 principle. Below is the summary of the B-BBEE evaluation results based on their current scorecards:

#### B-BBEE Evaluation

Bidder Name	BBBEE level	Points
Bidder 1	Level 4	5
Bidder 3	Level 3	8
Bidder 5	Level 3	8

Refer to Annexure N for the a detailed B-BBEE evaluation sheets

### 2.6 Stage Five – Due Diligence & Negotiations

All three shortlisted bidders were subjected to a Due Diligence process in order to clarify their bid submissions and verify their technical capability to execute on a contract of this magnitude. The CFET in consultation with Management took a decision that in the interest of time due to the eminent expiry of the Neotel contract, only Due Diligence will be conducted at this stage and Post Tender Negotiations (PTN) will only be conducted with the preferred bidder post signature of the Letter of Intent (LOI).

During Due Diligence the following activities were done by the Cross Functional Evaluation Team (CFET):

- Discussions with the Individual shortlisted bidders were held to clarify all assumptions and the bidders were requested to submit their revised commercial proposals to the Transnet TAC Secretariat by no later than 24 October 2013 at 09h00;
- Individual interviews with the shortlisted bidders' key resources were conducted;
- Site visits to the shortlisted bidders' premises to inspect their Network Operations Centre (NOC), Data Centres/Hosting Facilities and Disaster Recovery (DR) sites were conducted;
- Telephonic interviews with the shortlisted bidders' key customers were conducted to determine their performance track-record on some of their current network services customers.

A Due Diligence report which is included as Annexure O of this TEAR report was compiled by the Cross Functional Evaluation Team (CFET) on conclusion of the Due Diligence process. Based on the Due Diligence report Bidder 1 and 3 obtained a green overall score as both scored above 70% while Bidder 5 received an amber score as their overall Due Diligence score was 68.94%.

## Transnet Group ISCM Tender Evaluation And Recommendation Report

### 2.7 Weighted Score

Below is the final ranking that forms the basis of the recommendation after the normalization of the received pricing. Based on the below consolidated weighted scoring results, Bidder 1 is the highest in terms of ranking and they are the recommended bidder for further contract negotiations as a preferred bidder.

#### Final Ranking for Network Services RFP (Post Due Diligence & Normalisation)

Criteria	Bidder 1	Bidder 3	Bidder 5
Price	90.00	75.37	65.35
B-BBEE	5	6	8
<b>Total Score</b>	<b>95.00</b>	<b>83.37</b>	<b>73.35</b>

The CFET team's recommendation is to award all service towers to a single service provider as opposed to awarding service towers separately based on the following reasons:

- The bidders have indicated that certain efficiencies that have been created through leveraging their relationship management structures will be diluted if service towers are awarded separately.
- Transnet does not currently possess the structure nor the level of maturity to fulfil an aggregator role to manage the integration between separate service providers should the service towers be awarded individually.
- Adopting of a split services model and appointing an aggregator usually results in a 10% premium of the value of individual service towers managed by the Aggregator (Gartner market insight).
- Awarding of service towers separately will increase the contract costs as bidders were requested to price as if they will be awarded all service towers in order to leverage on economies of scale and splitting the award of service towers might result in cost escalations on each service towers.
- Appointment of more than one service provider introduces additional complexity and could result in finger pointing impacting on service delivery.

### 3. CONTRACT BUDGET

The successful Bidder will be appointed for a period of three (3) years with an option to extend for two (2) years. The current Neotel contract spend per annum is approximately R550m. The new contract spend per annum prior to negotiations is estimated at R440m. The estimated contract spend over a period of three (3) years is R1, 3 billion. Based on the above spend estimations, there is already a cost saving of R110m per annum based on the new contract prices. All Transnet Operating divisions have sufficient budgets available for these respective Network Services requirements.



## Transnet Group ISCM Tender Evaluation And Recommendation Report

### 4. PROJECT RISKS

The risks associated with this recommendation are as follows:

- Both Bidder 3 and 5 have both indicated that they may not be able to fully transition the Wide Area Network (WAN) services within the stipulated twelve (12) months transition period from the Incumbent service provider. Should this materialise both bidders have indicated that they will enter into commercial agreements with the Incumbent provider to continue with the services in so doing minimise possible service interruptions to Transnet.
- The Security risk for Transnet as a result of the past Security breach impacting Bidder 1 and 5 who are Transnet's current ICT service providers. The EIMS department indicated that the security requirements have increased significantly between the current contract and the requirements expressed in the RFP. This is from a technical requirements viewpoint, an SLA performance viewpoint as well as compliance to Security standards and certification (ISO 27001 and 27002 are explicitly mentioned. In addition to the above requirements the following measures have also been taken:
  - The Transnet has already implemented external monitoring of the network through Symantec MSS and is in the process of building further security intelligence monitoring capability and the service provider will be required to provide real-time security information from all devices on the network to the new security intelligence centre. Data will also be provided to Symantec MSS until such time as the security intelligence function is fully online.
  - The Next generation firewall implementation is currently underway through Neotel and the winning network provider would take over the management and first level monitoring of these devices to provide increased levels of protection on the network perimeter and key areas within the network. This will significantly enhance the current protection levels.
  - The transition from current service levels to the new service levels is a massive step change which will require fundamental re-organisation, recapitalization and certification of the vendor competency in the security area. It is critical that this is effectively managed through the transition period, and Transnet must obtain third party validation through the transition period that the objectives are being met.

### 5. RFP QUALITY ASSURANCE

Transnet's prescribed RFP process was followed as per the PPM and with the guidance of Transnet Internal Audit (TIA) and the ISCM Governance Department.



## **Transnet Group ISCM Tender Evaluation And Recommendation Report**

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The following sequence of steps was followed:

Stage 1 - Administrative Evaluations conducted by Group Strategic Sourcing Team.

Stage 2 - Substantive Evaluations conducted by Group Strategic Sourcing, Group ICT Team and the Supplier Development Team.

Stage 3 - Technical Evaluations conducted by the ICT Representatives from all ODs.

Stage 4 - Commercial Evaluations conducted by the ISCM Commercial Team, Group ICT Representatives and B-BBEE by the Supplier Development Team. Final Weighed scoring consolidation was done by the Cross Functional Evaluation Team (CFET).

Stages 1, 2, 3, & 4 were conducted sequentially and to ensure that the principles of the gateways were adhered to, the following actions were taken:

- a) Teams evaluated separately;
- b) Moderation took place separately;
- c) Gateway review sessions were held with the relevant team members and Transnet Internal Audit (TIA) to confirm shortlisting of bidders per threshold.

TIA representatives participated in the full process from the strategy development stage, through to the completion of the evaluations and recommendation for award.

Governance was consulted throughout the process to ensure compliance to Transnet's Supply Chain Policies.

### **HVT Gateway Reviews**

Gateway review sessions were held with the relevant team members and Transnet Internal Audit (TIA) to confirm shortlisting of bidders was done following the evaluation process as outlined in the RFP.

TIA representatives participated in the full process from the strategy development stage, through to completion of the evaluations and development of a recommendation for approval of Due Diligence, negotiations and award. The High Value Tender (HVT) Gateway 1 and 2 reports provided by TIA indicates full compliance (green audit) to the Procurement process. The HVT Gateway 3 report indicated a need for improvement due to the rounding-off of technical scores and the possible conflict of interest issue between T-Systems and Detecon Consulting. The above mentioned issues have already been mitigated through the rounding-off permission that was received from the National Treasury and a written Affidavit from T-Systems confirming that there was no information sharing between them and Detecon Consulting. Refer to Annexure P for the full HVT Gateway 1, 2 and 3 reports.

A possible conflict of interest issue was also raised during tender evaluations between T-Systems and Detecon Consulting due to their involvement in the Due Diligence project (Phase 1 of this RFP). T-Systems

## **Transnet Group ISCM Tender Evaluation And Recommendation Report**

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provided a signed Affidavit confirming that there was no information sharing between them and Detecon Consulting during compilation of their RFP submission. T-Systems was requested to further confirm on the Affidavit that should it later emerge that there was information sharing between them and Detecon Consulting, they will welcome whatever action Transnet might want to take against them. The T-Systems Affidavit is included as Annexure 5 the TEAR report.



*[Handwritten signatures]*  
*[Handwritten initials: JAM]*


## Transnet Group ISCM Tender Evaluation And Recommendation Report

### 6. RECOMMENDATION:


6.1 It is recommended that the GCE approve the following:

- Approve the procurement process and award of business to Neotel (Pty) Ltd;
- Sign the Letter of Intent (LOI) for the preferred bidder (See Annexure Q); and
- Sign the regret letters for the four (4) unsuccessful bidders (See Annexure R).

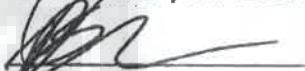
#### COMPILED BY:

  
Macdonald Matuleke  
Commodity Manager (Group Strategic Sourcing)  
Date: 30/10/2013


#### RECOMMENDED/NOT RECOMMENDED

  
Gerrie van der Westhuizen  
Executive Manager (Office of the Head: EIMS)  
Date: 30/10/2013


#### RECOMMENDED/NOT RECOMMENDED

  
Peter Volmink  
Executive Manager (Governance & Compliance)  
Date: 30/10/13

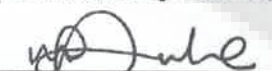
#### RECOMMENDED/NOT RECOMMENDED

  
Garry Pita  
Group Chief Supply Chain Officer  
Date: 30/10/13


#### APPROVED/NOT APPROVED

  
Sheria Pillay  
Acting Group Chief Executive  
Date: 31 October 2013


#### RECOMMENDED/NOT RECOMMENDED

  
Mandla Dube  
Category Manager (Group Strategic Sourcing)  
Date: 30/10/2013

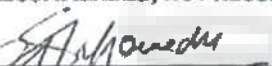
#### RECOMMENDED/NOT RECOMMENDED

  
Fanle van der Walt  
Executive Manager (Strategic Sourcing)  
Date: 30/10/2013

#### RECOMMENDED/NOT RECOMMENDED

  
Mantlaka Matsoane  
Group Executive (EIMS)  
Date: 31/10/2013

#### RECOMMENDED/NOT RECOMMENDED

  
Mohammed Matromedy  
Acting Group Chief Financial Officer  
Date: 31.10.2013

## ANNEXURE PV 15



PV15

Transnet SOC Ltd  
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## MEMORANDUM

www.transnet.net

**To:** Sharla Pillay, Acting Group Chief Executive (GCE)

**From:** Mohammed Mahomed, Acting Group Chief Financial Officer (GCFO)  
Mantsika Matsoane (Chief Information Officer)  
Garry Pita, Group Chief Supply Chain Officer (GCSCO)

**Date:** 30 October 2013

**Subject:** RFP No. GSM/13/04/0722 for Provision of Network Services – Request for approval to approve the process, award contract and issue a Letter of Intent (LOI) inviting Neotel to further negotiations as the preferred bidder of this RFP

### PURPOSE OF SUBMISSION:

1. To request the Group Chief Executive (GCE) to:
  - Approve the procurement process and award of business to Neotel (Pty) Ltd;
  - Sign the Letter of Intent (LOI) for the preferred bidder (See Annexure Q);
  - Sign letters of regret for the four (4) unsuccessful bidders (See Annexure R) and
  - Sign the letter to extend the current Neotel contract (Annexure T).

### BACKGROUND:

2. The current five (5) year Neotel contract for Network Services was established through a sale agreement of Transnet to Neotel. This agreement was due to expire on 31 March 2013 and the Board subsequently approved five (5) and two (2) months extensions respectively and the current expiry date is 31 October 2013.
3. All Transnet Operating Divisions (ODs) make use of this contract for their Network Services requirements and the contract is managed at Group level by EIMS previously known as Group ICT.
4. The need for the Network Services RFP came about as a result of the imminent expiry of the Network Services agreement with Neotel (Pty) Ltd and the Transnet Board requested that management should test the open market for this requirement.

### DISCUSSION



5. A Network Services sourcing strategy and RFP was prepared by the Cross Functional Sourcing Team (CFST) that consisted of technical representatives from all ODs. This sourcing strategy was recommended by the Executive Committee (EXCO) and Board Acquisitions and Disposal Committee (BADC) and approved by the Board of Directors (Board) in February 2013. The subsequent amendments on the sourcing strategy pertaining to the contract period and technical threshold were further approved by the BADC on 29 May 2013.
6. The Board delegated authority to approve the Sourcing Strategy, RFP, Advert and Award to the Group Chief Executive Officer subject to approval of the BADC and the BADC concurred with that recommendation. Refer to Annexure B of the attached TEAR report for the BADC resolution delegating authority to the GCE as indicated above.
7. An RFP was sent out to the market on 14 June 2013 and closed on 13 August 2013 after being extended twice as per requests from the bidders and approved by the GCE. A compulsory briefing session was held on 27 June 2013 and all nineteen (19) bidders who purchased the RFP document attended the briefing session. Only five (5) bidders responded to the RFP.
8. Bidders were evaluated against specific criteria as set out in the Request for Proposal (RFP) that was approved by the GCE on 09 June 2013. The table below indicates the number of bidders that passed at each of the evaluation stages.

Evaluations				
Stage 1	Stage 2	Stage 3	Stage 4	Stage 5
Administrative Responsiveness	Substantive Responsiveness	Technical Evaluation	Commercial Evaluation	Award Incl. Post Tender Negotiations
5	4	3	3	1

9. It was concluded during the technical evaluation process that three (3) bidders namely Neotel (Bidder 1), Dimension Data (Bidder 3) and T-Systems (Bidder 5) passed stage 1 to 4 of the evaluation process.
10. The preliminary Network Services evaluation results in the form of a Tender Evaluation and Recommendation (TEAR) report were presented to Management for review on 01 October 2013. Management identified scoring discrepancies and requested that the Cross Functional Evaluation Team (CFET) should re-moderate areas where there were huge scoring discrepancies to be in line with Section 18.4.1(iii) of the PPM that stipulates that 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. A re-moderation session was held at Carlton Centre on 04 October 2013 where all the impacted service towers were re-moderated and agreed upon by the entire evaluation team including Transnet Internal Audit (TIA).
11. Transnet has also considered the issue of Vodacom acquiring Neotel, its assets and customer base as part of this RFP. Neotel has however indicated as part of the process

that this risk will be mitigated and should the Due Diligence being conducted by Vodacom prove to be positive for the sale and should the Competition Commission approve the sale Neotel will continue to fulfill its mandate as part of Vodacom and offer services under the agreed Terms and Conditions between Neotel and Transnet. Should the sale not be concluded Neotel has also committed to continue delivery of services to Transnet on the proposed services as described in their RFP response with the necessary commitment from their shareholders.

12. A recommendation for approval of Due Diligence and negotiations was submitted to the GCE for approval upon conclusion of commercial and B-BBEE evaluations. The GCE approved the Due Diligence and negotiations request on 14 October 2013 and a copy of the approved memorandum is included as Annexure C of the attached TEAR report. Due Diligence and negotiations letters were issued to the bidders on 14 October 2013 and the process commenced on 16 October 2013.
13. The Due Diligence process kicked off with discussions on the bid proposals with the individual shortlisted bidders to clarify their assumptions and enable them to submit their Best and Final Offers (BAFO) to Transnet. The process progressed to site visits to the three (3) shortlisted bidders' facilities to conduct interviews with some of their key resources and to conduct a facilities inspection to determine their technical capability to execute on the contract if successful on this RFP. The Due Diligence process culminated in conducting of telephonic interviews with two of the three references that were provided by each bidder to establish their performance track-record on the network related contracts which they have with their current customers. The above process was finalised on 23 October 2013 and a Due Diligence report that was compiled by the CFST is included as Annexure O of the Network Services TEAR report.
14. The Network Services TEAR report detailing the entire RFP process is included as **Appendix 1** of this memorandum. The High Value Tender (HVT) Gateway reports 1 and 2 provided by Transnet Internal Audit (TIA) as required by the HVT process indicates full compliance (green audit) to the Procurement process. The HVT Gateway 3 report indicated a need for improvement due to the rounding-off of technical scores and the possible conflict of interest issue between T-Systems and Detecon Consulting. The above mentioned issues have already been mitigated through the rounding-off permission that was received from the National Treasury and a written Affidavit from T-Systems confirming that there was never any information sharing between them and Detecon Consulting. Copies of the TIA Gateway Reviews reports are included as Annexure P of the attached TEAR report.
15. Table 2 below indicates project timelines for the remaining activities to the completion of this procurement event for the Network Services RFP:

Item	Activity	Planned Completion Date
1	Stage 1: (Administrative Evaluations & Moderation)	Finalised
2	Stage 2: (Substantive Evaluations & Moderation)	Finalised

3	Stage 3: (Technical Evaluations & Moderation)	Finalised
4	Stage 4: (Commercial Evaluations & Moderation)	Finalised
5	Issuing of presentations invites to the shortlisted bidders	Finalised
6	Presentations by the shortlisted bidders	Finalised
7	Submit recommendation for approval of Due Diligence and Negotiations to the GCE for approval	Finalised
8	Conduct Due Diligence to clarify assumptions and establish the shortlisted bidders' technical capability	Finalised
9	Request Best and Final Offers (BAFO) after Due Diligence	Finalised
10	Stage 5: Post Tender Negotiations with the preferred bidder	Deferred to post issuing of the LOI
11	Present a final recommendation for award together with LOI(s) to the GCE for approval	25 – 30 October 2013
12	Stage 6: Issue LOI(s) to the successful bidder	31 October 2013
13	Discuss transition plan with the preferred bidder	31 October 2013
14	Negotiate and sign Master Services Agreement (MSA) during the transition period including Supplier Development Plan	01 November 2013 to 28 February 2014

Table 2: Project Timelines

### RISKS ASSOCIATED WITH THE CURRENT SERVICE PROVIDERS

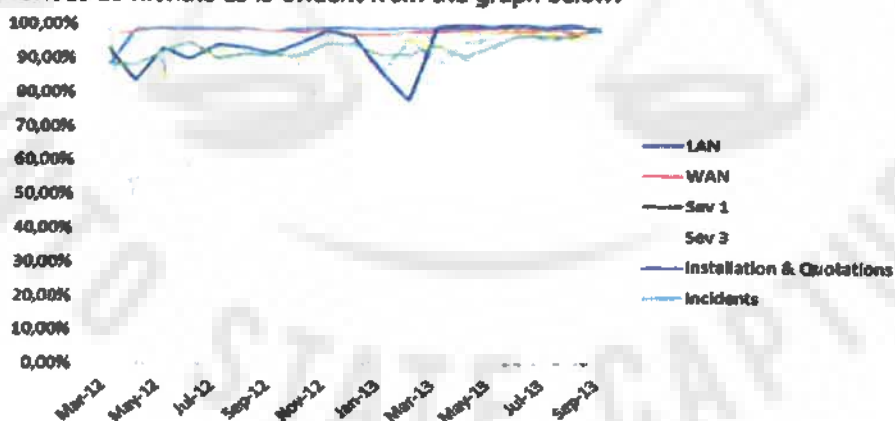
16. Two of the bidders are current service providers to Transnet and risks linked to current services and mitigating actions are highlighted in the table below:

Bidder 1 – Neotel		Bidder 5 – T-Systems	
Risk	Mitigating actions	Risk	Mitigating actions
Security services not meeting requirements	<ul style="list-style-type: none"> <li>• Security requirements have increased significantly between the current contract and the RFP;</li> <li>• Transnet has implemented external monitoring of the network;</li> <li>• Real time monitoring;</li> <li>• Implementation of next generation firewalls;</li> <li>• Supplier has committed to employ additional resources;</li> <li>• All findings linked to security incident has been cleared.</li> </ul>	Security services not meeting requirements	<ul style="list-style-type: none"> <li>• Security requirements have increased significantly between the current contract and the RFP;</li> <li>• Transnet has implemented external monitoring of the network;</li> <li>• Real time monitoring;</li> <li>• Implementation of next generation firewalls;</li> <li>• Supplier has committed to employ additional resources;</li> <li>• All findings linked to security incident has been cleared.</li> </ul>
Lack of project	<ul style="list-style-type: none"> <li>• Strong contractual support to</li> </ul>	Lack of project	<ul style="list-style-type: none"> <li>• Strong contractual support to</li> </ul>

governance	<p>force supplier to enact the appropriate governance with the support from bidders internal governance functions;</p> <ul style="list-style-type: none"> <li>• Transnet will require independent certification of competence of project delivery function;</li> <li>• SLA's will also be applicable on future project with service credits linked to the project budgets and timelines.</li> </ul>	governance	<p>force supplier to enact the appropriate governance with the support from bidders internal governance functions;</p> <ul style="list-style-type: none"> <li>• Transnet will require independent certification of competence of project delivery function;</li> <li>• SLA's will also be applicable on future project with service credits linked to the project budgets and timelines.</li> </ul>
		Overall quality of service delivery	<ul style="list-style-type: none"> <li>• Service credits are being charged;</li> <li>• Focus on continuous service improvement.</li> </ul>
		Poor Financial Management	<ul style="list-style-type: none"> <li>• Project launched to identify weaknesses and to improve current financial reporting;</li> <li>• Internal Audit initiated to validate the accuracy of current billing.</li> </ul>

17. Considering the factors above management is confident that any risk linked to the recommend bidder can be mitigated, if not already done by implementing the new contract and more onerous service level agreements as included in the RFP process.

18. The proposed bidder's overall service delivery trends have also improved over the previous 18 months as is evident from the graph below:



**APPROVALS AND DELEGATION:**

19. The Group Chief Executive has already provided the following approvals:

- Approval of the Request for Proposal (RFP) and Advert to go out on an open tender;
- Approval to advertise and issue a RFP to the open market for provision of Network Services for a period of three (3) years with an option to extend for another two (2) years;
- Approval to conduct Due Diligence and Negotiations on the Network Services RFP.

20. In terms of clause 6.4(e) of the Delegation of Authority on the latest PPM effective from 01 October 2013, all recommendations for award exceeding R2 billion should be approved by the Board. This recommendation is forwarded to the GCE for approval as per delegation from the BADC dated 29 May 2013, a copy of which is included as Annexure B of the attached TEAR report.

**FINANCIAL IMPLICATIONS:**

21. The estimated contract value for a period of three (3) years is estimated at R1.5 billion. Transnet does have an option to extend the contract for an additional 2 years, which would increase the cost with an estimated R1 billion. R1.3 billion
22. A minimum savings target of 10% will be negotiated with the preferred bidder during post tender negotiations as part of Transnet's FY 2013/14 cost savings drive.

**BUDGET IMPLICATIONS:**

23. All Transnet OD's and Specialist Business Units (SBUs) have budgets available for their respective Network Services requirements.

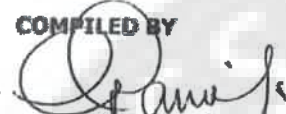


**RECOMMENDATION:**

24. To request the Group Chief Executive (GCE) to:

- Approve the procurement process and award of business to Neotel (Pty) Ltd;
- Sign the Letter of Intent (LOI) for the preferred (See Annexure Q);
- Sign letters of regret for the four (4) unsuccessful bidders (See Annexure R); and
- Sign the letter to extend the current Neotel contract (Annexure T).

**COMPILED BY**

  
Macdonald Maluleke

Commodity Manager: Group Strategic Sourcing  
Date:

**RECOMMENDED / NOT RECOMMENDED**

  
Mandla Dube


Category Manager: Group Strategic Sourcing  
Date: 30/10/2013

**RECOMMENDED / NOT RECOMMENDED**

  
Fanie van der Walt

Executive Manager: Group Strategic Sourcing  
Date: 31/10/2013

**RECOMMENDED / NOT RECOMMENDED**

  
Gerrie van der Westhuizen

Executive Manager: Office of the CIO  
Date: 31/10/2013

**RECOMMENDED / NOT RECOMMENDED**

  
Peter Volmink

Executive Manager: Governance & Compliance  
Date: 31 OCTOBER 2013

**RECOMMENDED / NOT RECOMMENDED**

  
Yusuf Loonat

Executive Manager: EIMS Service Delivery  
Date: 31/10/2013

**RECOMMENDED / NOT RECOMMENDED**

  
Garry Pita

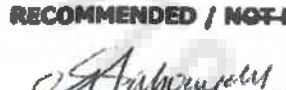
Group Chief Supply Chain Officer  
Date: 31/10/13

**RECOMMENDED / NOT RECOMMENDED**

  
Mantsika Matsoane

Chief Information Officer  
Date: 31/10/2013

**RECOMMENDED / NOT RECOMMENDED**

  
Mohamed Mahomed

Acting Group Chief Financial Officer  
Date: 31. 10. 2013

**APPROVED / NOT APPROVED**

  
Sharla Pillay

Acting Group Chief Executive  
Date: 31 October 2013

Please obtain letter from Neotel CEO to confirm that they will fulfill their mandate in the event of Vodacom acquiring Neotel (This should be part of Vodacom due diligence).

## ANNEXURE PV 16



PV16

Transnet SOC Ltd  
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Number  
1990/000900/30

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TRANSNET

**MEMORANDUM**

www.transnet.net

**To:** Anoj Singh, Group Chief Financial Officer (GCFO)  
Mantsika Matooane (Chief Information Officer)  
Garry Pita, Group Chief Supply Chain Officer (GCSCO)

**From:** Brian Molefe, Group Chief Executive (GCE)

**Date:** 20 November 2013

**Subject:** RFP No. GSM/13/04/0722 for Provision of Network Services – Request for approval to approve the process, award contract and issue a Letter of Intent (LOI)

**PURPOSE OF SUBMISSION:**

1. To inform the Group Chief Financial Officer, Group Chief Information Officer and the Group Chief Supply Chain officer of my decisions to award the above mentioned business to T-Systems South Africa in terms of your request in your memorandum dated 31 October 2013.

**BACKGROUND:**

2. Your previous correspondence addressed to me dated 30 October 2013 with subject "RFP No. GSM/13/04/0722 for Provision of Network Services – Request for approval to approve the process, award contract and issue a Letter of Intent (LOI) inviting Neotel to further negotiations as the preferred bidder of this RFP" (Annexure A) and the TEAR report (Annexure B) which accompanied this letter refers.
3. This correspondence requested me to:
  - a. Approve the procurement process and award of business to Neotel (Pty) Ltd;
  - b. Sign the Letter of Intent (LOI) for the preferred bidder;
  - c. Sign letters of regret for the four (4) unsuccessful bidders; and
  - d. Sign the letter to extend the current Neotel contract.

**PROCUREMENT PROCESS**

4. In approving the procurement process the following must be taken into account by the Acquisition Council (AC), which in this case is the Transnet Board, which sub-delegated this responsibility to the Transnet GCE:
5. The Role of the AC is set out in par 20.2 of the PPM, October 2013, which is set out below:

## 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. It is important to note that for the purposes of adjudication, bids are required to remain valid only until the matter is considered by the AC provided that the AC approves the process. Should the AC not approve the matter, the validity period must be timeously extended;*
- 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 certificate, VAT certificate (where applicable) and whether the recommended Bidder complies fully with all legal requirements stated in the RFP. Note that in terms of the Preferential Procurement Regulations 2011 no business may be awarded to a person whose tax matters have not been declared to be in order by SARS;*
- 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 foregoing;*
- 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.*

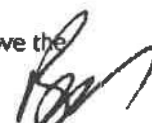
*20.6.5 Non-award of business (as a result of Transnet's bad planning) should for obvious reasons be minimised as far as possible as Bidders expend a significant amount of time, effort and money when preparing and lodging Bids. Non award has the effect of cancelling a bid and the AC must therefore act 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 In terms of the Preferential Procurement Regulations, 2011, if it is stipulated that the 80/20 preference point system is applicable to a particular bid process and all bids received exceed R1 000 000, the bid must be cancelled. If one or more of the acceptable bid(s) received are within the R1 000 000 threshold, all bids received must be evaluated on the 80/20 preference point system. Similarly, if it is stipulated that the 90/10 preference point system is applicable to a particular bid process and all bids received are equal to or below R1 000 000, the bid must be cancelled. If one or more of the acceptable bid(s) received are above the R1 000 000 threshold, all bids received must be evaluated on the 90/10 preference point system. If a bid is cancelled in terms of this paragraph, the correct preference point system must be stipulated in the bid documents of the re-invited bid.*

**20.6.8 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, services, works requested. [ACs must ensure that only goods, services or works that are required to fulfil the needs of the institution are procured]; or*
- b) funds are no longer available to cover the total envisaged expenditure. [ACs must verify that the budgetary provisions exist]; or*



*c) no acceptable bids are received. [If all bids received are rejected, Transnet must review the reasons justifying the rejection and consider making revisions to the specific conditions of contract, design and specifications, scope of the contract, or a combination of these, before inviting new bids].*

*When the AC authorises a non award on the grounds of a) or b) above, all Bidders should be reimbursed for the bid document fee, if bid documents were sold.*

*20.6.9 The decision to cancel a bid in terms of paragraph 20.6.8 must be published in the media in which the original bid invitation was advertised."*

**FURTHER CONSIDERATIONS TAKEN INTO ACCOUNT RELATED TO THE APPOINTMENT OF NEOTEL, THE PREFERRED BIDDER IN TERMS OF THE TEAR REPORT:**

6. I have given consideration to your recommendation as per your previous correspondence mentioned earlier as well as section 20.5 of the Procurement Procedures Manual which states that, should a dispute arise between the recommending officer(s) and the Acquisition Council (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.
7. I have the following specific concerns with your recommendation and responses to me, including the responses to me in the various meetings held with the recommending officers for re-motivation, which is discussed further in this document:
  - a. Counterparty Risk and alienation of state assets;
  - b. Concentration risk as Transnet is Neotel's largest client;
  - c. BBBEE Partners
  - d. Information Security incident; and
  - e. CCTV camera exposures.

**Counterparty Risk and alienation of state assets;**

8. Government's intention with the sale of the Transnet Wide-Area Network (WAN) to Neotel was to create a second fixed line operator. I don't believe that Neotel met this mandate due to the fact that they have had very little market penetration and Neotel has recently announced that they have entered into negotiations to sell this network to Vodacom which could be perceived to be alienation of state assets.
9. Lastly, Transnet did not consider Vodacom's ability to manage the Neotel infrastructure and should the sale transaction of Neotel to Vodacom realize this will expose Transnet to unnecessary counterparty risk.

**Concentration risk as Transnet is Neotel's largest client**

10. Transnet is currently Neotel's biggest single client which exposes Transnet to unnecessary concentration risk.

**BBBEE Partners**

11. Neotel has not delivered against its BEE mandate which was part of the initial sale of state assets to Neotel and has in fact diluted black ownership of the company as is evident from the correspondence I received from Mr. Kennedy Memani, the Chairman of Nexus Connexion the BEE partner to Neotel. (Annexure C)

**Information Security Incident**

12. During 2011, Transnet Internal Audit (TIA) was requested by Management to perform a review on the Neotel Network Outsources IT Services. TIA issued a report highlighting certain weaknesses as it related to firewalls in October 2011.
13. Network traffic was analysed by Neotel on an ongoing basis, focusing on the highest volumes first to build required rules to resolve audit findings.
14. On 30 May 2012, Neotel indicated that they have found traffic on the network which were not known to them. Management made a decision not to block this traffic as it could potentially be related to operational systems and blocking this could result in business interruptions;
15. Group EIMS decided to do scanning of their own to identify the source of this unknown traffic;
16. On the 5 June 2012, the unknown traffic was identified as foreign traffic and IP addresses from 5 different countries were found on the Transnet network within a period of 24 hours;
17. Should skilled and determined third parties have made use of the vulnerabilities they may have been able to access servers and resources in the Transnet environment which may include servers containing:
  - a. Financial information;
  - b. Operational information; and
  - c. Other sensitive / confidential information.
18. Although Transnet management and Neotel has implemented certain actions I am of the view that the activities specifically as it relates to Neotel was not adequate and exposed the organisation to unnecessary risk.

**CCTV Network issues**

19. TNPA identified that a number of their CCTV cameras in various ports were not operational or operating as intended as a result of potential poor workmanship and network issues. I am of the view that Neotel had a role to play as far as the network supporting these cameras are concerned and this concern is more reason for me to disagree with the recommendation made.

**GCE'S CONCLUSION OF THESE CONCERNS**

20. \Due to the above I have fundamental concerns in award a 3 year network contract to Neotel. This network is the heart of the Transnet business and I am of the view that awarding the business to Neotel will expose Transnet to unnecessary risk.

**APPOINTMENT OF T-SYSTEMS SOUTH AFRICA**

21. Post the close of the final offers being submitted T-Systems indicated that they unfortunately due to the strict timelines set by Transnet only managed to get confirmation from their shareholder on certain pricing elements and that they would be in a position to reduce the price submitted the week before by a further R248 million.

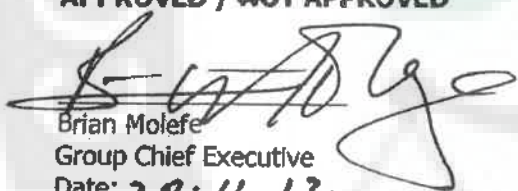
RFP No. GSM/13/04/0722 for Provision of Network Services – Request for approval to approve the process, award contract and issue a Letter of Intent (LOI)

22. I approve that the R248 million be taken into consideration as part of T-Systems best and final offer as the commitment was made in writing to Transnet and shortly after the best and final offers have closed and I don't believe that any other bidders were prejudiced by this.
23. I further do not believe it is necessary to request another best and final offer from any of the vendors as all 3 preferred bidders were given the opportunity to confirm if the prices submitted are accurate and if they omitted anything.
24. As per the TEAR report, should this R248 million be taken into account and business not be awarded to Neotel due to the risks stated above, T-Systems would be the preferred bidder.
25. Management must ensure that more favourable prices are agreed with T-Systems to at least be at a similar level to the prices submitted by Neotel as part of the post tender negotiations.

**APPROVAL:**

26. Based on the explanations given above, I request that the Group Chief Financial Officer, Group Chief Information Officer and the Group Chief Supply Chain officer note the my decisions to award business to T-Systems South Africa in terms of section 20.5 of the Procurement Procedure Manual (PPM) and that I am overriding the recommendation made in the TEAR report.
27. Please find the following attached:
  - a. Signed letter of intent to T-Systems South Africa (Annexure D)
  - b. Signed letter of regrets to four (4) unsuccessful bidders (Annexure E); and
  - c. Signed letter to extend the current Neotel contract (Annexure F).

**APPROVED / NOT APPROVED**

  
 Brian Molefe  
 Group Chief Executive  
 Date: 20.11.13.



## ANNEXURE PV 16(a)



PV 16(a)

Office of Nokuthula Khumalo, Deputy Group Company Secretary



EXCERPT FROM THE DRAFT MINUTES OF THE SPECIAL MEETING OF THE BOARD ACQUISITIONS AND DISPOSALS COMMITTEE NO.13/07 HELD ON 29 MAY 2013 AT 13:00 IN STIMELA BOARDROOM, 1<sup>ST</sup> FLOOR, TRANSNET ENGINEERING OFFICES, 160 LYNNETTE STREET, KILNER PARK

**"5.1 Networks and Telecoms Contract Extension**

**RESOLVED** that the Committee approved the proposed amendments to the previously recommended and approved Network Services Sourcing Strategy.

Further **RESOLVED** to delegate authority to the GCE to approve the Network Services RFP, advertise, negotiate, award, contract and sign all relevant documentation in line with the approved strategy.

13/7/11"

Certified a true excerpt.

**NOKUTHULA KHUMALO**  
Deputy Group Company Secretary  
Transnet SOC Ltd  
Date: 30 May 2013

Transnet SOC Ltd  
Registration Number  
1990/000900/30

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Directors: M E Mkwana (Chairman) B Molefe\* (Group Chief Executive) NK Choubey\* MA Fanuchil Y Fortes HD Gazendam NP Mxwasa N Moola NR Njoku TM Sharma  
B Skosana F Tshabalala DJ Tsheni A Singh\* (Group Chief Financial Officer)  
Executive \*Indian

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Group Company Secretary: ANC Ceba

## CONFIDENTIAL AND PRIVILEGED

5

Resolution No/  
For Attention

rails with a lead time of six months.

- The acquisition and testing of the turnouts will take place in terms of the agreed Timelines and a report will be submitted to the Committee with a contract to award on 27 September 2013.
- Appointment of a supplier with long-term plans of establishing a local welding facility for rails and turnouts.
- The total costs for the rails will be limited to R750m and the cost for the turnouts will be fixed at R420m.

13/2/2

*Messrs Jiyane and Mtetwa were excused from the meeting at 12:30*

5.2 **iSCM Strategy Review**

- 5.2.1 Management took the Committee through the submission as contained in the pack. The submission was taken as read. The purpose of the submission was to review the strategy that was approved in April 2012. Management displayed a monitoring tool and shared the roadmap with the Committee with emphasis on the lowlights being the Human Capital management and iSCM systems which needed improvement. The highlights were the Supplier Development and the logistics programmes which have shown remarkable improvement and have catapulted the Company to greater heights.

- 5.2.2 Ms Njeke sought clarity on whether the monitoring tool would not duplicate the work of the newly created RMO position. Management informed the Committee that the monitoring tool was procurement based and its focus was on the daily activities that the ODs embark upon in the iSCM environment.

- 5.2.3 Management informed the Committee that some of the current projects were data clean-up and migration from a budget-based to a need-based procurement process.

- 5.2.4 Management informed the Committee that there was a major hindrance with capital projects as a result of the withdrawal of the PPPFA exemption. The Committee undertook to schedule a meeting with the Shareholder Minister to resolve the impasse. Ms Tshepe will provide her comments when she has perused the document.

Messrs Mkwanazi/  
Sharma

**RESOLVED** that the Committee approved the iSCM Strategy.

13/2/3

5.3 **Extension of the Neotel Contract and the Proposed Procurement Strategy for Network and Infrastructure Services**

- 5.3.1 Management took the Committee through the submission as contained in the pack. The submission was taken as read. The submission was part of the contract extension approved by the Board on 15 February 2013.

**RESOLVED** that the Committee recommended that the Board approves the Procurement Strategy for network services with the following essential features:

- 95% technical threshold (Minimum criteria).
- Supplier Development initiatives.
- Suppliers who pass the technical threshold will be evaluated against the 90/10 rule; price (90%) and BBBEE (10%).
- Flexibility to allow for the RFP to be evaluated as if PPPFA exemption is active.
- Issue the RFP subject to Board approval.
- Award a 5 year contract as result of the RFP process.

Further **RESOLVED** that the Committee recommended that the Board delegates authority to the GCE to issue the RFP and award a contract to a preferred bidder.

13/2/4

5.4 **Options to include Supplier Development in procurement methodology**

EXCERPT FROM THE DRAFT MINUTES OF THE BOARD OF DIRECTORS OF TRANSNET SOC LTD MEETING NO. 13/1 HELD ON 15 FEBRUARY 2013 AT 10:00 IN ROOM 723, 1<sup>ST</sup> FLOOR, THE JUNCTION, MODDERFONTEIN ROAD, ESSELENPARK, KEMPTON PARK

**\*6.9 Telecommunication LAN & WAN Contract Extension**

**RESOLVED** that the Board approved the following:

- 5 months extension of the Neotel (Pty) Ltd contract for provision of Network and Telecommunications services with effect from 1 April until 31 August 2013.
- Delegated authority to the GCE to sign all the documentation to effect the contract extension.
- Delegated authority to the Board Acquisitions and Disposals Committee to approve the Sourcing Strategy, RFP and Contract Award for the Networks and Telecoms tender.

13/1/11"



## ANNEXURE PV 16(b)





PV 16(b)

TRANSNET

**SUB-DELEGATION OF AUTHORITY**

I, **Brian Molefe**, in my capacity as the **Group Chief Executive**, hereby delegate all the power of authority vested in me to **Sharla Pillay, Chief Executive: Transnet Pipelines**, for the period **28 October 2013 to 01 November 2013**.

A comprehensive report of significant incidents, rulings, occurrences and decisions taken during my absence, must be forwarded to my office on my return. Copies of all approvals/decisions taken must also be forwarded, for record purposes.

Signed on the 25 day of October 2013 in Johannesburg

SIGNED: *Brian Molefe*

WITNESS: *N. Molefe*  
*M. Molefe*

I, **Sharla Pillay, Chief Executive: Transnet Pipelines**, accept the authority as delegated to me by **Brian Molefe, Group Chief Executive** and will present a report of significant incidents, rulings, occurrences and decisions taken during the period of my acting.

Signed on the 28<sup>th</sup> day of October 2013 in Durban

SIGNED: *S. Pillay*

WITNESS: *G. Mavender*  
*H. Mavender*



## ANNEXURE PV 17



PV17

TRANSNET



Date: 20 November 2013  
Reference: GSM/13/04/0722

**Neotel (Pty) Ltd**  
44 Old Pretoria Main Road  
Halfway House  
Midrand  
1685

Attention: Sunil Joshi

Dear Sir,

**RFP FOR THE PROVISION OF NETWORK SERVICES TO TRANSNET SOC LIMITED FOR A PERIOD OF THREE [3] YEARS WITH AN OPTION TO EXTEND FOR A FURTHER TWO [2] YEARS**

Transnet expresses its appreciation for your valued participation in bidding for the above-mentioned requirement.

After extensive evaluation of all bids received and adjudication, we regret to advise that your company's bid was not successful.

The following bidder has been afforded "Preferred Bidder" status: T-Systems South Africa (Pty) Ltd.

We regret that your company was unsuccessful on this occasion, and would indicate that this decision was based primarily on the under-mentioned factors:

- Business Risk to Transnet

We thank you for your participation in this procurement process and would like to take this opportunity to encourage your future involvement in bidding for associated business opportunities which will be advertised by Transnet from time to time. *Hi Eddie*

Yours sincerely

Name: Brian Molefe

Designation: Group Chief Executive

Date:

Transnet SOC Ltd  
Registration Number  
1990/000900/30

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Johannesburg  
2001

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Directors: ME Mkwazi (Chairman) B Molefe\* (Group Chief Executive) MA Fanucchi Y Forbes HD Gazendam NP Mxasana N Moola NR Njike IM Sharma TB Skosana  
E Tshabalala DLJ Tshepe A Singh\* (Group Chief Financial Officer)  
\*Executive

Group Company Secretary: ANC Ceba

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*Please note that it is P 3 of Paja, when Transnet makes a decision which materially & adversely affects the rights or legitimate expectations of an entity, it must follow a process which is procedurally fair. In this instance it would mean that before a final decision is taken to overtake Neotel, they must be informed of the risks which the company poses to Transnet, (b) be informed that Transnet proposes not to award the contract to them because of these risks (c) be invited to make any representations to Transnet which they wish to make. Transnet must also consider such representations before making a final decision.*  
*See Logbro Properties v Bedderson;*  
*See also Du Bois v Stampdrift Resproeiingsraad and National & Overseas Modular Construction (Pty) Ltd v Tender Board, Free State Provincial Court.*

*Please ask Mkwazi, Molefe to provide written advice before a final decision is taken.*

## ANNEXURE PV 18







**ANNEXURE A – RESPONSE TO THE RISKS RAISED BY THE TRANSNET GROUP CHIEF EXECUTIVE (GCE) RELATING TO NEOTEL (PTY) LTD IN HIS LETTER DATED 20 NOVEMBER 2014**

**Executive Summary:**

The Group Chief Executive raised a number of risks relating to the appointment of Neotel (Pty) Ltd as Transnet's network service provider. These risks together with the current status of these risks are listed below:

Response to the following concerns raised by the GCE in previous memorandum:

- *Counterparty risk and alienation of state assets;* - This risk can be mitigated with an asset buy back which will be included in the Letter of Intent (LOI) to Neotel and the Vodacom buy out could reduce the risk further;
- *Concentration risk as Transnet is Neotel's largest client;* - Risk could reduce as a result of the sale of Neotel to Vodacom as Vodacom has significantly more clients than Neotel and higher revenues than Neotel;
- *BBBEE Partners;* - Risk could be addressed by letter from Neotel;
- *Information Security Incident* – Risk could be mitigated through activities post incident;
- *CCTV Camera exposures* – There is no evidence of wrong doing by Neotel as supported by forensic investigation and TNPA correspondence.

**Conclusion:**

- All the risks raised by the GCE in his memorandum dated 20 November 2014 are discussed in this memorandum with additional information for the GCE's consideration.

**Detailed discussion:**

**Counterparty risk and alienation of state assets**

*Information available at 20 November 2013:*

1. Senior Management from both Tata Communications and Vodacom has met with the Transnet Group Chief Financial Officer and gave their full commitment to Transnet irrespective of whether the sale process proceeds. In addition, the

counterparty risk should reduce if the sale is approved as the Neotel resources would be taken over by Vodacom and Transnet should have access to far more resources and expertise as Vodacom is much larger and has a much larger market penetration than Neotel.

2. A concern was also raised relating to Vodacom buying Neotel as Vodacom submitted a bid but did not pass the technical gate. Should the Vodacom transaction go through then the Neotel infrastructure and human resources will be included in the sale, which means that Transnet will have a service provider which is technically competent.
3. In addition, the sale of Neotel to Vodacom will result in convergence and will afford Transnet with an opportunity to potentially source both its fixed line network and cellular network requirements from the same service provider in future, which will result in economies of scale and a reduction in prices. This is a strategic and unique opportunity that Transnet is party to without having to construct the situation.

*Information available post 20 November 2013:*

4. Transnet has insisted that Neotel sell relevant portions of the network previously owned by Transnet back to Transnet, which will facilitate a buyback of previously owned state assets to potentially address the risk of alienation of state assets. These assets will include optic fibre assets which forms the foundation of the Transnet network which is not only a strategic asset but is critical to operations across Transnet. In addition, the buyback of these strategic assets give Transnet the ability to transition from service providers which is currently costly and near impossible as the Transnet network is owned by Neotel. Transnet will ensure that this is included in the Letter of Intent (LOI) to Neotel should the recommendation contained in this memorandum be approved by the GCE;

#### **Concentration risk as Transnet is Neotel's largest client**

*Information available at 20 November 2013:*

5. Although Transnet is Neotel's largest single client, Transnet contributes only approximately 15% of the current Neotel revenue. The potential sale of Neotel to Vodacom should reduce the risk even further.

#### **BBBEE Partners**

*Information available at 20 November 2013:*

6. Neotel has committed to a 30% supplier development (SD) obligation which can be used for the greater good of the South African economy.
7. The contract with the preferred bidder will include penalties and pay-back to Transnet should Neotel not deliver against this commitment.

*Information available post 20 November 2013:*

8. Transnet requested Neotel to respond to the allegations made by the Chairman of Nexus, which they did in the attached correspondence (Annexure A1), which may adequately address all the concerns raised by Nexus.
9. Transnet will include a BBBEE Improvement plan obligation as part of the negotiations to ensure that Neotel improves its BBBEE status. This plan will be tracked on quarterly basis by Transnet.

**Information Security Incident**

*Information available at 20 November 2013:*

10. A significant number of actions have been implemented since the incident occurred by both Transnet and Neotel current network service provider as detailed below:
  - A number of security audits have been completed (during and subsequent to the June 2012 incident), and these show an improvement in the security posture, although there are still activities to be completed;
  - The security organization structure was approved in December 2012 (after the instruction to centralize information security) and we are in the process of filling this structure. This is a slow HR process and skills are hard to find in the market however we are making progress and putting Transnet in a much better position to pro-actively manage our service providers and security environment;
  - The next generation firewalls are in place in monitoring mode and the project is proceeding towards full implementation. Some implementation challenges have been experienced but we have started to see the benefits of the improved monitoring;
  - Leading up to the 5<sup>th</sup> of November 2013 we were notified by the State Security Agency of a risk of attack. A pre-emptive plan was put in place to proactively manage down risk, to raise awareness during the period and be prepared to react. No known attack was experienced. The exercise showed that significant progress has been made since last year and although a list of future improvements is being created, it was a positive experience;
  - The business case for an independent security intelligence centre (SIC) to act as the central nerve centre for information security is underway after completion of the strategy. This SIC when implemented will provide a real-time capability to monitor, identify and react to security threats across the business and will supplement the security being provided by the current service provider. This will reduce our dependence on the service provider to provide us with security expertise and capability;
  - The Service Level Agreements included in the proposed Master Services Agreement (MSA) to the preferred bidder is far more stringent than those included in the current MSA which will further improve security services;
  - Transnet will include an exit clause in the MSA should the preferred bidder not meet the SLA's linked to security for a prolonged period that Transnet will be able to give the preferred bidder notice and remove security services from the MSA; and

- As part of the tender evaluation process, the preferred bidder was found to be technically competent which included the security tower and the due diligence did not reveal any significant concerns.
- T-Systems was also responsible to some extent for the security incident and blame should not be placed solely on Neotel.

### **Information Security (IS) Incident conclusion**

11. Although there are further improvements required to the Transnet ICT environment as it relates to information security from both Transnet and the current service provider, management is of the view that the improved SLA's and exit clauses included in the proposed MSA could address the risk.

### **CCTV network issues**

*Information available at 20 November 2013:*

12. Transnet Group has limited information regarding this issue but the facts as we understand it are as follows:
  - a. A tender was issued by TNPA to the market for the provision of CCTV Security Surveillance system which was awarded to a company called Engineering Systems Solution (ESS) in 2007;
  - b. The tender included the provision of a standalone / access network as part of the CCTV security surveillance system;
  - c. It appears as if TNPA subsequent to the roll-out of the CCTV network by ESS, requested that the CCTV network be linked to the "Umbambano / Wide Area Network (WAN)" in order for the picture of the cameras to be accessible in Johannesburg over the WAN network;
  - d. Neotel was then requested to upgrade the CCTV network, a layer 2 network to a layer 3 network and to integrate the CCTV network to the WAN network (This project included that Neotel procures the layer 2 network from TNPA which was established by ESS);
  - e. A project was initiated to integrate the network and when Neotel reviewed the layer 2 network it was found that there were issues with the equipment which included the following (as communicated to TNPA on 13 June 2011):
    - The equipment has reached the end of its useful life in April 2009;
    - The equipment was not supported by the OEM as of April 2009;
    - The equipment reached its end of maintenance as of April 2009;
    - The equipment warranties ended in October 2008;
    - Number of these devices are registered as demo equipment from Cisco;
    - Number of these devices are registered to University of Washington USA.
  - f. Although initial progress was made on the above project the project lost momentum and eventually ended resulting in the CCTV network not being fully upgraded nor being fully integrated to the WAN network;
  - g. A number of key individuals involved in the TNPA CCTV project have resigned from Transnet and TNPA respectively which makes it difficult to gather any additional information.

*Information available post 20 November 2013:*

13. The GCE recently approved a confinement to Neotel for the award of business to Supply a CCTV solution to TNPA in which the key issues with mitigating actions were discussed and are reflected below for information purposes:

ISSUED EXPERIENCED	PROPOSED SOLUTION
Separate Service Providers responsible for Network and camera	Neotel will be accountable for the entire solution with SLA's.
Limited involvement from key areas with in Transnet and inadequate project management during previous rollout	A Steering Committee will be established to oversee the project with representatives from the following areas: <ul style="list-style-type: none"> <li>• TNPA – IMS;</li> <li>• TNPA – Operations;</li> <li>• Group Security; and</li> <li>• Group EIMS.</li> </ul>
Supplier paid for previous rollout regardless of solution not being fully operational;	TNPA will withhold a 15% retention of the total cost of the project until project completion sign off is received form the following parties: <ul style="list-style-type: none"> <li>• TNPA – IMS;</li> <li>• TNPA – Operations;</li> <li>• Group Security; and</li> <li>• Group EIMS.</li> </ul>

14. The Chief Operating Officer of TNPA, Mr Herbert Msagala sent an email to Transnet Group indicating the following: "Reference to our discussion regarding Neotel and the performance. We had numerous engagement with Neotel and we are happy with their service and to date we don't have anything that we are worried about concerning their involvement on the CCTV surveillance system installed at TNPA.
15. A forensic investigation into the CCTV project was performed and the forensic report did not highlight any wrong doing on the part of Neotel.
16. In addition, in discussions between Transnet and Neotel, Neotel indicated that they will carry the cost for any network upgrades related to the CCTV network if any obligation or fault can be proven by Transnet.



**CCTV network issues conclusion**

17. Although there are further improvements required as it relates to CCTV from both Transnet and the current service provider, management is of the view that focus of responsibility to Neotel as the single supplier and improved monitoring of implementation and retention amounts could address the risk.



## ANNEXURE PV 19



PV 19



10 December 2013

Anoj Singh  
Group Chief Financial Officer  
Transnet SOC Limited  
Carlton Centre  
150 Commissioner Street  
Johannesburg  
2001

Email: [anoj.singh@transnet.net](mailto:anoj.singh@transnet.net)

Dear Anoj

**NOTICE OF EXTENSION – MASTER SERVICES AGREEMENT BETWEEN TRANSNET AND NEOTEL DATED 11 DECEMBER 2007 ("MSA")**

Following our letter of 5 December 2013, we had numerous discussions and meetings to deliberate mutually acceptable terms of an extension of the MSA.

It is to be noted that the initial term of the MSA expired on 31 March 2013. Following the expiry of the initial term, the Parties mutually agreed to extend the duration of the MSA to 31 August 2013 and thereafter to 31 October 2013. The Parties now wish to further extend the duration of the MSA for a period of 12 months commencing on 01 November 2013.

Neotel thus proposes an extension of the MSA on the following terms and conditions:

1. The MSA be extended from 1 November 2013 for a fixed period of 12 months expiring on 31 October 2014 ("Third Extension").
2. The price for the Third Extension shall be a flat rate of R50 000 000,00 per month (excluding VAT) notwithstanding that during the period of this Third Extension, Transnet elects to migrate one or more Services to its incumbent, or any other, service provider. The flat rate will be due and payable on the last working day of each month. As previously agreed, this amount includes an additional 5% usage fee over and above the agreed volume limit as at 31 March 2013.
3. The price in paragraph 2 shall exclude charges for actual voice and data usage over and above the 5% limit referred to in paragraph 2. The usage charges for voice and data over and above this 5% threshold will be billed separately monthly in arrears in accordance with the terms and conditions of the MSA, save that payment shall be made on the last working day of the month from when the invoice or statement is dated and not 30 days from such date of invoice or statement.
4. An order for the required upgrade of the technology as advised in our letter of 26 November 2013 is placed on Neotel on or before 13 December 2013. Please see attached proposal setting

www.neotel.co.za

Neotel (Pty) Ltd

Reg No. 2004/004619/07

44 Old Pretoria Main Road, Halfway House, Midrand, 1685, Gauteng South Africa  
Telephone number +27 (0)11 585 0000 Facsimile number +27 (0)11 585 0001

DIRECTORS: N Srinath\* (Non-Executive Chairman) S Joshi\*\*\*\* (Managing Director & Chief Executive Officer) S Bawa/s\* C Sassoulas\*\*\*  
A Chawan\* XK Mema\* FJP Ndoroma\*\* SS Ntsaluba SG Ranade\*

ALTERNATE DIRECTORS: WM van der Vyver\*\*

(\*Indo, \*\*Namibia, \*\*\*French, \*\*\*\*New Zealand)



our the technology upgrade required. Ownership in all CISCO equipment procured in terms of this technology upgrade will pass to Transnet SOC once paid for in full.

5. For the duration of this Third Extension and for the period of the transition as provided for in the MSA and referred to in 6 below, Transnet shall not increase either directly or indirectly the current cost for telecommunications facilities utilised by Neotel, including but not limited to, site rental charges, facilities rental, fibre leasing, etc.
6. This Third Extension excludes all costs in relation to transitioning the current services as provided for in the MSA. The Parties agree that the costs for transitioning the current services will be determined and agreed in a separate transition plan in accordance with the provisions of the MSA after the Parties in conjunction with Transnet's incumbent service provider for network services have agreed the full scope of the transition required.
7. After the expiry of this Third Extension, should Neotel, whether expressly, tacitly or by inference, be required to continue to provide the Services, such Services will be provided on the same terms and conditions of this Third Extension, save that the flat rate in 2 above shall increase by the CPIX rate applicable at the time of the expiry of this Third Extension.
8. Neotel accepts the outcome of the RFP process for the provision of network services and acknowledges both the award to T-Systems South Africa (Pty) Ltd as the successful bidder and the letter of rejection Neotel received as an unsuccessful bidder.

Sincerely

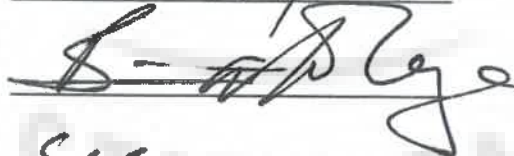
  
**Francois van der Merwe**  
 General Manager: Strategic Accounts

ACCEPTED FOR AND ON BEHALF OF TRANSNET SOC LIMITED:

NAME:

B. Molega

SIGNATURE:



DESIGNATION:

SCE

DATE:

11.12.13.

AWA: (neotel) - 24

Neotel (Pty) Ltd

Reg No. 2804 004619/07

44 Old Pretoria Main Road, Halfway House, Midrand, 1685, Gauteng South Africa  
 Telephone number +27 (0)11 585 0000 Facsimile number +27 (0)11 585 0001

DIRECTORS: N Srinath\* (Non-Executive Chairman), S Joshi\*\*\*\* (Managing Director & Chief Executive Officer), S Baweja\*, C Sassoulas\*\*\*\*  
 R Chakrabarti\*\* KK Memani, FJP Ndoroma\*\*\* SS Ntsakuba, SG Ranade\*  
 ALTERNATE DIRECTORS: WM van der Vyver\*\*

(\*India, \*\*Namibia, \*\*\*French, \*\*\*\*New Zealand)





### QUOTATION

**Transnet**

Customer Details		VAT Number:	
BRS Name :	Carlton Centre		4E00224455
Attention :			
Client name :	Franser Corporate	Regional Office:	Medan
Address :	155 Commissioner Street		
	Carlton Centre	Key Account Manager:	Ryan Parbhunath
QUOTE No :	1003307		
Contact Person :	Gerne Van Der Werfhuizen	Created by:	Ryan Parbhunath
Telephone. No. :			
Reference. No. :	1003307	Contact:	
		Date:	

We have the pleasure in submitting a quotation as per our understanding of your requirements.

Supply replacement Disc Switches to Transnet Network. Upgrade Avaya Software version from CM3.3 to CM5.

Item Number	Description	TYPE	UOM	UNIT PRICE	QTY	Non Recurring Cost (NRC)	Monthly Recurring Cost (MRC)
<b>Service Enablement Hardware</b>							
	1941 Router - 3x Module's						
	Cisco 1941 w/2 GE 2 EHWIC slots 256MB CF 512MB DRAM IP Base			12,430.64	1	12,430.64	
	PRTRN SS 6X5XNBD Cisco 1941 w/2 GE2			273.53	1	273.53	
	Cisco 1900 IOS UNIVERSAL			0.00	1	-	
	Data License for Cisco 1900			4,676.10	1	4,676.10	
	2-Port Serial WAN Interface Card			3,455.45	2	10,910.90	
	Cisco 1941 AC Power Supply			0.00	1	-	
	AC Power Cord (South Africa) C13 86 546 1 6m			0.00	1	-	
	1 21 Cable DYE Male to Smart Serial 10 Feet			378.35	4	3,117.40	
	IP Base License for Cisco 1900			0.00	1	-	
	Cisco Config Pro Express on Router Flash			0.00	1	-	
	512MB Default DRAM for Cisco 1941 ISR			0.00	1	-	
	256MB Compact Flash for Cisco 1900 2900 3900 ISR			0.00	1	-	
	Insert Packout - PI-MSE			0.00	1	-	
	3650 24Port - IP Base						
	Cisco Catalyst 3650 24 Port PoE 2x10G Uplink IP Base			51,437.10	197	10,133,108.79	
	PRTRN SS 8X5XNBD Cisco Catalyst 3650 24 Port PoE 2x10G Up			1,885.06	197	331,956.82	
	CAT3650 Universal k9 image			0.00	197	-	
	640W AC Config 2 Power Supply			0.00	197	-	
	India AC Type A Power Cable			0.00	197	-	
	10Gig 8FP's						
	10GBASE-LR SFP Module			31,135.04	504	17,580,162.00	
	3680 24Port - IP Services						
	Cisco Catalyst 3650 24 Port PoE IP Services			88,080.55	4	352,262.20	
	PRTRN SS 8X5XNBD Cisco Catalyst 3650 24 Port PoE IP Servi			1,853.20	4	7,452.80	
	India AC Type A Power Cable			0.00	4	-	
	Cisco Catalyst 3650 2 x 10GE Network Module			10,483.75	4	37,935.00	
	CAT3650 UNIVERSAL			0.00	4	-	
	50CM Type 1 Stacking Cable			0.00	4	-	
	Catalyst 3750X Stack Power Cable 30 CM			0.00	4	-	
	715W AC Config 1 Power Supply			0.00	4	-	
	3850 48Port - IP Services						
	Cisco Catalyst 3850 48 Port PoE IP Services			163,683.50	51	8,346,820.50	
	PRTRN SS 8X5XNBD Cisco Catalyst 3850 48 Port PoE IP Servi			3,317.42	51	169,188.32	
	India AC Type A Power Cable			0.00	51	-	
	Cisco Catalyst 3850 4 x 10GE Network Module			31,174.00	51	1,589,874.00	
	CAT3850 UNIVERSAL			0.00	51	-	
	50CM Type 1 Stacking Cable			0.00	51	-	
	Catalyst 3750X Stack Power Cable 30 CM			0.00	51	-	
	715W AC Config 1 Power Supply			0.00	51	-	
	Avaya Software Upgrade - CM3-5 to version CM6, refer Annex Site List				119	19,000,000.00	
				<b>SUB TOTAL EXCLUDING VAT</b>		<b>R 56,600,198.90</b>	<b>R 0.00</b>
				<b>VAT @ 14%</b>		<b>R 7,924,026.73</b>	<b>R 0.00</b>
				<b>TOTAL</b>		<b>R 64,524,217.53</b>	<b>R 0.00</b>

**Keywords & Categories**


- Terms & Conditions**
1. This quotation is valid for 30 days. subject to change without prior notice and foreign exchange variations 793 = 710.02
  2. Pricing is based on the requirements received from Tansnet
  3. **EO OE - (Excludes and Omissions Excluded):**
  4. The scope and contents of the USA between Tansnet and Netherland apply to this quotation
  5. This quote is based on the quantities reflected. If such quantities are reduced during the contract term the price will be adjusted to reflect the actual quantities received
  6. **Added Terms and Conditions attached as Addendum A - American** in

### Assessing and Combining

**Price includes installation charges. Project Management Fee and Management Monthly Charge.**



Supply only

Details of person providing quotation :		Acceptance by Transnet :	
Name :	Ryan Parthunath	Name :	
Tel. :	0115861837	Signature :	
Fax :	0115853232	Account No. :	
Cell :	0833831423	Date :	
E-mail :	ryan.parthunath@transnet.co.za	Purchase Order #:	
Signature :		Signature:	



<b>PROPOSAL SUBJECT TO THE MASTER SERVICES AGREEMENT</b>	
<p>This Proposal is submitted to Transnet SOC Limited on the basis that the supply of the products and services set out in the Proposal ("Specified Services") will be undertaken in accordance with, and be subject to, the terms and conditions of the existing signed Master Services Agreement dated 11 December 2007 in place between Neotel (Pty) Ltd and Transnet SOC Limited ("Agreement"). In the event that the Agreement terminates for whatever reason before the expiry of the term of the Specified Services in this Proposal, all rights and obligations in relation to the provision of the Specified Services shall continue, in full force and effect, in accordance with the terms and conditions of the Agreement as if the Agreement had not been terminated, until the expiry of the term of the Specified Services.</p>	
<b>Early Termination Fees</b>	
<p>In the event that Transnet terminates the Specified Services prior to the expiry of the term specified in this Proposal due to no fault on the part of Neotel, early termination fees shall be imposed and calculated based on the outstanding fees and charges for the Specified Services as at the date on which Neotel will discontinue provision of the Specified Services to Transnet, and will be determined as follows:</p>	
<b>Service Enablement Hardware</b>	
<p>100% of the fees relating to the Service Enablement Hardware for the term as set out in this Proposal.</p>	
<p>Upon the full settlement of the amounts due and payable hereof, Transnet has the option to request Neotel to code the hardware to Transnet at which point Neotel will transfer all risk and ownership of the hardware to Transnet. The early termination fees paid for by Transnet will be deemed as final settlement for the Service Enablement Hardware.</p>	
<b>Monthly Service Fees</b>	
<p>For monthly service fees (excluding Service Enablement Hardware) included in this Proposal for Specified Services, the following early termination fees shall apply calculated, based on the outstanding service fees and charges as at the date on which Neotel will discontinue provision of the Specified Services:</p>	
<p>In the event that the remaining term of the Specified Services is 12 (twelve) months or less, 100% of the service fees and charges will be due.</p>	
<p>In the event that the remaining term for the Specified Services is greater than 12 (twelve) months, 100% of the service fees and charges for the first 12 (twelve) months and 50% of the service fees and charges for each month thereafter until the end of the term specified in this proposal.</p>	
<b>Once off Costs (NRC)</b>	
<p>Upon installation of service 100% of Once off costs will be due and payable to Neotel.</p>	
Accepted on behalf of Transnet SOC Limited.	

	SITE NAME	SOFTWARE VERSION
1	Cape Town Trunk	R015x.01.1.415.1 CM5
2	Cape Town Harbour Container Bldg	R015x.01.0.414.3 CM5
3	Cape Town Harbour Portnet House	R015x.01.0.414.3 CM5
4	Bellville	R014x.00.4.739.0 CM4
5	Bellville Propnet Building	R015x.02.0.947.3 CM5
6	Salt River	R015x.02.0.947.3 CM5
7	Huguenot	R014x.00.4.739.0 CM4
8	Malmesbury	R014x.00.4.739.0 CM4
9	Saldanha Bay	R014x.00.4.739.0 CM4
10	Saldanha Harbour	R014x.00.4.739.0 CM4
11	Saldanha NPA Building	R014x.00.4.739.0 CM4
12	Beaufort West	R015x.02.0.947.3 CM5
13	Hutchinson	R014x.00.4.739.0 CM4
14	Laingsburg	R014x.00.4.739.0 CM4
15	Worcester	R015x.02.0.947.3 CM5
16	Klawer	R014x.00.4.739.0 CM4
17	George	R014x.00.4.739.0 CM4
18	Mossel Bay	R014x.00.4.739.0 CM4
19	Kimberley	R013x.01.2.632.1 CM3
20	Warrenton	R015x.02.0.947.3 CM5
21	Sishen	R015x.02.0.947.3 CM5
22	De Aar	R015x.02.0.947.3 CM5
23	Postmasburg	R015x.02.0.947.3 CM5
24	Uplington	R015x.02.0.947.3 CM5
25	Klerksdorp	R015x.02.0.947.3 CM5
26	Coligny	R015x.02.0.947.3 CM5
27	Mafikeng	R015x.02.0.947.3 CM5
28	Bloemfontein Trunk	R014x.00.4.739.0 CM4
29	Bloemfontein Transwerk	R014x.00.4.739.0 CM4
30	Kroonstad	R015x.02.0.947.3 CM5
31	Sasolburg	R014x.00.4.739.0 CM4
32	Welkom	R014x.00.4.739.0 CM4
33	Bethlehem	R015x.02.0.947.3 CM5
34	PE North End Trunk	R014x.00.4.739.0 CM4
35	PE Coega Harbour	R015x.02.0.947.3 CM5
36	PE Deal Party	R015x.02.0.947.3 CM5
37	PE Sturrock	R015x.02.0.947.3 CM5
38	PE Port Captain	R015x.02.0.947.3 CM5
39	PE Swartkops	R015x.02.0.947.3 CM5
40	Alicedale	R014x.00.4.739.0 CM4
41	Rossmead	R014x.00.4.739.0 CM4
42	Uitenhage	R015x.02.0.947.3 CM5
43	Cuyler Manor	R015x.02.0.947.3 CM5
44	Cookhouse	R014x.00.4.739.0 CM4
45	Cradock	R014x.00.4.739.0 CM4
46	Noupoot	R014x.00.4.739.0 CM4
47	East London Trunk	R015x.02.0.947.3 CM5
48	Cambridge	R015x.02.0.947.3 CM5
49	Queenstown	R014x.00.4.739.0 CM4
50	Burgersdorp	R014x.00.4.739.0 CM4
51	Durban Trunk	R015x.02.0.947.3 CM5
52	Kingsmead	R015x.02.0.947.3 CM5
53	Empangeni	R014x.00.4.739.0 CM4
54	Empangeni RMO	R014x.00.4.739.0 CM4
55	Richards Bay	R014x.00.4.739.0 CM4
56	Richards Bay Bayvue	R014x.00.4.739.0 CM4
57	South Dunes RCB	R014x.00.4.739.0 CM4

58	Nsese	R014x.00.4.739.0	CM4
59	Estcourt	R014x.00.4.739.0	CM4
60	Glencoe	R014x.00.4.739.0	CM4
61	Ladysmith	R015x.02.0.947.3	CM5
62	Pietermaritzburg	R015x.02.0.947.3	CM5
63	Mason's Mill	R015x.02.0.947.3	CM5
64	Newcastle	R015x.02.0.947.3	CM5
65	Pinetown	R015x.02.0.947.3	CM5
66	Stanger	R014x.00.4.739.0	CM4
67	Vryheid	R014x.00.4.739.0	CM4
68	Johannesburg Trunk	R015x.02.0.947.3	CM5
69	Luipaardsvlei	R015x.02.0.947.3	CM5
70	Sivewright	R015x.02.0.947.3	CM5
71	Wellington Street	R015x.02.0.947.3	CM5
72	Carlton Centre	R014x.00.0.730.5	CM4
73	Kaserne	R013x.01.2.632.1	CM3
74	City Deep	R013x.01.2.632.1	CM3
75	City Deep Freight Dynamics	R014x.00.0.730.5	CM4
76	Germiston	R013x.01.2.632.1	CM3
77	Natalspruit	R014x.00.0.730.5	CM4
78	Isando	R014x.00.0.730.5	CM4
79	Isando Protekon	R015x.02.0.947.3	CM5
80	Benoni	R014x.00.0.730.5	CM4
81	Springs	R015x.02.0.947.3	CM5
82	Sentrand	R015x.02.0.947.3	CM5
83	Trichardt	R014x.00.0.730.5	CM4
84	Heidelberg	R014x.00.0.730.5	CM4
85	Vereeniging	R015x.02.0.947.3	CM5
86	Langlaagte	R015x.02.0.947.3	CM5
87	Rodepoort	R014x.00.0.730.5	CM4
88	Krugersdorp	R015x.02.0.947.3	CM5
89	Randfontein	R014x.00.0.730.5	CM4
90	Potchefstroom	R014x.00.0.730.5	CM4
91	Standerton	R015x.02.0.947.3	CM5
92	Pretoria Trunk	R015x.01.0.414.3	CM5
93	Pretoria Translux	R014x.00.4.739.0	CM4
94	Capital Park	R015x.02.0.947.3	CM5
95	Koedoespoort	R015x.01.0.414.3	CM5
96	Pretoria North	R014x.00.4.739.0	CM4
97	Pyramid Sourh	R014x.00.4.739.0	CM4
98	Witbank	R013x.00.1.346.0	CM3
99	Rustenburg	R014x.00.4.739.0	CM4
100	Waterval Boven	R014x.00.4.739.0	CM4
101	Nelspruit	R013x.00.1.346.0	CM3
102	Ogies	R015x.02.0.947.3	CM5
103	Piet Retief	R014x.00.0.730.5	CM4
104	Emelo	R015x.02.0.947.3	CM5
105	Kilner Park	R014x.00.4.739.0	CM4
106	Nylstroom	R014x.00.4.739.0	CM4
107	Potgietersrus	R014x.00.4.739.0	CM4
108	Pietersburg	R014x.00.4.739.0	CM4
109	Louis Trichardt	R014x.00.4.739.0	CM4
110	Messina	R014x.00.4.739.0	CM4
111	Middelburg	R014x.00.4.739.0	CM4
112	Tzaneen	R014x.00.4.739.0	CM4
113	Belfast	R014x.00.4.739.0	CM4
114	Kaapmuiden	R014x.00.4.739.0	CM4
115	Komatipoort	R014x.00.4.739.0	CM4
116	Lydenburg	R014x.00.4.739.0	CM4

117	Phalaborwa	R014x.00.4.739.0	CM4
118	Hoedspruit	R014x.00.4.739.0	CM4
119	Esselen Park	R014x.00.0.730.5	CM4



A handwritten signature in black ink, located in the bottom right corner of the page.



## ANNEXURE PV 20



PV 20 1

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## OPINION

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1.

I have been requested to provide my view of certain aspects of the award made in respect of the Transnet SOC Ltd ('Transnet') Network Services Tender (RFP GSM/13/04/0722).

2.

It is to be considered whether there has been any non-compliance with the Transnet Procurement Procedures Manual ('PPM') and any related applicable legislation, particularly with regard to:

- 2.1 The Board of Directors of Transnet (hereinafter referred to as 'the Board') delegating authority to the Group Chief Executive ('GCE') as recommended by the Board Acquisitions and Disposals Committee ('BADC') of Transnet, (as referred to in the excerpt from the draft minutes of the special meeting held on 29 May 2013 wherein it is stated that the BADC recommends that the Board delegates authority to the GCE to issue the RFP in relation to the network services tender and award a contract to the preferred bidder) as well as the nature of the authority which was granted to the GCE under this delegation;
- 2.2 T-Systems South Africa Holdings (Pty) Ltd ('T-Systems') being permitted to bid/continue with their bid when it is a fellow subsidiary to 'T-Systems International' alongside 'Detecon SA', which conducted a due diligence review at Transnet in order to develop the RFP for the network services tender referred to above;

- 2.3 The decision to round off functional evaluation scores of bidders with the result that the rounding off ultimately pushed T-Systems through to the next evaluation stage;
- 2.4 The verbal extension of Transnet's contract with Neotel (Pty) Ltd ('Neotel'), Transnet's current network services provider.

### 3.

I have perused the following documentation to assist me in outlining my view:

- 3.1 The Public Finance Management Act ('PFMA'), Act 1 of 1999, as amended;
- 3.2 The Preferential Procurement Policy Framework Act, Act 5 of 2000, as amended;
- 3.3 The Standardized Public-Private Partnership provisions as issued by the Department of National Treasury;
- 3.4 The Transnet Procurement Procedures Manual ('PPM'), version 2 dated October 2013;
- 3.5 The Transnet Delegation of Authority Framework (effective from 1 May 2012);
- 3.6 The Letter of Intent ('LOI') addressed to 'Detecon international GmbH' issued by Transnet dated 29 October 2012 for the appointment of a service provider to drive and assist Transnet with developing a network sourcing strategy and performing a comprehensive due diligence of its network and telecoms assets for a period of three (3) months;
- 3.7 Excerpt from the Draft Minutes of the Special Meeting of the Board Acquisitions and Disposals Committee No 13/07 held on 29 May 2013;

- 3.8 A copy of the affidavit provided by Anja Stefanie Hattingh (Passport No: C466MLRFO), the Vice President: Finance at T-Systems South Africa (Pty) Ltd dated 10 October 2013;
- 3.9 A letter from Transnet Internal Audit ('TIA') (signed by Dr Andre Botha) to the Executive Manager: Governance at Transnet (Mr. Peter Volmink) dated 28 October 2013 and the Evaluation Gateway Report issued by TIA;
- 3.10 A letter from T-Systems to Transnet SOC Ltd dated 28 October 2013 regarding a Reduction of Broadband Infraco (BBI) Costs;
- 3.11 The Tender Evaluation and Recommendation Report ('TEAR') dated 30 October 2013;
- 3.12 An internal memorandum to the Acting GCE, Sharla Pillay from the Acting Group Chief Financial Officer ('GCFO'), Chief Information Officer and Group Chief Supply Chain Officer ('GCSCO') dated 30 October 2013;
- 3.13 An internal memorandum to the GCFO, Chief Information Officer and GCSCO from Brian Molefe, the GCE dated 20 November 2013;
- 3.14 A letter of regret from Transnet to Neotel dated 20 November 2013;
- 3.15 A letter from Neotel to Brian Molefe, the GCE at Transnet dated 26 November 2013;
- 3.16 A letter dated 10 December 2013 from Neotel to Anoj Singh ('GCFO') at Transnet with a proposal for an extension of the Master Services Agreement between Transnet and Neotel dated 11 December 2007, as accepted by Brian Molefe, the GCE at Transnet on behalf of Transnet on 11 December 2013.

## 4.

A broad briefing on the matter was provided by Linda Yanta, Willem Van Niekerk and Collins Mashishi. Further, a summary setting out 'focus points' was provided by Thokozani Nkwanyana (as reviewed by Linda Yanta, Collins Mashishi and Gerrit Prinsloo).

## 5.

Delegation of Authority and the Nature of the Authority Granted

- 5.1 The primary document considered pertaining to the delegation of authority for procurement processes is the PPM. It is important to note that the initial Procedures Manual which was made effective 26 May 2009, was re-written to align it with the Supply Chain Policy. The re-written manual was made effective on 1 October 2012. This manual was again re-written to align it with the revised Supply Chain Policy and Preferential Procurement Policy Framework Act, Act 5 of 2000 as amended and made effective on 1 October 2013.
- 5.2 According to the TEAR on page 3, the Network Services RFP was issued to the market on 14 June 2013 and closed on 13 August 2013. Certain extensions in respect of the closing date were requested and granted. Each extension still fell before 1 October 2013, the effective date of the current applicable PPM.
- 5.3 It is assumed that the PPM dated 1 October 2012 was utilized as a guide to the procurement process for this tender. I have not had access to the PPM dated 1 October 2012.
- 5.4 For purposes of this opinion, I will refer to the PPM that I was provided with. I believe the principles reflected below may still be consistent with the PPM dated 1 October 2012.



5.5 As reflected on page 9 of the latest PPM, it (along with the Supply Chain Policy) gives effect to the statutory requirements as set out in the Constitution (Act 108 of 1996, as amended) and the PFMA which stipulates that Transnet must have and maintain an appropriate procurement and provisioning system which is -

- fair,
- equitable,
- transparent,
- competitive; and
- Cost-effective.

It goes on to say that the policy ensures a coherent framework within which procurement principles and compliance controls are applied across Transnet.

5.6 Delegation of Authority ('DoA') is defined as '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 authorize, condone or rescind a decision already taken by a sub-delegate.'

5.7 Regardless of which PPM is applicable and whether or not there is any discrepancy between the one dated 1 October 2012 and the one dated 1 October 2013, the PFMA remains applicable. According to S49 of the PFMA the Transnet Board is the accounting authority of Transnet being a public entity. Section 56 goes on to say that:

*(1) The accounting authority for a public entity may-*

- (a) in writing delegate any of the powers entrusted or delegated to the accounting authority in terms of this Act, to an official in that public entity; or*
- (b) instruct an official in that public entity to perform any of the duties assigned to the accounting authority in terms of this Act.*

*(2) A delegation or instruction to an official in terms of subsection (1)-*

- (a) is subject to any limitations and conditions the accounting authority may impose;*
  - (b) may either be to a specific individual or to the holder of a specific post in the relevant entity; and*
  - (c) does not divest the accounting authority of the responsibility concerning the exercise of the delegated power or the performance of the assigned duty.*
- (3) The accounting authority may confirm, vary or revoke any decision taken by an official as a result of a delegation or instruction in terms of subsection (1), subject to any rights that may have become vested as a consequence of the decision.*

5.8 The Board of Transnet therefore has the power to delegate powers entrusted to it.

5.9 My view is that the delegation should be interpreted to be an instruction to the holder of a post as referred to in clause 2(b) and not to a specific individual. As per the excerpt of the minutes, it was resolved to delegate the authority to the GCE, not to Brian Molefe who holds this position. Hence, the Acting GCE, Sharla Pillay was authorized to carry out the instructions of the Board. As per paragraph 2 (c), it is important to note that the Board is still accountable for ensuring the delegated power is carried out as intended.

5.10 As per the memorandum dated 30 October 2013 to Sharla Pillay, the Acting GCE, it was recommended that the procurement process completed be approved and the business be awarded to Neotel, the relevant letter of intent and letters of regret be issued and the letter to extend the existing Neotel contract be signed. In the later memorandum dated 20 November 2013 however, Brian Molefe notifies the GCFO, Chief Information Officer and GCSCO of his decision to award the business to T-Systems instead of Neotel.

- 5.11 The question which arises is whether it was in the discretion of the GCE to decide on awarding a different party to the one recommended. As per the GCE's memorandum, the Acquisition Council (AC) is the Board which delegated certain functions to the GCE i.e. to issue the RFP and award a contract to the preferred bidder.
- 5.12 According to Chapter 20 of the PPM, sub-paragraph 5 indicates that in the event of a dispute arising after the AC has referred the matter back to the recommending officer for re-motivation; the matter must be escalated to the CEO for a final decision. It is understood that a reference to the CEO refers to the GCE.
- 5.13 The initial authority granted i.e. by the Board to the GCE can be seen as going against the principles of fairness (being one of the 'best practice' principles captured in the PPM). No escalation could have taken place as referred to above since the GCE was the party who awarded the contract to Neotel. He would then be fulfilling a dual role.
- 5.14 Further, according to the PPM (page 80 paragraphs 13.3.1), evaluation criteria must be stated upfront in the RFP document. No evaluation criteria should be used in the evaluation process which was not stipulated in the RFP document. It appears as though bidders were not requested to disclose interests such as the possible sale transaction between Neotel and Vodacom which seems to have played a role in not awarding the business to Neotel and further seems to have been the reason cited for the 'non-award'.

(Another aspect which appears to have been taken into account by the GCE in awarding the contract to Neotel was pricing. Subsequent to final price offers being submitted by the three successful candidates, following Neotel, another bidder, known as 'Dimension Data' fell second and T-Systems fell third. Despite this, the award was still made to T-Systems. A factor taken into account was a possible price reduction by T-Systems however their submission was made after the deadline for doing so therefore it should have been disregarded.)

- 5.15 Please note certain valid concerns were raised in the memorandum dated 20 November 2013 however the procedural aspects in terms of following an open and transparent procurement process appear problematic.

Conclusion:

- 5.16 The authority delegated does not support the objective of fairness and transparency set out in the PPM since the authority fell on a party (i.e. the GCE) who ultimately had to fulfill a dual role. It appears as though the GCE had the authority to make the award as he did however the factors taken into account in electing to award the contract to T-Systems over and above Neotel, the recommended service provider, again do not support the objectives of fairness and transparency as referred to above, particularly pertaining to the 'equal treatment of bidders'. The function being delegated appears to be compliant with the PPM and applicable legislation; however, in the interests of fairness and transparency one should be wary of authority falling upon a party who will need to fulfill a dual role.

6.

Possible Disqualification of Bidder

- 6.1 T-Systems submitted a bid under this tender although it is a fellow subsidiary of Detecon which conducted a due diligence at Transnet in order to develop the RFP for the network services tender referred to above. According to a report issued by TIA, the RFP for the due diligence tender indicated that 'Bidders are advised that should they be successful with regards to this RFP for the Due Diligence (Phase 1), they will then be excluded from tendering, partnering and/or advising bidders for the main Tender (Phase 2).
- 6.2 My opinion is that this clause automatically disqualifies T-Systems from submitting any bid and any bid submitted should not have been considered.

- 6.3 Further as per the Letter of Intent ('LOI') issued by Transnet to Detecon on 29 October 2012, which was signed on behalf of Detecon by its Managing Partner and VP Central and Southern Africa, 'The Service Provider and/or its affiliates agrees to being excluded from tendering for the main network services tender (Phase 2) as referenced to in the RFP, Section 2, paragraph 2.3.3.'
- 6.4 It is important to understand the meaning of 'affiliate' for purposes of this opinion. The Oxford English Dictionary defines affiliate as 'connect as a subordinate member or branch' and affiliated as 'of a subsidiary group or a person attached or connected to an organization.' Such dictionary meaning would take precedence in the court of law.
- 6.5 As per the standardised Public-Private Partnership Provisions as issued by the Department of National Treasury 'affiliate' is defined as any person that directly or indirectly through any one or more intermediaries controls, is controlled by or is under common control with any person, where "control" means the ability to direct or cause the direction of the business affairs and management policies or practices of a person;
- 6.6 The affidavit obtained from Anja Stefanie Hattingh (Passport No: C466MLRFO), the Vice President: Finance at T-Systems South Africa (Pty) Ltd dated 10 October 2013 offers an explanation regarding the relationship between T-Systems South Africa and Detecon however the same opportunity was not afforded to other parties which goes against the values of fairness and transparency as set out in the PFMA and PPM.
- 6.7 A possible conflict of interest may have prevented another prospective party from bidding had they known that Transnet requires affidavits. One could argue that had other potential bidders known that an explanation pertaining to their relationship with affiliates would be acceptable, they or their affiliates could have submitted a bid.



Conclusion:

6.8 Based on the above definitions, T-Systems and Detecon are affiliates. As per the LOI, it should have been excluded from tendering. My opinion is that T-Systems should not have been allowed to continue with the bid process upon it submitting a tender.

6.9 Firstly, T-Systems would have been disqualified as per the predetermined evaluation criteria in respect of the tender in question and secondly, it was requested to provide an affidavit with an undertaking pertaining to its affiliation with Detecon. This opportunity was not afforded to all parties, hence going against the principle of equal treatment of bidders which conforms to fairness and transparency which is to be upheld in any procurement process.

## 7.

Rounding off functional evaluation scores

7.1 It was considered necessary to request the Department of National Treasury to provide guidance regarding whether technical scores were to be rounded off. In the TEAR it states that this was in support of an open and competitive tender process. As with the predetermined criteria pertaining to affiliates being disqualified from bidding, the criteria for a technical score of 70% was predetermined and two other bidders made this score or higher. Two bidders were therefore qualified to be fairly considered for the business.

Conclusion:

7.2 The criteria against which bidders would be evaluated were set out in the tender documents. This criterion must be adhered to. The Preferential Procurement Policy Framework Act speaks loudly of the fact that the conditions of tender are to be set out in the tender document issued to the public. The public responds based upon

the conditions of tender. Changing evaluation criteria subsequent to the submission of bids and during the evaluation of bids goes against this principle. It further goes against the objectives of fairness and transparency and the equal treatment of bidders as set out in the PPM.

8.

Verbal extension of Neotel Contract

- 8.1 A tacit term is one that the parties did not specifically agree upon, but which (without anything being said) both or all of them expected to form part of their (oral or written) agreement. It is a wordless understanding, an unarticulated term, having the same legal effect as an express term.
- 8.2 In this instance, the initial term of the agreement between Transnet and Neotel expired on 31 March 2013. It was extended by mutual agreement to 31 August 2013 and thereafter to 31 October 2013. Between 31 October 2013 and 11 December 2013 there was no official written extension of the contract however Neotel continued to render required services of the contract and Transnet continued to pay Neotel for such services. One can argue that there was tacit acceptance of the continuation of the contract.

Conclusion:

- 8.3 Further information pertaining to the exact nature of the verbal extension would be required to comment upon this aspect in more detail however it should be noted that as per the Transnet Delegation of Authority Framework (effective from 1 May 2012), at paragraph 4.1 it states that an original bearer of authority may *in writing* (own emphasis) sub-delegate to his or her subordinate during his or her temporary absence for an indefinite period. The principle of delegating authority to bind Transnet to contracts in writing should be adopted here.

- 8.4 No current dispute exists pertaining to the validity of the extension of the contract with Neotel and a written contract was entered into subsequent to a verbal extension of same. Further, prior to the written contract being entered into, there was tacit acceptance of the terms applicable.
- 8.5 The only aspect which could be problematic and where Transnet should exercise caution in the future is with regard to the verbal granting of authority to bind Transnet to a contract with a third party.

## 9.

### Overall Conclusion:

- 9.1 As set out in more detail above, the key concerns are around the principles of fairness and transparency as provided for in section 51 of PFMA and captured in the PPM.

### Concern regarding Non-Compliance :

- 9.2 Based on the information provided T-Systems should have been excluded from consideration as per paragraph 6.7 above.

### Other areas of Concern:

- 9.3 Vodacom and Neotel were not given an opportunity to explain their interest as was the case between Detecon and T-Systems who were provided with that opportunity as per paragraph 5.14 above.
- 9.4 Repeated rounding off of the evaluation scores which was ultimately taken to National Treasury for validation creates a perception that T-Systems were given favorable treatment over other bidders.

9.5 The fact that Dimension Data which was placed second in the final adjudication process was overlooked which re-enforces the perception that T-Systems was the preferred bidder.

9.6 Taking the non-compliance and areas of concern into account it is advisable that Transnet improves upon its compliance with the procurement mechanisms in place within the organization.

**DATED AT PRETORIA ON THIS 9TH DAY OF MAY 2014.**

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**ANGELA FOURIE**  
**LEGAL DIVISION**



## ANNEXURE PV 21





Pv 21



▪ MKHABELA HUNTLEY ADEKEYE INC ▪

## OPINION MEMORANDUM

**TO:** TRANSNET SOC LIMITED

**ATTENTION:** MR NDIPHIWE SILINGA

**DATE:** 23 MAY 2014

**SUBJECT:** WHETHER OR NOT THE AWARD OF THE TRANSNET NETWORK SERVICES TENDER TO T-SYSTEMS SOUTH AFRICA HOLDINGS PROPRIETARY LIMITED CONSTITUTES A CONFLICT OF INTEREST

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## INTRODUCTION

- 1 During November 2013 Transnet SOC Limited ("Transnet") selected T-Systems SA Holdings Proprietary Limited ("T-Systems") as the preferred bidder for the award of the tender for the provision to Transnet of Network Services for a period of 3 (three) years with an option to extend for 2 (two) years, advertised under reference GSM/13/04/0722 ("Network Services Tender").
- 2 Transnet's decision was conveyed to T-Systems by letter dated 20 November 2014 ("LOI"). In terms of the LOI Transnet and T-Systems were to enter into negotiations with the view to conclude the Master Services Agreement ("MSA") that would regulate the terms and conditions upon which the services forming the subject of the Network Services Tender would be provided to Transnet.
- 3 In terms of the LOI, the MSA was to be concluded within 120 days from date of issue of the LOI. Transnet reserved the right to approach the alternate preferred bidders if the MSA was not concluded within this period. We are instructed that on 18 March 2014 the parties agreed to extend the period for the negotiation and conclusion of the MSA to 31 May 2014.

Ref No:

- 4 In the meanwhile, during the course of the performance of the annual audit on the business of Transnet for the financial year ending April 2014 the external auditors of Transnet, Sizwe Ntsaluba Gobodo Incorporated ("SNG"), made certain findings which are critical of the selection of T-Systems as the preferred bidder for the award of the Network Services Tender. The basis of the adverse audit finding made by SNG are, amongst others, that:

*"The procurement process followed allowed a supplier that ought to have been excluded from a tender process by virtue of its affiliate, which results in a conflict of interest, having been awarded a bid which explicitly prohibits the affiliates or parties related to it from bidding".*

- 5 It is apparent that the basis of the audit finding made by SNG is a legal opinion provided to them by a Ms Angela Fourie dated 9 May 2014 ("**Fourie Opinion**") in which it is opined, amongst others, that:

*"6.1 T-Systems submitted a bid under this tender although it is a fellow subsidiary of Detecon which conducted a due diligence at Transnet in order to develop the RFP for the network services tender referred to above. According to a report issued by TIA, the RFP for the due diligence tender indicated that 'Bidders are advised that should they be successful with regards to this RFP for the Due Diligence (Phase 1), they will then be excluded from tendering, partnering and/or advising bidders for the main Tender (Phase 2)."*

*6.2 My opinion is that this clause automatically disqualifies T-Systems from submitting any bid and any bid submitted should not have been considered."*

- 6 It is against the backdrop of the circumstances set out above that we are required by Transnet to advise whether or not we are in agreement with the opinions and conclusions expressed in the Fourie Opinion.
- 7 We set out our opinion herein below.

#### **DUE DILIGENCE REQUEST FOR PROPOSAL**

- 8 On 26 June 2012 Transnet issued a Request For Proposal for the appointment of a service provider to drive and assist Transnet with developing a network sourcing strategy and performing a comprehensive due diligence of its network and telecoms assets for a period

of 3 (three) months, issued under reference number GSM/12/06/0456 (**"the Due Diligence RFP"**) (hereinafter, **"the Due Diligence Tender"**).

- 9 Of relevance to this opinion is a condition which is stipulated in clause 2.3.3 of the Due Diligence RFP, that:

*"Bidders are advised that should they be successful with regards to this RFP for the Due Diligence (Phase 1), they will then be excluded from tendering, partnering and/or advising bidders for the main network services tender (Phase 2), subject to the findings of the Due Diligence (Phase 1) Outcomes. ("Condition of Bid").*

- 10 It is apposite to point out at the stage that the Condition of Bid, in our view, had a very limited reach. It simply precluded any successful bidder from the Due Diligence RFP from participating in the Network Services Tender. We are of the view that the limitation stipulated in the bid condition did not extend its application to anyone other than the bidder itself.

- 11 Following the evaluation of the proposals submitted pursuant to the Due Diligence RFP Detecon International GmbH (**"Detecon"**) was selected as the preferred bidder and subsequently awarded the Due Diligence Tender.

- 12 On 31 October 2012 Transnet and Detecon entered into a letter of intent regulating the terms and conditions of the appointment of Detecon for the provision of the due diligence services as contemplated in the Due Diligence Tender (**"the Due Diligence LOI"**). The Due Diligence LOI was to be substituted by a formal service agreement. At the time of writing of this opinion we had not been furnished with a copy of the said service agreement.

- 13 In terms of clause 1.5 of the Due Diligence LOI, the parties agreed that:

*"the Service Provider and/or its affiliates agrees to being excluded from tendering for the main networks services tender (Phase 2) as referred to in the RFP, Section 2, paragraph 2.3.3.3."*

(hereinafter, **"the Exclusion Condition"**)

- 14 Despite that we have not had sight of the service agreement which would have been concluded between Transnet and Detecon pursuant to the Due Diligence, we have been

instructed to assume for the purposes of this opinion that the Exclusion Condition remained applicable to the contractual relationship between Detecon and Transnet, until completion of implementation by Detecon of the services contemplated in the Due Diligence Tender.

#### MEANING OF "AFFILIATE"

- 15 The term "affiliate" as used in the Due Diligence LOI is not defined. There is no definition of this term in any South African legislative instrument that we could come across.
- 16 There are various canons of construction which are available to interpret the meaning of words contained in a document, be it a contract or a statute.
- 17 In *Venter v Rex*<sup>1</sup>, it was stated that in interpreting a statute, the words must be given their literal and grammatical meaning unless such an approach results in an absurdity or repugnance.
- 18 The South African Courts have developed the approach to be adopted in interpreting statutes by stating that the requirement to determine the meaning of the language used, is to study the whole enactment and the subject-matter which obviously relates to the purpose of the enactment.
- 19 Most recently, in *Natal Joint Municipal Pension Fund v Endumeni Municipality*<sup>2</sup>, Wallis J in the Supreme Court of Appeal stated that:

*"Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors.<sup>13</sup> The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to,*

<sup>1</sup> 1907 TS 910 at 914 and 919-21

<sup>2</sup> 2012 (4) SA 593 (SCA).

*and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.'*

- 20 In the absence of a statutory definition of the word "Affiliate" we have considered the meaning of the word as defined in its ordinary dictionary meaning. The Black Law Dictionary, 9<sup>th</sup> Edition defines the word to mean:

*"A corporation that is related to another corporation by shareholdings or other means of control; a subsidiary, parent, or sibling corporation"; or "One who controls, is controlled by, or is under common control with an issuer of a security"*

- 21 In the course of our research we also looked at other common uses of the word in business. In the current International Financial Reporting Standards (IFRS), where the term is commonly used in relation to consolidation of financial statements of companies, the term used as follows:

*"An affiliate of an entity is a party that, directly or indirectly through one or more intermediaries, controls or is controlled by the entity, or is a fellow subsidiary of the entity. Associated and jointly controlled entities are not affiliates"*

- 22 T-Systems was requested by Transnet to clarify its relationship with Detecon. In the affidavit deposed to by Anja Stefanie Hattingh on 10 October 2013 at the instance of Transnet Ms Hattingh, in a rather convoluted response, stated that the two companies "share a parent company".
- 23 Upon receipt of instructions to provide this opinion we requested Transnet to obtain an organogram setting out the shareholding structures of each of Detecon and T-Systems, which revealed that Detecon is a wholly-owned subsidiary of T-Systems International GmbH, whereas T-Systems is a majority owned subsidiary of T-Systems International GmbH ("T-Systems International"), which owns a 70% stake in T-Systems.
- 24 Accordingly, having regard to the definition of the term and the context within which it is used in the Due Diligence LOI, we are satisfied that Detecon and T-Systems are



"affiliates" of each other by virtue of their common control by, or their subsidiary to, T-Systems International.

- 25 It is plain that the sole purpose of incorporating the Exclusion Condition in the Due Diligence LOI, as contended by Transnet, was to ensure that a company which participates in the Due Diligence Tender, which would ultimately inform the basis of the Network Systems Tender, does not, either by itself or associated companies or arrangements, benefit unfairly through its participation in the Network Services Tender.

#### ENFORCEABILITY OF THE EXCLUSION CONDITION

- 26 The LOI constitutes a contract between Transnet and Detecon. T-Systems is not a party to that contract. Neither are we aware of evidence that T-Systems ever consented or acquiesced to the Exclusion Condition.

- 27 Each of Detecon and T-Systems enjoy a discrete legal personality, which is independent of each other, despite their common control by, and subsidiary to, T-Systems International. This concept of separate legal personality of a company was best expressed in *Salomon vs Salomon and Co Ltd* in which it was held that:

*"...it seems to me impossible to dispute that once the company is legally incorporated it must be treated like any other independent person with its rights and liabilities appropriate to itself, and that the motives of those who took part in the promotion of the company are absolutely irrelevant in discussing what those rights and liabilities are".<sup>3</sup>*

- 28 This concept of separate legal personality was restated subsequently in *Dadoo Ltd vs Krugersdorp Municipal Council*<sup>4</sup>, amongst others, where Innes CJ held that:

*"...taking the intention then [of the legislature] to be the prohibition of ownership of fixed property by Asiatics and the prohibition of the acquisition and the occupation of mining rights by coloured people, I come to enquire whether the transaction complained of is a contravention of this statute. In other words, whether ownership of Dadoo Ltd is in substance ownership by its Asiatics shareholders. Clearly in law it is not. A registered company is a legal person distinct from the members who compose it.*

<sup>3</sup> [1897] AC22 (HL)

<sup>4</sup> Paras 19, 20, 80, 530

*....nor is the position affected by the circumstance that a controlling interest in the concern may be held by a single member. This conception of the existence of a company as a separate entity distinct from its shareholders is no merely artificial and technical thing. It is a matter of substance...*<sup>5</sup>

- 29 South African common law recognises that parties to a contract may make a stipulation in favour of a third person who may not necessarily be present nor himself be a signatory to such contract (this is also referred to as a contract for the benefit of a third person), deriving from a Roma-Dutch law principle called a *stipulatio alteri*. However, this principle is primarily underpinned by a benefit, or a right, in favour of a third person, but not an obligation *per se*. An obligation cannot in our law be created for and be binding on another person without his consent.<sup>6</sup> Instances where an obligation can be created is only when as an attendant to the right or benefit, a stipulation is made for the benefit of a third person.<sup>7</sup>
- 30 On 14 July 2013 Transnet issued a request for proposals for the provision of network services for a period of 3 (three) years with an option to extend for 2 (two) years ("the **Network Services RFP**").
- 31 The Exclusion Condition was not incorporated into the Network Services RFP, whether expressly or by reference or otherwise. Consequently, without expressly consenting or acquiescing to be bound to the Exclusion Condition, there was also no bar upon T-Systems from participating in the Network Services Tender. Nevertheless, if the Exclusion Condition had been expressly incorporated into the Network Services RFP, T-Systems would undoubtedly have been unsuited to partake in the Network Services Tender. It was seemingly a mistake on the part of Transnet (and apparently Detecon) to assume that the Exclusion Condition will apply to affiliates of Detecon even if it was not incorporated into the Network Services RFP.
- 32 Accordingly, absent a clear commitment by T-Systems to be bound by the Exclusion Condition, the Exclusion Condition, which is a contractual stipulation between Transnet and Detecon, would not apply to T-Systems. We are of the view that the common control or subsidiarity of Detecon and T-Systems to or by T-Systems International does not alter that position.

<sup>5</sup> This case relates to old apartheid legislation under which Asiatics were prohibited from owning immovable property in the Transvaal, but nothing was said as to Asiatic companies.

<sup>6</sup> LAWSA Vol. 5 Part 1, par 181.

<sup>7</sup> Per Innes CJ in *McCullogh v Fernwood Estate Ltd*. 1920 AD 204.

- 33 Whilst we agree that Detecon and T-Systems are affiliates of each other, we do not agree with the Fourie Opinion insofar as it suggests that T-Systems may be excluded from participating in the Network Services Tender solely on the basis of the Exclusion Condition.

#### CONFLICT OF INTEREST

- 34 The Network Services RFP, insofar as it seeks to regulate conflicts of interest, states that:

*"a conflict of interest arises when personal interests or activities influence [or appear to influence] the ability to act in the best interest of Transnet. Examples include, but are not limited to:*

- i) Transnet employees awarding business to entities in which their family members or business associates have an interest*
- ii) Transnet employees have a financial interest in a bidding entity*

*bidding entities are required to disclose any interest/s which exist between themselves and any employee and/or Transnet Board member".*

- 35 We could not find any other provision in the Network Services RFP or the Transnet Procurement Process Manual or Supply Chain Policy that seeks to regulate conflicts of interest differently.
- 36 The concept of conflict of interest is not one to which there will always be a set answer. Conflict of interest is a matter of fact, which can only be properly evaluated on the circumstances of each case.
- 37 In *V Medical Administrators (Pty) Ltd and Another v Jacques and Others*<sup>8</sup> the court held that:

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<sup>8</sup> (2010/46241) [2010] ZAGPJHC 131 (9 December 2010)

*"It should also be remembered that not every interest necessarily constitutes a conflict of interest. Regard must be had to the particular circumstances in each case. Any issue regarding a conflict of interest must be approached on a common sense basis...."*

- 38 We are of the view that the circumstances of this case do not give rise to the issue of conflict of interest between Transnet and/or Detecon and/or T-Systems. We say so for the following reasons:

38.1 Detecon has provided services to Transnet pursuant to the Due Diligence Tender. That assignment has been completed. In this regard, it is important to note that Detecon did not submit a tender in respect of the Network Services RFP. If Detecon had submitted a tender in response to the Network Systems RFP, a conflict of interest would certainly have arisen, because Detecon would have been privy to the basis of the RFP that would inform the terms of the Network Services Tender;

38.2 T-Systems submitted a bid in response to the Network Service Tender. There is no evidence to suggest that Detecon is associated with that bid. If there was such evidence, Detecon would indeed be in a situation of conflict of interest, which would naturally render the T-Systems bid unsuited to participate in the Network Services Tender. The relationship between T-Systems and Detecon as affiliates of each other or by their subsidiarity to T-Systems International does not alter this position.

38.3 The conflict of interest provision stipulated in the Network Services RFP is not of any assistance in this instance. It is structured to address conflicts as they may arise as between bidders and Transnet and/or its employees.

- 39 We therefore do not agree with the views expressed in the Fourie Opinion in respect of conflict of interest. We do not believe a conflict of interests arises between Transnet and T-Systems.

## **RELEVANT LEGISLATION AND POLICY CONSIDERATIONS**

### **The Constitution of the Republic of South Africa, 1996**

- 40 The foundational document for all procurement laws and policies within the Republic of South Africa is the Constitution of the Republic of South Africa, Act No 108 of 1996 ("the Constitution").

41 In terms of section 2 of the Constitution, the Constitution is the supreme law of the Republic. Any law or conduct inconsistent with the Constitution is invalid and the obligations imposed by the Constitution must be fulfilled.

42 In terms of section 217(1) of the Constitution, when an organ of state in the national, provisional or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost effective.

#### **The Public Finance Management Act, Act No. 1 of 1999**

43 In terms of section 51(1)(a)(iii) of the Public Finance Management Act, 1999 ("the PFMA") an accounting authority for a public entity must ensure that a public entity has and maintains an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost effective.

44 In terms of section 3 of the PFMA, in the event of any inconsistency between the PFMA and any other legislation, the PFMA prevails.

#### **Fairness and lawfulness of the procurement process**

45 Our courts have on numerous occasions been called upon to determine the validity of tenders, mainly on account of failure to comply with the aforesaid procurement principles.

46 In *Steenkamp*<sup>9</sup>, Moseneke DCJ stated:

"Section 217 of the Constitution is the source of the powers and function of a government tender board. It lays down that an organ of state in any of the three spheres of government, if authorised by law may contract for goods and services on behalf of government. However, the tendering system it devices must be fair, equitable, transparent, competitive and cost-effective. This requirement must be understood together with the constitutional precepts on administrative justice in section 33 and the basic values governing public administration in section 195(1)." (*own emphasis*)

47 In *Millennium Waste*<sup>10</sup> the Supreme Court of Appeal (per Jafta JA) elaborated:

<sup>9</sup> *Steenkamp NO v Provincial Tender Board, Eastern Cape* [2006] ZACC 16; 2007 (3) SA 121 (CC); 2007 (3) BCLR 300 (CC)

<sup>10</sup> *Millennium Waste Management (Pty) Ltd v Chairperson of the Tender Board: Limpopo Province and Others* [2007] ZASCA 165; 2008 (2) SA 481 (SCA)



"The . . . Constitution lays down minimum requirements for a valid tender process and contracts entered into following an award of tender to a successful tenderer (section 217). The section requires that the tender process, preceding the conclusion of contracts for the supply of goods and services, must be 'fair, equitable, transparent, competitive and cost-effective'. (own emphasis)

- 48 In *Firechem*<sup>11</sup> Schutz JA, dealing with a situation where the award of a tender outside the applicable legal framework arose, stated that:

*"One of the requirements . . . is that the body adjudging tenders be presented with comparable offers in order that its members should be able to compare. . . . Yet another requirement is that competitors should be treated equally, in the sense that they should all be entitled to tender for the same thing. Competitiveness is not served by only one or some of the tenderers knowing what is the true subject of tender. . . . That would deprive the public of the benefit of an open competitive process."* (own emphasis)

- 49 All of the above authorities are restated in the In the most recent case of *AllPay*<sup>12</sup>, where the Constitutional Court held that –

*"In public procurement matters, priority should be given to the public good. This means that public interest must be assessed not only in relation to the immediate consequences of invalidity..., but also in relation to the effect of the order on future procurement.*

*The primacy of the public interest in procurement.... matters must also be taken into account when the rights, responsibilities and obligations of all affected persons are assessed. This means that the enquiry cannot be one dimensional. It must have a broader range".* (own emphasis)

- 50 Having regard to the facts and circumstances of this matter, it is apparent that Transnet has always been concerned about the adverse impact on fairness and competitiveness, amongst others, that could arise if the supplier that was awarded the Due Diligence Tender (and its affiliates) were allowed to participate in the Network Systems Tender. Such supplier would clearly enjoy an unfair advantage over its competitors. Similarly, to the extent that the affiliates of such supplier were to be allowed to participate in the Network Services Tender such a risk would arise.

<sup>11</sup> *Premier, Free State, and Others v Firechem Free State (Pty) Ltd* [2000] ZASCA 28; 2000 (4) SA 413 (SCA)

<sup>12</sup> *AllPay Consolidated Investments Holdings (Pty) Ltd. And Others v The South African Social Security Agency and Others*, CCT48/13

- 51 It would simply be impractical for Transnet to monitor and ensure that the supplier who was awarded to Due Diligence Tender does not share the information it gleaned from that process with its affiliates. It would be impractical to do so. Inasmuch as a declaration or undertaking to that effect could be obtained from such supplier, there is no full proof manner in which Transnet could ensure strict adherence with such declaration or undertaking, if given.
- 52 Accordingly, it was prudent in our view of Transnet to determine that no affiliate of supplier that was successful in the Due Diligence Tender would be eligible to participate in the Network Services Tender. Nevertheless, we now know that in its endeavour to do so, Transnet failed give effect to the Exclusion Condition in a manner which would have rendered it efficient. Transnet merely made the Exclusion Condition a term of its contract with Detecon. It did not include the Exclusion Condition as a term of the Network Services RFP, which would have rendered it equally applicable to T-Systems.
- 53 In our view, now that Transnet is fully appraised of the nature of the relationship between Detecon and T-Systems, and the inherent risk that the proximity of that relationship poses to the fairness and competitiveness of the procurement process, amongst other concerns, Transnet cannot but take steps to avert the implementation of a tender process whose outcome may suffer an unlawfulness. Transnet has a constitutional obligation to do so. We do not believe that the risk has to be confirmed. That is an impossible task in circumstances such as present. The mere real likelihood of the risk materialising would suffice.
- 54 Thus we are of the view that, in accordance with the various case authorities we have cited above, Transnet would be entitled in these circumstances to reconsider its decision to award the Network Services Tender to T-Systems. Otherwise, there is a very high risk that the award may be challenged by any unsuccessful bidder in terms of section 6(f) of the Promotion of Administrative Justice Act, 2000, on the basis that the award contravened the procurement prescripts stipulated in the Constitution (section 217) and the PFMA (section 51), amongst other grounds.
- 55 Transnet is therefore within its rights to revoke its decision to award the tender to T-Systems.

#### **RECONSIDERATION OF AWARD**

- 56 In the event Transnet decides to re-consider the decision to select T-Systems as the preferred bidder, Transnet has to bear in mind that the decision it made remains valid and has a force of law until reviewed and set aside by a court of law. This principle was

properly articulated in *Oude Kraal Estates*<sup>13</sup>, where the Supreme Court of Appeal held that:

*"The proper functioning of a modern state would be considerably compromised if all administrative acts could be given effect to or ignored depending on the view the subject takes of the validity of the act in question. No doubt it is for this reason that our law always recognized that even an unlawful administrative act is capable of producing legally valid consequences for so long as the unlawful act is not set aside".*

57 The position expressed above is consistent with the established common law doctrine of *functus officio*. According to this doctrine, an official who has once "*discharged his official function*" by making a decision is unable to change his mind and revoke, withdraw or revisit the decision. In general, this principle applies only to final decisions. Finality is a point arrived at when the decision is published, announced or otherwise conveyed to those affected by it<sup>14</sup>. In this instance, the decision to select T-Systems as a preferred bidder has already been conveyed to it and contract negotiations pursuant thereto initiated. Thus the decision has become final.

58 A distinction is often drawn between valid and invalid decisions. There are authorities that suggest that invalid decisions must simply be ignored, whereas valid decisions cannot be ignored but that they can only be revoked on authority of a court order, unless by consent<sup>15</sup>. However, case law in this area of the law remains unclear. Nevertheless, it seems that the foregoing approach cannot stand in light of the *Oudekraal* estates decision referred to above.

59 But what is clear is that unless T-Systems consents to the reconsideration (and possibly revocation) of its selection as the preferred bidder, Transnet may be forced to approach the high court to have its own decision reviewed and set aside. This approach was affirmed by the Supreme Court of Appeal in *Pepkor Retirement Fund*<sup>16</sup> where the court held that the Financial Services Board, too, was both entitled and obliged to seek review of decisions of the Registrar "*which it considers to be invalid and which, if not reversed, would prejudice the public interest*".

## CONCLUSION

<sup>13</sup> *Oude Kraal estates (Pty ) Ltd v City of Cape Town* 2004 (6) SA 222 SCA

<sup>14</sup> Cora Hoexter, *Administrative Law in South Africa*, p247

<sup>15</sup> Hoexter, p249 to 250

<sup>16</sup> *Pepkor Retirement Fund v FSB* 2003 (6) SA 38 (SCA)

- 60 We are broadly in agreement with the correctness of the audit finding made by SNG and the conclusion reached in the Fourie Opinion, albeit on the basis of a distinct reasoning and opinion.
- 61 We are of the view that Detecon and T-Systems are affiliates of each by virtue of their common control by, or their subsidiarity to, T-Systems International. However, we do not agree with the Fourie Opinion insofar as it suggests that T-Systems may be excluded from participating in the Network Services Tender solely on the basis of the Exclusion Condition.
- 62 The Exclusion Condition was not incorporated into the Network Services RFP, whether expressly or by reference or otherwise. Consequently, without expressly consenting or acquiescing to be bound to the Exclusion Condition, there was no bar upon T-Systems from participating in the Network Services Tender. The Exclusion Condition is contractual stipulation between Transnet and Detecon, would not apply to T-Systems. We are of the view that the common control or subsidiarity of Detecon and T-Systems to or by T-Systems International does not alter that position.
- 63 We do not agree with the views expressed in the Fourie Opinion in respect of conflict of interest. We do not believe a conflict of interests arises between Transnet and T-Systems. There is no evidence to suggest that Detecon is associated with the T-Systems bid. If there was such evidence, Detecon would indeed be in a situation of conflict of interest, which would naturally render the T-Systems bid unsuited to participate in the Network Services Tender. The conflict of interest provision stipulated in the Network Services RFP is not of any assistance in this instance. It is structured to address conflicts as they may arise as between bidders and Transnet and/or its employees.
- 64 The nature of the relationship between Detecon and T-Systems poses a real risk to the fairness and competitiveness of the procurement process. Thus Transnet is enjoined to take steps to avert the implementation of its award of the Network Services Tender to T-Systems if the outcome of that award may suffer an unlawfulness. Transnet has a constitutional obligation to do so. We do not believe that the risk has to be confirmed. That is an impossible task in circumstances such as present. The mere real likelihood of the risk materialising would suffice to justify such an action by Transnet.
- 65 In the event Transnet decides to reconsider its decision, unless T-Systems consents to the reconsideration (and possibly revocation) of its selection as the preferred bidder, Transnet may be forced to approach the high court to have its own decision reviewed and set aside

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▪ MKHABELA HUNTLEY ADEKEYE INC ▪

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## ANNEXURE PV 22



Brian Molefe, Group Chief Executive



**T-SYSTEMS SA (PTY) LTD**  
International Business Gateway  
New Road  
Midrand  
1685

Dear Mr Schoonbee

**Revocation of Letter of Intent in respect of RFP No. GSM/13/04/0722 for Provision of Network Services**

1. We refer to the Letter of Intent (LOI) entered into by Transnet SOC Limited ("Transnet") and T-Systems SA (Pty) Ltd ("T-Systems") on 20 November 2013 in terms of which Transnet identified T-Systems as the preferred bidder for the provision of Network Services to Transnet for a period of three (3) years, with an option to extend for a further period of two (2) years. The LOI was issued subject to successful contract negotiations between the parties. This LOI was subsequently extended on 18 March 2014 to enable the parties to successfully negotiate and conclude the Master Services Agreement ("MSA") by 31 May 2014.
2. Transnet's procurement process is governed by the Transnet Procurement Procedures Manual ("PPM"); the Public Finance Management Act 1 of 1999 ("PFMA"); the Preferential Procurement Policy Framework Act 5 of 2000 ("PPPFA"), and the Constitution of the Republic of South Africa Act 108 of 1996, amongst others.
3. Implicit in all the relevant governing instruments, including the Transnet Supply Chain Policy, the PPM provides that Transnet must have and maintain an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective. These principles are also contained in section 51(1)(a)(i)(iii) of the PFMA.
4. During the month of April 2014, Transnet's external auditors audited the Network Services RFP ("RFP") and have highlighted certain concerns relating to the RFP process and the appointment of T-Systems as the preferred bidder, namely:
  - 4.1. According to the audit findings, T-Systems ought to have been excluded from the RFP bidding process by virtue of its association with Detecon SA (Pty) Ltd ("Detecon").

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A handwritten signature in black ink, appearing to be 'B. Molefe'.

Directors: ME Mkwana (Chairman) B Molefe\* (Group Chief Executive) MA Fanucchi Y Forbes HD Gazendam NP Mxasana N Mooka NR Njike IM Sharma IB Skosana  
E Tshabalela DJ Tshepe A Singh\* (Group Chief Financial Officer)  
\*Executive

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Group Company Secretary: ANC Ceba

TRANSNET



This association resulted in a conflict of interest which was explicitly prohibited during Phase 1 of the RFP when Detecon was awarded the contract to conduct the due diligence project for this RFP.

- 4.2. Further, the principles of fairness and transparency were not afforded to other bidders when T-Systems was given the opportunity to offer an explanation regarding its relationship with Detecon. A possible conflict of interest may have prevented another prospective party from bidding had they known that Transnet requires affidavits to explain their affiliations.
- 4.3. In addition seeking an explanatory affidavit goes against the principles of fairness, transparency and the equal treatment of bidders as set out in the PPM, the PFMA and the PPPFA.
5. As a result of the afore mentioned findings, Transnet is considering revoking the LOI and its decision to award the preferred bidder status to T- Systems. In accordance with the provisions of Section 3 of PAJA, you are hereby given notice to make representations in writing, if any, within seven (7) days from the date hereof, why Transnet should not take the decision to revoke the LOI dated 20 November 2013 and the decision to award the preferred bidder status to T-Systems.

Kind regards

**Brian Molefe**

Group Chief Executive

Date: 16.5.14.

## ANNEXURE PV 23



pv 23

# T-Systems

Mr Brian Molefe  
Group Chief Executive  
Transnet SOC Limited  
Carlton Centre  
150 Commissioner Street  
Johannesburg  
2001

Gert Schoonbee  
011 254 7799  
20 May 2014

Revocation of Letter of Intent in Respect of RFP No.GSM/13/04/0722 for Provision of Network Services

Dear Mr Molefe,

Thank you for your letter of 10 May 2014.

We have taken note of Transnet's intention to revoke its appointment of T-Systems South Africa (Pty) Ltd (T-Systems) as the preferred bidder, and the basis on which Transnet proposes to do so.

However, we respectfully submit that Transnet is mistaken about the legal position and that if Transnet were to revoke T-Systems' preferred status, Transnet would not be correcting a wrong, as none exists, but would perpetrate a wrong against T-Systems, by treating it unfairly and unequally. We set our reasons for saying so out in Annexure A hereto.

We trust that Annexure A will provide Transnet with sufficient grounds not to revoke the Letter of Intent. However, if Transnet were to be challenged on an alleged involvement of Detecon in the preparation of T-Systems' proposal, T-Systems will assist Transnet to oppose such proceedings, if Transnet so requests.

T-Systems South Africa (Pty) Ltd  
International Business Gateway, New Road, Midrand, 1685  
PO Box 2496, Midrand, 1685  
Phone: +27 11 254 7400 Fax: +27 11 266 0082 e-mail: communications@t-systems.co.za  
Standard Bank, Branch Code: 019 206 90, Account No: 420 984 178  
G Hell" (Non-Executive) MM Nxumalo (Executive), G Schoonbee (Director), ME Sethusha Letlape (Non-Executive), KPM Simelane (Non-Executive), M vd Walt-Korsten (Non-Executive and Chairperson), \*German  
Reg. No: 1989/007547/07, VAT Reg. No: 4540174028

# T - Systems -

Transnet's letter refers to an audit report that alleges a conflict of interest arising from T-Systems' alleged association with Detecon. And, T-Systems is aware that Transnet also obtained a legal opinion pursuant to the audit report. We believe that such audit report and opinion contain information as contemplated in the Promotion of Access to Information Act. T-Systems therefore requests that Transnet furnish it with a copy of the report and opinion. We understand that you may have to redact certain parts of the report and opinion that do not pertain to T-Systems.

We trust that T-Systems' position is clearly set out in Annexure A, but we would be happy to debate any aspects thereof with you in a meeting, as a written response can only deal with such matters on a high level.

It occurs to us that the letter of intent might expire before this matter is resolved and we hereby formally request that its period of validity be extended until after resolution.

We await your response.

T-Systems' rights are reserved in full.

Regards



GERT SCHOONBEE

Managing Director



# T - Systems -

## ANNEXURE A

### RESPONSE IN TERMS OF SECTION 7 OF THE PROMOTION OF ADMINISTRATIVE JUSTICE ACT

1. The reasons that Transnet provides for revocation of T-Systems status are as follows:
  - 1.1. there has been an audit finding that there is an association between T-Systems and Detecon SA (Pty) Ltd;
  - 1.2. such association would give rise to a conflict of interests;
  - 1.3. other bidders may have been precluded from bidding because they may not have known the requirement to provide affidavits to explain their affiliations;
  - 1.4. seeking an affidavit would go against fairness transparency and equal treatment.
2. We will respond to each of these points separately hereunder. We will also deal with matters relating to the PFMA

#### *Audit finding regarding an association with Detecon SA (Pty) Ltd*

3. Your letter alleges an association with Detecon SA (Pty) Ltd. A search of the records of the Registrar of Companies will reveal that there is no entity registered in South Africa known as Detecon SA (Pty) Ltd and, therefore, T-Systems cannot be associated with it.
4. There is a company registered as a local presence of Detecon GmbH. Prior to the appointment of T-Systems as the preferred supplier, T-Systems provided an affidavit to Transnet (upon Transnet's request), in which T-Systems confirmed that it is not affiliated to Detecon GmbH and that position remains unchanged.

#### *Such association would cause a conflict of interest*

# T - Systems -

5. As T-Systems does not have an association with either Detecon GmbH or its locally registered company, there can be no conflict of interest. Any allegations of such a conflict are unsubstantiated and, therefore, refuted.
6. Your letter refers to a conflict of interest that was prohibited during the due diligence phase. We assume that to be a reference to the agreement by Detecon GmbH to the effect that any of its affiliates would be excluded from taking part in the tender for the provision of the network services. We wish to point out that the term "affiliate" was not defined and also does not carry a generally accepted meaning in South African law. The existing Master Services Agreement with T-Systems defines an affiliate as any subsidiary of T-Systems. In terms of this definition T-Systems is not deemed to be an affiliate of its holding company or the subsidiaries of its holding company. As T-Systems has no association with Detecon GmbH, we deny that T-Systems is an affiliate of Detecon GmbH for the purposes of such an agreement or for the purposes of the network tender. Any representations by Detecon GmbH to the contrary would be unauthorised and unwarranted.
7. Be that as it may, Detecon GmbH did, in any event, not have any right or authority, in law or by contract, to accept such an exclusion of T-Systems and T-Systems can, therefore, not be held to it.
8. The PFMA makes no reference to "associations" creating a conflict of interest. We submit that the term "association" has such a broad application that using "associations" to support an argument for a conflict of interest, would be bad in law as it could easily be used to frustrate competitive bidding.
9. Within the context of the network tender, the concept of a conflict of interest is also not good in law. A conflict would exist when one party owes conflicting obligations to two different parties. That clearly is not the case in this matter. What is probably meant is that T-Systems may have enjoyed an unfair advantage over other bidders because of the involvement of Detecon GmbH in the due diligence phase. We repeat that there was no collaboration between T-Systems Detecon

# T-Systems

GmbH in the preparation of T-Systems' proposal. If any third party were to suggest that there was, the onus would be on it to prove such advantage which, because it did not exist, will be impossible. Transnet can, therefore, not rely on such a statement to revoke T-Systems' status as preferred bidder.

*Other bidders may have been precluded from bidding because they may not have known the requirement to provide affidavits to explain their affiliations*

10. We respectfully submit that this statement does not follow logically. As far as we are aware, there are no other South African ICT companies who may have any association with Detecon GmbH that would have precluded them from bidding. Theoretically the only company that could remotely have been in that position is T-Systems (and, as explained above, the reality does not admit of any association or prejudice).
11. Clauses 5 and 7 of section 10 of RFP response (RFP declaration form) required all respondents to declare any business or social relationships with regard to Transnet. T-Systems duly submitted such declarations. This would have given other prospective parties the opportunity to offer an explanation regarding the relationship with Detecon or Transnet.
12. It may, also, be noted that T-Systems provided an affidavit upon Transnet's request and not of its own volition.

*Seeking an affidavit would go against the fairness transparency and equal treatment*

13. Transnet's request for and acceptance of T-Systems' affidavit cannot amount to unfairness, as it was merely a step to seek clarification which Transnet was entitled and even obliged to take.
14. We draw Transnet's attention to the following points:
  - 14.1. Clause 10 of the bid conditions specifically provides for the bidder being permitted to respond to any question related to the bid, after submission.

# T · · Systems ·

- 14.2. Section 18 (Supplier Requirements) of Transnet's procurement policy reserves the right to Transnet to verify any details of a supplier;
  - 14.3. Section 49 of the PFMA requires Transnet's accounting officer to present necessary documentation to satisfy any explanation or motivation required from the relevant treasury or the Auditor-General;
  - 14.4. Section 50 of the PFMA requires Transnet's accounting officer to ensure that executive authorities are apprised of any material fact which may influence a decision and would be required to compile such information to meet the requirements of section 54(2) of the PFMA; and
  - 14.5. Section 60 of the PFMA permits an auditor to investigate whether adequate measures and procedures have been applied in the management of public entity.
15. Based on the above, a query raised with respect to a possible conflict of interest, would require an investigation from Transnet's accounting officer to ensure that the officer could demonstrate the integrity and transparency of the process. The response to the query would have to be documented to satisfy section 13 (Code of Ethics and Conflict of Interest) of the Transnet Procurement Policy requiring adherence to a documented process. These provisions and conditions would have applied equally to all bidders that responded to the bid, on *any* matter relevant to the response and do not create an advantageous position for T-Systems, but rather proof that due diligence was applied in the evaluation of the tender.
16. And, again, as there is no prejudice against any other party, no such party would have grounds for complaint.

## *T-Systems' participation not precluded by PFMA or Transnet's Bid Conditions*

17. We have, in the light of Transnet's reliance on the PFMA, again reviewed the PFMA, the applicable Treasury Regulations and Treasury Practise Notes and wish to draw Transnet's attention to the following:

# T-Systems

- 17.1. The PFMA itself does not contain reference to "conflicts of interest" and accordingly even if there had been an association between T-Systems and Datacon (which there wasn't) the PFMA would not have prohibited T-Systems' participation in the tender process;
- 17.2. The Schedule of Treasury Regulations for departments, trading entities, constitutional institutions and public entities issued in terms of the PFMA apply to Schedule 2 companies only in respect of paragraph 6.1.2, 24, 25, 27 to 29 and 31 to 33;
- 17.3. National Treasury Practice Note Number SCM 3 of 2003, issued under the framework for supply chain management as published in Gazette no. 25767 on 5 December 2003 contains reference to conflicts of interest, but is applicable to only:
  - 17.3.1. national and provincial departments and trading entities;
  - 17.3.2. constitutional institutions;
  - 17.3.3. public entities listed in Schedule 3A and 3C of the PFMA;

As Transnet is a Schedule 2 company the Treasury note (and hence, the conflict provisions) do not apply to Transnet.
- 17.4. The Transnet General Bid Conditions did not exclude T-Systems from the process.
- 17.5. Clause 3 of section 10 of the RFP response (RFP declaration form) required all respondents to declare that they received no information from other sources with regard to their bids. T-Systems duly submitted such declaration to the effect that that it had received no such information.

## *T-Systems' participation cannot precluded by agreement with third party*

18. T-System's supports the purpose of the PFMA to satisfy the provisions of Section 217(1) of the Constitution to enforce the principles of procurement being conducted in accordance with a system that is fair, equitable, and transparent. To accept that Transnet and a third party could enter into an agreement, without T-Systems' knowledge or consent, to prevent T-Systems from

# T · · Systems ·

participating in a major tender process would thwart the provisions of clause 51(a)(iii) & (iv) of the PFMA, and contravene section 5 (Policy Statement) and section 14 (Procurement Process) of Transnet's own procurement policy which requires that:

- 18.1. all bidders are treated the same;
- 18.2. no bidder is disadvantaged over another; and
- 18.3. that the procurement process "ensures open, transparent and fair competition for any person or enterprise who wishes to tender for Transnet's business".

## *Conclusion*

19. It is T-Systems' position that:

- 19.1. it cannot be seen as an affiliate of Detecon GmbH;
- 19.2. even if it were to be seen as an affiliate (which T-Systems denies), Detecon GmbH could not, in law or in contract, have excluded T-Systems from participation in the network tender;
- 19.3. Transnet's acceptance of T-Systems' affidavit was entirely regular;
- 19.4. no other party could have been precluded from tendering by virtue of Transnet's acceptance of T-Systems' affidavit;
- 19.5. neither the PFMA, nor the Treasury Regulations and Practice Notes contain any prohibition against Transnet's acceptance of T-Systems' participation in the network tender;
- 19.6. there was no collaboration *at all* between T-Systems and Detecon GmbH (whether with its German or South African presence) with regard to the network tender;
- 19.7. accordingly, there was no conflict of interest, T-Systems was not advantaged, and no third party was prejudiced in any manner whatsoever;



# T-Systems

- 19.8. therefore, if Transnet were to revoke T-Systems' preferred status, Transnet would not be correcting any wrong, as none exists, but would perpetrate a wrong against T-Systems, by treating it unfairly and unequally.



## ANNEXURE PV 24



PV 24

Brian Molefe, Group Chief Executive

TRANSNET



Our Ref No: BM/16944

Mr Gert Schoonbee  
T-SYSTEMS SA (PTY) LTD  
International Business Gateway  
New Road  
MIDRAND  
1685

E-mail: [Gert.Schoonbee@t-systems.co.za](mailto:Gert.Schoonbee@t-systems.co.za)

Dear Mr Schoonbee

**REVOCATION OF PREFERRED BIDDER STATUS IN RESPECT OF RFP NO. GSM/13/04/0722 FOR PROVISION OF NETWORK SERVICES**

1. We refer to your letter dated 20 May 2014 written in response to Transnet's stated intention to revoke your status as preferred bidder in respect of the Networks Services tender.
2. Transnet considered your representations as set out in the aforementioned letter and hereby wish to inform you of our final decision which is that your preferred bidder status has been revoked.

Yours sincerely

**Brian Molefe**  
Group Chief Executive  
Transnet SOC Limited  
Date: 6.6.14.

**Acknowledgements:**

1. We the undersigned hereby accept the revocation of T-Systems SA (Pty) Ltd's preferred bidder status for the Networks Services Tender GSM/13/04/0722 for Provision of Network Services.
2. We further acknowledge that our respective companies have no claims for damages or any other legal course of action against Transnet arising from this revocation.

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E Tshabalala DLJ Tshope A Singh\* (Group Chief Financial Officer)

\*Executive

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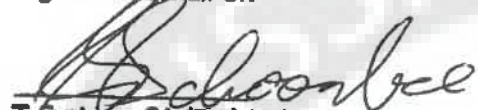
Group Company Secretary: ANC Caba

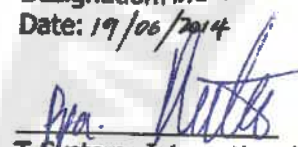


Page 2

3. We consent to Transnet revoking T-Systems SA (Pty) Ltd's preferred bidder status without Transnet having to approach a court of law for an order to this effect.
4. We have been duly authorized to sign this acknowledgement on behalf of our respective companies.

Signed on behalf of:

  
T-Systems SA (Pty) Ltd  
Name: **Mr G. Schoonbee**  
Designation: *MD TSCA*  
Date: *19/06/2014*

  
T-Systems International GmbH  
Name: *Jens Ruescher*  
Designation: *SVP Delivery EMEA*  
Date: *19/06/2014*



## ANNEXURE PV 25





## MEMORANDUM

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**To:** Board Acquisitions and Disposals Committee (BADC)

**From:** Anoj Singh, Group Chief Financial Officer (GCFO)  
Garry Pita, Group Chief Supply Chain Officer (GCSCO)

**Date:** 1 July 2014

**Subject:** **Network Services RFP award status update for noting by the Board Acquisitions and Disposal Committee**

---

### PURPOSE OF SUBMISSION:

1. The purpose of this submission is to request the Group Chief Executive (GCE) to recommend to the Board Acquisitions and Disposals Committee (BADC) to note the current status of the Network Services tender, as requested in item 17 of the matters arising from the last BADC meeting.

### BACKGROUND:

2. Transnet currently procures network services from Neotel (Pty) Ltd (Neotel) as a result of the sale agreement of Transnet to Neotel. The MSA was initially due to expire on 31 March 2012, but was extended until 31 October 2013. It has since been further extended until 31 October 2014.
3. On 14 June 2013, Transnet issued a Request for Proposals (RFP) to the open market for Network Services. This RFP closed on 13 August 2013 and five (5) responses were received from Neotel, T-Systems SA (Pty) Ltd (T Systems), Dimension Data (Di Data), Telkom and Vodacom, respectively.
4. After an extensive evaluation process, Neotel was selected by the CFET as the preferred bidder.
5. The GCE however identified certain risk factors affecting Neotel and indicated that the risks constituted grounds not to award business to Neotel. He awarded the business to T Systems instead. Contract negotiations with T Systems were underway until May 2014, when Transnet issued T Systems with a notice indicating its intention to revoke T System's status as preferred bidder.



6. This memorandum seeks to explain to the BADC the sequence of events which resulted in the current status of the Network Services tender. A summary of the timeline indicating the sequence of events is attached as "A".

#### **THE "CONFLICT OF INTEREST" ISSUE:**

7. Tender evaluations on the Networks tender commenced during August 2013 and was finalised during October 2013. During the course of the evaluation, Transnet Internal Audit (TIA) raised two main concerns. The first concern related to a possible conflict of interest between T-Systems and Detecon GmbH (Detecon). This was based on the fact that Detecon had been awarded the Due Diligence tender, which preceded the Network Services tender. Detecon's Due Diligence findings identified available sourcing strategy options for the Network Services tender. The LOI which Transnet issued to Detecon pursuant to the award of the Due Diligence tender, stated that Detecon and its "affiliates" would not be permitted to participate in the forthcoming Network Services tender. This was to prevent Detecon and its affiliates from unfairly benefiting from information obtained as a result of their involvement in the Due Diligence tender. A copy of the LOI issued to Detecon is attached as "B". As T Systems SA and Detecon GmbH are both owned by a common parent company ie T Systems GmbH, TIA was of the view that T Systems was an "affiliate" of Detecon and that a conflict of interest had arisen. A copy of the structure of the Deutsche Telekom group of companies is attached as "C".
8. However, the Network Services RFP did not contain the exclusion which had been placed on "affiliates" by the LOI which had been issued by Transnet to Detecon. As a result, the exclusionary provision was not incorporated as a term of the Network Services tender. Furthermore, T Systems was not a party to the LOI between Transnet and Detecon at the time and did not consent to its exclusion from the Networks tender.
9. As a result of the conflict of interest concern raised by TIA, Transnet requested an affidavit from T-Systems to confirm that they did not benefit from their relationship with Detecon. T-Systems subsequently provided an affidavit in which they confirmed that they had not obtained any information relating to the Network RFP from Detecon or its parent company. A copy of the affidavit is attached as "D".
10. The Cross Functional Sourcing Team (CFST) and Transnet Management accepted the affidavit as evidence that T-Systems had not derived any benefit from their relationship with Detecon GmbH. Based on this, T Systems was allowed to continue as a bidder in the Network Services tender process.

## ROUNDING OFF OF SCORES FOR FUNCTIONALITY

11. The second concern raised by Internal Audit pertained to the rounding off of the scores for functionality. The minimum threshold for functionality as set out in the RFP was 70%. The bidders which were assessed at the functionality stage achieved the following scores:

Table 1

	Neotel	Telkom	Dimension Data	T Systems
Technical Evaluation	Final scores	Final scores	Final scores	Final scores
Initial Technical scores	76.30%	67.20%	74.00%	69.70%

12. However, management picked up certain discrepancies regarding the scores for functionality and requested that the scores be re moderated as they felt that the initial moderation had not been done correctly. As a result of the re moderation, the scores for functionality changed as follows:

Table 2

	Neotel	Telkom	Dimension Data	T Systems
Technical Evaluation	Final scores	Final scores	Final scores	Final scores
Technical scores after re moderation	76.42%	66.80%	73.71%	69.93%

13. As appears from the re moderated scores, T Systems did not achieve the minimum score of 70%. They achieved 69.93% and missed the threshold by 0.07%. Regulation 11(4) of the PPPFA regulations (2011) stipulates that points scored must be rounded off to the nearest 2 decimal places. If T System's score was rounded off to the nearest two decimal places, they would still not have achieved the threshold. However, para 13.1.3 of the Implementation Guide issued by National Treasury (NT) applies the principle of rounding off to the nearest 2 decimal places to the points allocated for *price and preference* only – in other words rounding off to the nearest 2 decimal places applies at the final stage when bidders are scored out of 100 for price and BBBEE. The PPPFA regulations appears to be silent on how scores for *functionality* are to be rounded off.
14. Transnet sought the advice of National Treasury (NT) on how it should approach the question of rounding off at the functionality stage. NT advised that Transnet may elect to either round off to the nearest whole number or apply the principle in regulation 11 (4) and round off to the nearest 2 decimal places. A copy of the email received from NT is attached as "E". Based on the advice received from NT, Transnet elected to round off T System's score for functionality to the nearest whole number, which meant that they achieved the minimum score of 70%. Telkom was excluded at this stage as they failed to

achieve the minimum score of 70%. As a result of the rounding off exercise, the scores for functionality were as follows:

Table 3

	Neotel	Telkom	Dimension Data	T Systems
Technical Evaluation	Final scores	Final scores	Final scores	Final scores
Technical scores after rounding off	76.00%	67.00%	74.00%	70.00%

### THE COMMERCIAL EVALUATION AND FINAL RANKING OF BIDDERS

15. Dimension Data, T Systems and Neotel were the only bidders who passed the functionality threshold and were evaluated for price and preference, based on the 90/10 formula. Based on the actual prices submitted by the various bidders they were scored as follows:

Table 4

Bidder name	Price	Points
Neotel	R 1 389 308 796.00	24.85
Dimension Data	R 805 934 857.67	90
T Systems	R 1 330 117 974.48	31.46

16. However, it was difficult to make a "like for like" comparison as the bidders used different assumptions when they calculated their price. To enable Transnet to conduct a "like for like" comparison, the CFET met with the shortlisted bidders to clarify their assumptions and requested them to resubmit a revised commercial offer based on the same assumptions. All 3 shortlisted bidders were requested to submit their revised prices by 24 October 2013. Below are the evaluation results after the revised commercial proposals were received:

Table 5

Bidder name	Price	Points
Neotel	R 1 330 876 516.32	90
Dimension Data	R 1 714 300 055.26	64.07
T Systems	R 1 622 157 146.03	70.3

17. After the revised pricing was received, Transnet conducted a further "normalization" exercise to ensure that bidders quoted for the same services and that there were no price omissions which may have given a particular bidder an unfair advantage. Below are the evaluation results after the normalization exercise was conducted:

Table 6

Bidder name	Price	Points
Neotel	R 1 363 407 228.40	90
Dimension Data	R 1 584 967 883.26	75.37
T Systems	R 1 736 894 366.39	65.35

18. After the normalization exercise was concluded, a final clarification session was held with the 3 bidders to check if anything had been omitted from their pricing. During this clarification session bidders were informed about price adjustments made during the normalization exercise and were given an opportunity to comment on any price adjustments made. In the course of this final clarification session, T Systems indicated that their offer could be reduced by a further R248 million. If this further reduction was taken into account T System's pricing would have reduced from R 1 736 894 366.39 to R1 488 894 366.39, as indicated in the table below:

Table 7

Bidder name	Price	Points
Neotel	R 1 363 407 228.40	90
Dimension Data	R 1 584 967 883.26	75.37
T Systems	R 1 488 894 366.39	81.72

19. This would have placed T Systems as the second ranked bidder and Di Data as the third ranked bidder. However, this further price adjustment was not taken into account in the final Tender Evaluation and Recommendation Report (TEAR) as the date for submitting revised pricing had already passed. As indicated above, the date for submitting revised pricing was 24 October 2014. The TEAR document therefore ranked the bidders based on their pricing after the normalization exercise was conducted, as indicated in Table 6 above.
20. A due diligence exercise on all 3 bidders was carried out by the CFET, which included interviews with the bidders' key resources and customers as well as site visits to the bidders' premises. To achieve a green rating, bidders were required to score between 70 and 100. A score of between 50 and 69 would result in an amber score and a score of below 50 would result in a red rating. As a result of the due diligence, Neotel and Dimension Data received a green rating. However, T Systems received an amber rating. The amber rating given to T Systems was based on the fact that they received a score of 64.65% based on reference checks. . A copy of the due diligence findings by the CFET is attached as "F".

21. After adding the points for preference, the final ranking of the bidders was as follows:

Table 8

Criteria	Neotel	Dimension Data	T Systems
Price	90	75.37	65.35
B-BBEE	5	8	8
<b>Total score</b>	<b>95</b>	<b>83.37</b>	<b>73.35</b>

22. The final TEAR report recommended the award of business to Neotel as the top ranked bidder. A copy of the TEAR report is attached as "G".
23. The TEAR report was presented to Sharla Pillay, the acting GCE at the time, who approved the award of business to Neotel. A copy of the signed memorandum by Sharla Pillay is attached as "H".

#### THE APPOINTMENT OF T SYSTEMS AS THE PREFERRED BIDDER

24. Subsequently, in his memorandum dated 20 November 2013 addressed to the GCFO and the GCSCO, the GCE outlined his reasons for not appointing Neotel as preferred bidder and for appointing T Systems instead. A copy of this memorandum is attached as "I". As appears from this memorandum, the GCE raised a number of concerns regarding the appointment of Neotel, which included the following:

- 24.1 Counterparty risk and alienation of state assets – the GCE stated that Government's intention with the sale of Transnet's Wide Area Network (WAN) to Neotel was to create a second fixed line operator. The GCE indicated that he did not believe that Neotel met this mandate as they had very little market penetration. Furthermore, in light of Neotel's negotiations to sell the network to Vodacom, it was felt that this could be perceived as an alienation of state assets.
- 24.2 Concentration risk as Transnet is Neotel's largest client – The GCE stated that Transnet was Neotel's biggest single client and as such Transnet was exposed to unnecessary concentration risk.
- 24.3 BBBEE partners – the GCE stated that Neotel had not delivered on its BEE mandate which was part of the agreement of sale of state assets to Neotel. It was also stated that Neotel had diluted its black ownership. This was based on correspondence received from the Chairman of Nexus Connexion, Neotel's BBBEE partner.
- 24.4 The information security incident – The GCE stated that during 2011, TIA conducted a review of Neotel's Network Outsourced IT services and issued a report which highlighted certain weaknesses in the existing firewalls. Furthermore, during May 2012, Neotel reported unknown foreign traffic on the Network emanating from 5 different countries. The GCE stated that if Transnet's servers had been accessed, unknown parties may have been able to access Transnet's



financial and operational information as well as other sensitive or confidential information. Although Transnet management and Neotel had put remedial measures in place, the GCE felt that these were not adequate and that Transnet had been exposed to unnecessary risk. In paragraph 4 of the TEAR document attached as "G", the CFET set out the remedial steps which had been taken. They also point out that the security breach impacted both Neotel as well as T Systems.

- 24.5 CCTV camera exposures – the GCE stated that TNPA had reported that a number of their CCTV cameras in the ports were not working. He expressed the view that Neotel had a role to play in ensuring that the network supported the cameras.
25. The GCE also approved that the further reduction of R248m offered by T Systems be taken into consideration as part of their best and final offer. He further stated that he did not believe it was necessary to request another best and final offer from any of the vendors as all 3 preferred bidders had already been given the opportunity to confirm if their prices were accurate.
26. For these reasons he approved the appointment of T Systems as preferred bidder.
27. Supply Chain advised that before a final decision was taken on the award of business to T Systems, that Neotel be afforded an opportunity to address Transnet on the perceived risks.
28. During December 2013, Group legal sought the advice of Adv Gilbert Marcus SC on the award of business to T Systems. Marcus SC was not able to provide a written opinion at the time but provided oral advice. Marcus SC advised that the decision to award business to T Systems was not in accordance with section 217 of the Constitution. He also expressed the view that extraneous factors were taken into account in awarding the business to T Systems. He also pointed out that Neotel was not afforded an opportunity to make representations on the risk factors highlighted by the GCE. Furthermore, he indicated that the process appears to have been fraught with instances of procedural unfairness, such as the acceptance of T Systems' revised price which was transmitted after the deadline for delivery thereof. Counsel advised that Transnet should review and withdraw its decision to award business to T Systems and once effected, proceed with the award of business to Neotel. A summary of the oral advice provided by Adv Marcus SC appears in the correspondence from Mkhabela Huntley Adeyeke Inc (Mkhabela attorneys) attached as "J".
29. The advice of Adv Gilbert Marcus SC on the award of business to T Systems was discussed with the Transnet GCFO on 10 December 2014.
30. An LOI was subsequently issued to T-Systems and letters of regret were issued to the other four (4) unsuccessful bidders namely; Neotel, Dimension Data, Telkom and Vodacom.



31. Neotel initially questioned the decision not to award the business to them, but subsequently wrote to Transnet indicating its acceptance of this decision. A copy of Neotel's letter is attached as "K".
32. As stated above, the existing Network Services contract with Neotel was subsequently extended until 31 October 2014.

#### **REVIEW BY EXTERNAL AUDIT**

33. Based on the LOI that was issued to T-Systems, contract negotiations commenced in December 2013 and were due to be finalised at the end of May 2014. The issued LOI to T-Systems was subject to successful contract negotiations.
34. During the month of April 2014, Transnet External Auditors reviewed the Network Services RFP as part of their annual procurement process audit at Transnet Group Strategic Sourcing and other Procurement Departments within Transnet.
35. The Transnet External Auditors raised the concern that T Systems should have been disqualified due to its relationship with Detecon. External Audit also obtained a legal opinion indicating that the award of the RFP to T-Systems was not in compliance with the Public Finance Management Act (PFMA). The legal opinion highlighted the following concerns:
  - The factors taken into account by the GCE in making the award to Systems do not support the objectives of fairness and transparency;
  - Possible conflicts of interest between T-Systems and Detecon GmbH as both parties are subsidiaries of T-Systems International. External Audit expressed the view that as T-Systems could be regarded as an "affiliate" of Detecon, it should have been automatically excluded from the bidding process;
  - the manner in which scores were rounded off at the functionality stage was not in accordance with the principles of fairness, transparency and equal treatment of bidders. It created a perception that T Systems was given favourable treatment over other bidders;
  - the fact that Dimension Data which was placed second in the final adjudication was overlooked, reinforced the perception that T Systems was the preferred bidder.
36. A copy of the legal opinion is attached as "L".
37. Group Legal sought the advice of Mkhabela Attorneys on the External Audit report. Mkhabela Attorneys expressed their disagreement with the view expressed in the external audit opinion that T-Systems should automatically have been disqualified on the "conflict of interest" grounds. They point out that the LOI issued to Detecon (annexure "B") constituted a contract between Transnet and Detecon and that T Systems was not a party to the contract. They explain that South African law recognises that parties to a contract may agree to bestow a benefit or right upon a third party who may not necessarily be a

party to the contract ( a so called *stipulation alteri*), but may not impose *obligations* on a third party without his consent. In their view, it is incorrect to state that T Systems should automatically have been excluded from the Network Services RFP process.

38. However, Mkhabela Attorneys stated that the affidavit received from T-Systems did not completely mitigate the risk that information could have been shared between T-Systems and Detecon. Mkhabela Attorneys advised that the value of the affidavit provided by T-Systems lies in Transnet's judgement. If Transnet remains dissatisfied with the response provided by T-Systems, Transnet would be entitled to reconsider the tender award. A copy of Mkhabela Attorneys' opinion is attached as Annexure "M".

### THE REVOCATION OF T SYSTEM'S POSITION AS PREFERRED BIDDER

39. Subsequent to receiving the external audit report, the CFST in conjunction with Transnet Group Legal drafted a letter to revoke T-Systems' status as a preferred bidder on the Network Services RFP. The letter was duly approved by the GCE on 16 May 2014 and subsequently sent to T-Systems for their consideration and response. A copy of this letter is attached as "N".
40. T-Systems responded to the above-mentioned letter from Transnet on 20 May 2014 indicating that they are not in agreement with the reasons advanced by Transnet for the revocation of their preferred bidder status. The issues raised by T Systems include the fact that they were never a party to the LOI and the exclusionary condition agreed to between Transnet and Detecon and also that Detecon had no authority to agree to the exclusion of T Systems from the Network Services tender. They also point out that the exclusionary condition was never incorporated as a term of the Network Services RFP. A copy of the response from T Systems is attached as "O".
41. After considering the response from T Systems, the GCE informed it that a final decision had been taken to revoke its preferred bidder status. T Systems indicated tht it accepted the decision of the GCE. A copy of the GCE communication to T System's as well as T Systems acceptance of this decision is attached as "P".
42. The BADC has approved a request for an extension of the T-Systems I.T. Outsource agreement between Transnet and T-Systems, which will include possible cost savings and inclusion of Supplier Development commitments during the extension period in support of the Transnet Market Demand Strategy (MDS). Transnet is currently in the process of negotiating the terms of this extension with T Systems. A copy of the BADC resolution is attached as "Q".
43. Once the above process has been concluded with T-Systems, the Transnet CFST will recommend a way forward as far as the award of this RFP is concerned to the GCE for consideration and an update will be forwarded to the BADC for noting in August 2014.

## DISCUSSION

44. Transnet has subsequently issued Neotel with a letter informing it that it had been awarded preferred bidder status. A copy of the letter to Neotel is attached as "R".

45. The PPM allows Transnet to contract with the next ranked bidder under certain circumstances. Although Neotel was not the second ranked bidder but was the initial top ranked bidder, the principles outlined in the PPM were taken into account in guiding Transnet's decision.

46. Para 21.7 of the PPM provides as follows:

*"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:*

- 21.7.1 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;*
- 21.7.2 when a successful bidder has failed to provide the necessary security, if required;*
- 21.7.3 when a successful bidder fails to meet a condition precedent for the award of business (eg to obtain the necessary funding, provide a valid and/or original tax clearance certification, etc), or*
- 21.7.4 when final contract negotiations with a preferred bidder fails and a contract is not agreed upon; and*
- 21.7.5 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."*

47. Management is of the view that the circumstances of this matter are covered by para 21.7.4 above, in that contract negotiations with T Systems have failed when Transnet made a final decision to revoke their preferred bidder status. Furthermore, this option is being exercised in little more than 6 months after the initial award to T Systems and as such, the option is being exercised "within a reasonable time after the initial award" as required by the PPM. It is also not practical within the time available to call for fresh bids. This is because the current contract with Neotel terminates on 31 October 2014. With little more than 4 months to go, it is not feasible to reissue the Network Services RFP and appoint another supplier by end October 2014.

**APPROVALS AND DELEGATION:**

48. The Group Chief Executive has already provided the following approvals:

- Approval of the Request for Proposal (RFP) and Advert to go out on an open tender;
- Approval to advertise and issue a RFP to the open market for provision of Network Services for a period of three (3) years with an option to extend for another two (2) years;
- Approval to conduct Due Diligence and Negotiations on the Network Services RFP;
- Approval of the award of the contract to T-Systems;
- Approval of the negotiations strategy and team;
- Approval of the revocation letter for T-Systems' preferred bidder status.
- Approval of the Letter of Intent to Neotel, informing it that it had been awarded preferred bidder status.

**FINANCIAL IMPLICATIONS:**

49. The estimated contract award to T-systems for a period of three (3) years is estimated at R1.7 billion based on their Best and Final Offer (BAFO).

**BUDGET IMPLICATIONS:**

50. All Transnet ODs and Specialist Business Units (SBUs) have budgets available for their respective Network Services requirements.

**RECOMMENDATION:**

51. It is recommended that the Group Chief Executive (GCE) recommend to the Board Acquisitions and Disposals Committee (BADC) to note the current status of the Network Services tender, as requested in item 17 of the matters arising from the last BADC meeting.

**COMPLIED BY**

\_\_\_\_\_  
Anoj Singh  
Group Chief Financial Officer  
Date:

**RECOMMENDED / NOT RECOMMENDED**

\_\_\_\_\_  
Brian Molefe  
Group Chief Executive  
Date:

## ANNEXURE PV 26





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PV 26  
 PV-445  
 TRANSNET

## MEMORANDUM

www.transnet.net

**To :** Brian Molefe, Group Chief Executive

**From :** Tau Morwe, Chief Executive: Transnet National Ports Authority (TNPA)

**Date :** 24 April 2014

**Subject:** **REQUEST FOR APPROVAL TO PROCURE A CCTV SECURITY SOLUTION FOR TNPA ACROSS ALL PORTS**

### PURPOSE:

The purpose of this submission is:

1. To request the Group Chief Executive to:
  - 1.1. Approve and award business for the procurement of CCTV cameras and related maintenance through a confined procurement process to the value of R142,795,868 from Neotel (Pty) Ltd (Annexure A);
  - 1.2. Award of business via the current Neotel MSA for the installation of the CCTV and security solution to the value of R186,639,252 allowing sole accountability to Neotel for effective working of the solution (Annexure A);
  - 1.3. Approve unforeseen Capex to the value of R252, 949,834 for the procurement of the security solution across all ports.

### BACKGROUND:

2. During 2007 TNPA awarded business to a company called ESS for the installation of a CCTV solution in all the major ports in South Africa.
3. TNPA has been experiencing certain problems with the CCTV solution and the solution has been the subject of a number of reviews being:
  - 3.1. TNPA internal review;
  - 3.2. Review conducted by Group Security;
  - 3.3. Forensic investigation commissioned through Transnet Internal Audit (TIA) – Annexure B; and
  - 3.4. A joint assessment performed between Neotel (current Transnet network service provider), NICE (CCTV original equipment manufacturer (OEM) and Techpro, the local NICE installation partner. (Annexure C).
4. In addition, Transnet has requested a view of the current state of the CCTV equipment from the OEM as at April 2014. (Annexure D)
5. This joint assessment and letter from the OEM highlighted the following as it relates to the current CCTV solution (Annexure C & D):



- 5.1. The hardware has reached the end of its useful life and is no longer supported and service levels can't be supplied;
- 5.2. The hardware is not upgradeable and can't support High Definition (HD) and Thermal series cameras;
- 5.3. Current storage equipment can't provide the storage and retention needs of the sites; and
- 5.4. 122 cameras were defective as at April 2013. The current number of cameras not operating as intended according to Techpro is approx. 180 cameras. In addition, approx. 400 cameras are not functioning due to server failures. This represents an approx. 64% failure rate of the 900 installed cameras.

#### **DISCUSSION:**

6. The International Ship and Port Facility Security (ISPS) Codes which TNPA needs to comply with to maintain its status as a Port authority and avoid blacklisting by the US Administration and to comply with the country obligations as a signatory to the International Maritime Organisation (IMO) legislation places certain obligations on a Port Facility. Specifically section 16.49 of the ISPS codes states the following:

#### **\*Monitoring the security of the port facility**

7. The port facility security organization should have the capability to monitor the port facility and its nearby approaches, on land and water, at all times, including the night hours and periods of limited visibility, the restricted areas within the port facility, the ships at the port facility and areas surrounding ships. Such monitoring can include use of:
  - Lighting;
  - security guards, including foot, vehicle and waterborne patrols; and
  - automatic intrusion detection devices and surveillance equipment

7.1. The current solution is end of life, unsupported and an estimated 580 cameras are sporadically non-functional at this stage.

7.2. Monitoring during night hours and periods of limited visibility requires lighting and thermal cameras. Current lighting in the Ports are adequate but as per Annexure D, the current cameras do not have thermal capability and this was not available at the time of procuring this equipment approx. 7 years ago.

8. Based on the reviews performed and letter from the OEM, TNPA is of the view that the CCTV security solution needs to be replaced as a matter of urgency to ensure compliance to the ISPS codes to maintain the status of a Port Authority.
9. In addition, TNPA is concerned about the potential for the current Insurance Provider to deny claims based on the potential non-compliance to the ISPS Codes and the IMO should an incident occur in one of the ports.

**REQUEST FOR APPROVAL TO PROCURE A CCTV SECURITY SOLUTION FOR TNPA ACROSS ALL PORTS**

10. Group Insurance was requested to express a view on the potential of Transnet's insurance provider denying a claim based on the above. Group Insurance responded stating the following as it relates to "Assets all risks": (Annexure E)

10.1. We shall not be prejudiced in the event of any security installation being inoperative provided that we take reasonable steps to remedy the situation as soon as possible.

11. TNPA is concerned that the insurance providers might argue in the event of an insurance claim that TNPA was aware of the non-functioning elements of the surveillance solution and that reasonable steps were not taken to remedy the situation.
12. The forensic report highlighted that certain elements of the previous transaction with ESS has to be reported in the Transnet Annual Financial Statements, as fruitless and wasteful expenditure amounting to approx. R57 million and irregular expenditure amounting to approx. R250 million respectively, which will be finalised in June 2014 and is still subject to audit and verification.
13. Where items of irregular or fruitless and wasteful expenditure are reported, the State Owned Company (SOC) reporting this needs to report on the remedial action taken to rectify the situation in their AFS and to the Parliament.
14. The table below highlights key issues from the previous CCTV rollout as well as actions to prevent similar issues during this proposed CCTV security roll-out:

ISSUED EXPERIENCED	PROPOSED SOLUTION
Separate Service Providers responsible for Network and camera	Neotel will be accountable for the entire solution with SLA's.
Limited Involvement from key areas with in Transnet and inadequate project management during previous rollout – - A Key deliverable of the Steering Committee will be to recommend a standard as far as CCTV is concerned for approval.	A Steering Committee will be established to oversee the project with representatives from the following areas: <ul style="list-style-type: none"> <li>• TNPA – IMS;</li> <li>• TNPA – Operations;</li> <li>• TNPA – Security;</li> <li>• Group Security (Chair); and</li> <li>• Group EIMS.</li> </ul>
Supplier paid for previous rollout regardless of solution not being fully operational;	TNPA will withhold a 15% retention of the total cost of the project until project completion sign off is received from the following parties: <ul style="list-style-type: none"> <li>• TNPA – IMS;</li> <li>• TNPA – Operations;</li> <li>• TNPA - Security</li> <li>• Group Security; and</li> <li>• Group EIMS.</li> </ul>

REQUEST FOR APPROVAL TO PROCURE A CCTV SECURITY SOLUTION FOR TNPA ACROSS ALL PORTS

Equipment failures experienced with NICE equipment and related warranties

- The root cause for the equipment failure was a lack of maintenance which was not supplied by ESS hence TNPA has entered into litigation with ESS as far as this contract is concerned.
- Transnet requested Neotel to specifically include maintenance for 3 years into the proposal and Neotel will be accountable for the entire solution, including equipment performance with SLA's.
- Neotel has recommended that NICE equipment be used as they will be willing to guarantee SLA's if this equipment is used.

## CONCLUSION

15. It is crucial that Transnet rectifies the CCTV security solution with the utmost urgency due to the following risks as highlighted above:
- Potential non-compliance to the ISPS codes;
  - Potential that insurance company will deny claims as a result of non-compliance to ISPS Codes; and
  - PFMA reportable items and the remediation of these needs to be finalised by June 2014.

## OTHER CONSIDERATIONS:

### 16. Procurement process / event:

- 16.1. Transnet entered into a Master Services Agreement (MSA) with Neotel for the provisioning of certain services which was linked to the sale of a portion of Transnet to Neotel in 2008;
- 16.2. The MSA between the parties states the following:
- 16.3. The following clauses extracted from the ruling Master Services Agreement signed between Transnet and Neotel are relevant as it relates to the procurement of equipment:

### 17. Master Services Agreement

Clause 2.2 Introduction - "Transnet wishes to appoint the Service Provider as the sole supplier of the Specified Services to Transnet upon the terms and subject to the conditions set forth in this Agreement, with effect from the Commencement Date and the Service Provider accepts such appointment"

Clause 3.2 Appointment - "Subject always to the provisions of clause 23 below, the Service Provider shall be the sole provider of the Services for the duration of this Agreement during which period Transnet shall not appoint any other party(ies) to provide the Specified Services."

REQUEST FOR APPROVAL TO PROCURE A CCTV SECURITY SOLUTION FOR TNPA ACROSS ALL PORTS

**18. Schedules to the MSA**

Schedule 1: Voice and data SLA, service description, pricing and service levels;

Exhibit 2: Network Service Level Agreement;

Clause 3.2.1.3 Acquisition & Management states the following:

"The acquisition and management process includes the purchase of all networking equipment, including new equipment, upgrades to existing equipment, or purchases resulting from a service or repair request. It also includes the execution of purchase orders, provides quotations, deals with goods handling."

19. The above extracts from the ruling MSA in place between Transnet and Neotel not only indicates that network equipment can be bought through Neotel, but also that the equipment must be bought exclusively from Neotel.
20. The CCTV equipment are however not included in the current MSA between Transnet and Neotel therefor the request is to confine this to Neotel. In addition the current Neotel MSA expires on 31 October 2014. The GCE is requested to approve a confinement to Neotel for the maintenance which will occur post the expiry date of this contract.
21. One of the key shortcomings according to the various reviews and reports is that the network and CCTV equipment was provided by two separate service providers which resulted in Transnet not being able to allocate accountability.
22. TNPA thus recommends that the entire surveillance solution be outsourced to a single provider being Neotel which will give them sole accountability to Transnet for the CCTV security solution. TNPA will retain 15% of the cost of the project until such time as all members of the Steering Committee have signed off the solution.

**GROUND FOR CONFINEMENT:**

23. Appended below, for your easy reference, is an extract from the latest Transnet Procurement Procedures Manual (PPM), stipulating the grounds for confinement.
  - a) where a genuine unforeseeable urgency has arisen which is not attributable to bad planning;
  - b) the goods/services are only obtainable from one supplier/limited number of suppliers. For instance, patented / proprietary goods or OEM spares and components. Operating Divisions are however required to satisfy themselves that there are no new entrants on the market who could also be tested;
  - c) for reasons of standardization or compatibility with existing products 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 "standardization" will not be considered; or

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- 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 tender 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 i.e. 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.
24. Grounds (a) and (c) are the stipulated grounds for confinement because of the following reasons:
- 24.1. A genuine unforeseeable urgency has arisen as TNPA could be non-compliant to the ISPS Codes which could result in major operational disruption should the TNPA Ports be blacklisted as well as potential that any insurance claims by Transnet could be denied due to non-compliance to the ISPS codes. The looming finalization of the AFS in June 2014 creates additional urgency to remediate the PFMA reportable items.
- 24.2. The CCTV equipment currently installed was provided by NICE and the introduction of another brand of cameras and servers could result in compatibility issues and TNPA would again find itself in a situation where a portion of the solution is non-operational and potentially non-compliant to the ISPS.
- 24.3. As stated before it is crucial that the entire surveillance solution be outsourced to a single provider which will give this company sole accountability to Transnet for the CCTV security solution, which was a key shortcoming in the past. The recommendation is to use Neotel as the current installation of fibre linked to this CCTV solutions must be bought exclusively from Neotel as per the current MSA between Transnet and Neotel.

#### **FINANCIAL AND BUDGET IMPLICATIONS:**

25. The total cost for the procurement of the surveillance solution including 3 years maintenance will be a maximum of R329, 435,120. (The cost of this solution was benchmarked to ensure reasonability and comparative quotes were obtained from 2 other providers which was more expensive than the comparative elements of the Neotel proposal. (Annexure F and G)

	Network related cost	Camera related Cost	Total
Capital cost	186,639,252	66,310,582	252,949,834
Maintenance cost	56,695,708*	19,789,578*	76,485,286
Total	243,334,960	86,100,160	329,435,120

\*All maintenance cost is post 31 October 2014, (Expiry date of current MSA between Transnet and Neotel) as the first years maintenance is free.

26. The R252, 949,834 will be funded from the 2014/15 capital expenditure plan. The R76, 485,286 will be funded from the TNPA opex budget for 2014/15.
27. The total amount relating to the request for confinement to Neotel is for all CCTV / Camera related costs , which includes camera maintenance (R86,100,160) plus the network related maintenance which will be incurred after the expiration date of the Neotel MSA (R56,695,708) = R142,795,868
28. Transnet will enter into a specific standalone agreement with Neotel which will include both parties' rights and obligations linked to the maintenance post expiry of the MSA.

REQUEST FOR APPROVAL TO PROCURE A CCTV SECURITY SOLUTION FOR TNPA ACROSS ALL PORTS



**RECOMMENDATION:**

29. It is recommended that the Group Chief Executive:

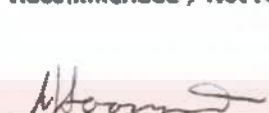
- 29.1. Approves and award business for the procurement of CCTV cameras and related maintenance through a confined procurement process to the value of R142,795,868 from Neotel (Pty) Ltd (Annexure A);
- 29.2. Award of business via the current Neotel MSA for the installation of the CCTV and security solution to the value of R186,639,252 allowing sole accountability to Neotel for effective working of the solution (Annexure A);
- 29.3. Approve unforeseen Capex to the value of R252, 949,834 for the procurement of the security solution across all ports.

Recommended by:



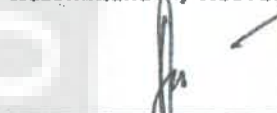
**Tau Morwe**  
Chief Executive: TNPA  
Date: 20/05/2014

Recommended / Not recommended by:



**Yusuf Loonat**  
EM: Enterprise Service Delivery  
Date: 20/05/2014

Recommended / Not recommended by:



**General Rodney Toka**  
GM: Group Security  
Date:

Recommended / Not recommended by:



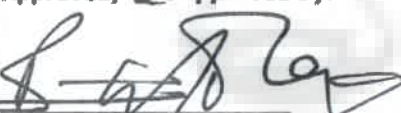
**Garry Pita**  
Group Chief Supply Chain Officer  
Date: 6/5/14

Recommended / Not recommended by:



**Anoj Singh**  
Group Chief Financial Officer  
Date: 08/05/14

Approved / Not Approved by:



**Brian Molefe**  
Group Chief Executive  
Date: 21.5.14

REQUEST FOR APPROVAL TO PROCURE A CCTV SECURITY SOLUTION FOR TNPA ACROSS ALL PORTS

## ANNEXURE PV 27



## MEMORANDUM

www.transnet.net

**TO:** Mr. Ndiphiwe Silinga, Group Executive: Legal and Compliance, Stanley Mamaregane, General Manager: Group Legal

**FROM:** Mr. Peter Volmink, Executive Manager: iSCM Governance

**DATE:** 8 February 2016

**SUBJECT: LEGAL EFFECT OF THE LETTER OF EXEMPTION ISSUED BY THE MINISTER OF POLICE TO NEOTEL (PTY) LTD.**

### PURPOSE:

1. The purpose of this memorandum is to highlight concerns regarding the legal effect of the letter of exemption issued by the Minister of Police, the Honourable Minister Nhleko ("the Minister"), to Neotel (Pty) Ltd dated 2 March 2016.

### BACKGROUND:

2. During 2013 TNPA awarded a confined tender to Neotel (Pty) Ltd for the upgrade and replacement of damaged CCTV fibre network at all its ports. During March 2015 TNPA issued a Letter of Appointment (LOA) to Neotel in respect of the tender. The final written contract between Neotel and Transnet has yet to be concluded.
3. A report produced by the High Value Tender (HVT) review team highlighted the fact that at the time Transnet awarded the contract to Neotel it was not registered as a security service provider, as required by section 20 of the Private Security Industry Regulation Act, 2001 ("the PSIR Act").
4. Section 20 requires anyone that wishes to provide a security service to be registered as a security service provider. The definition of "security service" includes "installing, servicing or repairing security equipment" such as CCTV equipment<sup>1</sup>.
5. Neotel's sub-contractor, Techpro Holdings (Pty) Ltd ("Techpro"), was however

<sup>1</sup> See section 1(1) of the PSIR Act for the definitions of "security service" and "security equipment".

registered as a security service provider. I understand that Techpro has already carried out the bulk of the services required.

### **THE PSIR ACT**

6. Section 20 of the PSIR Act reads as follows:

*(1)(a) No person.... may in any manner render a security service for remuneration, reward, a fee or benefit, unless such a person is registered as a security service provider in terms of this Act.*

*(b) .....*

*(2) A security business may only be registered as a security service provider -*

*(a) if all the persons performing executive or managing functions in respect of such security business are registered as security service providers; and*

*(b) in the case of a security business which is a company, close corporation, partnership, business trust or foundation, if every director of the company, every member of the close corporation, every partner of the partnership, every trustee of the business trust, and every administrator of the foundation, as the case may be, is registered as a security service provider.*

*(3) Any contract, whether concluded before or after the commencement of this Act, which is inconsistent with a provision contained in subsections (1), (2) or section 44(6), is invalid to the extent to which it is so inconsistent.*

*(4) The invalidity of a contract as contemplated in subsection (3), does not affect the applicability of any provision of this Act or the Levies Act.*

*(5) The Minister may, after consultation with the Authority, by notice in the Gazette exempt any security service provider or security service provider belonging to a category or class specified in the notice, either generally or subject to such conditions as may be specified in the notice, from the operation of any provision of this Act.*

## THE SCHIERHOUT PRINCIPLE

7. As early as 1926 the Appellate Division laid down the following rule in *Schierhout v Minister of Justice*<sup>2</sup>:

*It is a fundamental principle of our law that a thing done contrary to the direct prohibition of the law is void and of no effect...So what is done contrary to the prohibition of the law is not only of no effect, but must be regarded as never having been done – and that whether the lawgiver has expressly so decreed or not, the mere prohibition operates to nullify the act...And the disregard of peremptory provisions in a statute is fatal to the validity of the proceedings affected.*

8. The *Schierhout* principle (as it has come to be known) has undergone considerable evolution since it was first enunciated ninety years ago,<sup>3</sup> but it still remains sound law.<sup>4</sup> More recently, in *Metro Western Cape (Pty) Ltd v Ross*<sup>5</sup> the AD restated the principle as follows: “*It is a principle of our law that a thing done contrary to the direct prohibition of the law is generally void and of no effect; the mere prohibition operates to nullify the act...the contracts in question are rendered illegal...they are void ab initio and a complete nullity under which neither party can acquire rights.*”
9. Statutes do not always state expressly that a contract concluded in breach of its terms will result in a nullity.<sup>6</sup> However, in the present instance, the PSIR Act could not be clearer. It states clearly that a contract concluded in breach of the registration requirement is invalid. When such express language is used “*it will normally be given its straightforward meaning and the contract will be treated as non-existent, with the corollary that it cannot be subsequently ratified nor its voidness renounced or waived or overcome by estoppel...*” (emphasis added) Based on the above, it would appear that the award of contract to Neotel was a nullity, since the legislative requirement of registration was not complied with at the time the award was made.

<sup>2</sup> 1926 AD 99 at 109.

<sup>3</sup> *Steenkamp v Edcon Ltd* (2016) 37 ILJ 564 (CC) para 74.

<sup>4</sup> *Cool Ideas 1186 CC v Hubbard* 2014 (4) SA 474 (CC) para 77;

<sup>5</sup> 1986 (3) SA 181 (A) at 188 A-B.

<sup>6</sup> In such instances, the courts will be guided by various interpretative guides to determine the effect of the non-compliance. See Christie, *The Law of Contract in South Africa* (6 ed)(2011) 352; *Steenkamp v Edcon* (note 2 above) para 184.

<sup>7</sup> Christie (note 6 above) 351.

## EX-POST FACTO RECTIFICATION

10. The question that arises is whether the letter of exemption issued to Neotel by the Minister bestows ex-post-facto validity on the contract awarded to Neotel. A number of recent cases suggest that the answer is “no”.
  
11. The Constitutional Court case of *Cool Ideas 1186 CC v Hubbard*<sup>8</sup> is worthy of mention because there are a number of similarities (but also some differences) with the Neotel matter. In the *Cool Ideas* case a building contractor entered into a building contract with a client without being registered as a home builder, as required by section 10<sup>9</sup> of the Housing Consumers Protection Measures Act (the Housing Protection Act).<sup>10</sup> However, the sub-contractor appointed by the building contractor to perform the actual works was registered in terms of the Act.
  
12. A dispute concerning payment arose between the building contractor and the client, which was referred to arbitration. The arbitrator ruled in favour of the building contractor and ordered the client to pay certain amounts that were owing. The client however opposed the arbitration award being made an order of court on the grounds that the building contractor was not entitled to payment by reason of the fact that he was not registered as required by the Act and that the contract was invalid.
  
13. The building contractor sought to remedy this defect by registering as a home builder during the course of the litigation. Thus, the building contractor’s registration took place *after* the contract had already been concluded.

<sup>8</sup> Note 4 above.

<sup>9</sup> Section 10(1) of the Housing Protection Act states that ‘No person shall –

- (a) Carry on the business of a home builder; or
  - (b) Receive any consideration in terms of any agreement with a housing consumer in respect of the sale or construction of a home,
- Unless that person is a registered home builder.’

<sup>10</sup> Act 95 of 1998.



14. The high court ruled in favour of the building contractor and emphasized the fact that although the building contractor was not registered at the time the contract was concluded, it was subsequently registered with the relevant Council. The court also emphasized the fact that the work was done by a sub-contractor that was registered. The high court said that to preclude the building contractor from its right to payment would be giving effect to form over substance.
15. The Constitutional Court disagreed. It ruled that the Housing Protection Act did not permit after-the-fact registration of a home builder, after construction had already commenced.<sup>11</sup> The court reasoned that the core purpose of the Act was to protect the housing consumer, which purpose was achieved by requiring home builders to register *upfront* and not during the execution of the contract.<sup>12</sup>
16. The court also rejected the notion that the non-registration of the building contractor was cured by the fact that the sub-contractor, that did the actual work, was duly registered.
17. However, the court held that the non-registration of the building contractor did not result in the contract itself being invalid. This is because the Housing Protection Act (unlike the PSIR Act) does not state that contracts concluded by unregistered entities are invalid. The penalty for non-compliance prescribed by the Act is that the unregistered building contractor is ineligible to claim payment.<sup>13</sup>
18. In *Paola v Jeeva N.O.*<sup>14</sup> the appellant challenged the approval of building plans by a local authority on the basis that the plans were not recommended by a building control officer, as required by the relevant legislation.<sup>15</sup> Indeed, at the time the plans were approved a building control officer had not been appointed. The respondent argued that this was 'a mere irregularity of no consequence' since a building control officer was subsequently appointed and had approved the plans. It was also argued that no prejudice was caused to anyone as a result of this non-compliance.

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<sup>11</sup> Paras 29 and 34–36.

<sup>12</sup> Para 30.

<sup>13</sup> Paras 37 and 47–49.

<sup>14</sup> [2003] 4 All SA 433 (SCA).

<sup>15</sup> National Building Regulations and Building standards Act 103 of 1977.

19. However, the SCA rejected the argument that this was 'a mere irregularity of no consequence'. The SCA emphasized that the recommendation by a building control officer was a *jurisdictional fact* that was necessary for the valid approval of the plans. The court ruled that at the time the local authority approved the plans it exercised a power which did not in law exist, since the necessary jurisdictional facts were absent.<sup>16</sup> The SCA also rejected the notion that the irregular exercise of a statutory power was somehow validated by the fact that no-one was prejudiced.<sup>17</sup>

20. *Gidani Pty) Ltd v Minister of Trade and Industry and Others*<sup>18</sup> is yet another instance in which an argument based on after-the-fact rectification was rejected. This case concerned a challenge to the award of license to Ithuba Holdings (Pty) Ltd as the third operator of the National Lottery. One of the grounds of the challenge was that the Ithuba had failed to provide a performance bond upon award of license, as required by the RFP, but had merely provided "letters of comfort" from a bank. During legal argument Ithuba produced a performance bond that it had in the interim obtained from a bank. However, the court set aside the award of the license, since the license agreement did not conform to the provisions of the RFP that required that the bond be put in place *on the day the license was issue*. The necessary jurisdictional facts for the award of license were not in place, with the result that the Minister acted beyond his powers when he awarded the license. *This defect was not cured by the subsequent production of a performance bond.*<sup>19</sup>

21. Based on the discussion above, it would appear that after-the-fact exemption does not bestow validity on an invalid administrative act. The valid exercise of administrative power requires that the necessary jurisdictional facts *must exist at the time the power is exercised*. The award of contract to Neotel therefore amounted to an invalid administrative act, because an important jurisdictional fact – Neotel's registration as a security service provider – was not in place at the time the award was made. The above authorities indicate that an invalid award cannot be remedied by ex-post-facto rectification, whether by exemption or late registration.

<sup>16</sup> Para 16.

<sup>17</sup> Para 15.

<sup>18</sup> [2015] ZAGPPHC 457 (4 July 2015).

<sup>19</sup> Paras 83 – 103.

22. Furthermore, the purpose of the PSIR Act (which is to regulate the private security industry and ultimately to protect the interest of the public) would be frustrated if an invalid award of a contract to an unregistered service provider could be overcome by after-the-fact exemption.

23. There are also difficulties with the manner in which the exemption was issued. The letter of exemption does not comply with section 20(5), in that the exemption was not issued "by notice in the Gazette". There is also no express indication that the letter of exemption was intended to operate retrospectively to the date of contract award, or indeed that the Minister is empowered by the Act to grant retrospective exemption. This casts further doubt on its legal efficacy.

#### **A COUNTER-ARGUMENT**

24. There is a counter argument to be considered, one that suggests that Transnet *is* entitled to conclude the contract with Neotel. This argument proceeds from the following premise: all that the PSIR Act requires is that by the time *a contract is concluded*, a service provider should either (a) be registered as a security service provider or (b) be exempted from this requirement by the Minister. There is nothing in the Act that suggests that Neotel had to be registered by the time it was selected as the preferred service provider. Being selected as a preferred service provider is preliminary step to the conclusion of a contract but it does not amount to the conclusion of the contract itself. There was therefore nothing irregular about Transnet appointing Neotel as the preferred supplier to do the work.

25. What Neotel was required to do was to ensure that it was either registered or exempted from registration *by the time the contract is concluded*. The conclusion of the contract has still to happen at some point in the future. This is therefore not a case where an invalid contract was previously concluded which the parties now seek to remedy by means of an exemption. No breach of any legislation has occurred, there is no "invalid contract" in place and therefore no question of ex-post facto rectification.

26. This argument is not without its appeal. However, it overlooks certain key facts:

(a) Neotel was issued with a Letter of Appointment (LOA) in terms of which Neotel was appointed "to provide TNPA CCTV cameras and maintenance for a period of three (3) years." The LOA further stated that "This appointment shall be subject to the terms and conditions of the TNPA CCTV solution bid document, your response thereto and other contractual conditions negotiated thereafter." The LOA was clearly intended to authorise Neotel to carry out the works pending the conclusion of the final written contract.

(b) The bulk of the work has already been done by Neotel through its sub-contractor. It would therefore be specious to suggest that a contract has not been concluded despite the issuing of an LOA to Neotel and despite the work having already been completed.

### **CONCLUSION AND RECOMMENDATION**

27. My preliminary view on the matter is that the letter of exemption issued by the Minister does not validate the award of contract to Neotel. In my view, the LOA/contract for the upgrade and replacement of damaged CCTV fibre network should be cancelled, following a procedurally fair process.

28. The question arises as to how to deal with (a) monies previously paid to Neotel, (b) monies owing to Neotel for services rendered but as yet not paid (c) works or services that must still be completed.

29. My recommendation in respect of the way forward is as follows:

29.1 The funds spent on Neotel to date for installing, servicing or repairing the equipment for both CCTV phase 1 and CCTV phase 2 must be treated as irregular expenditure. However, in my view, the costs associated with the *procurement of the equipment* should not be regarded as irregular, as Neotel did not breach the PSIR Act when it procured the equipment. A service provider does not need to be PSIRA registered in order to procure equipment. The breach only occurs when the equipment is installed, serviced or repaired;

29.2 Monies still outstanding to Neotel in respect of servicing/maintenance costs, cannot be paid on the basis of the invalid LOA/contract. However, Group Legal

should establish whether Neotel may be paid based on the principles of unjustified enrichment;

29.3 In respect of maintenance and other works that must still be completed, it is recommended that Transnet award a confined tender for these services to Neotel and/or Techpro. It would not be in Transnet's interests to issue an open tender for the remaining works or services. The works or services that must still be completed are highly specialized, largely identical to works or services that were previously completed and it would result in wasted time or money for Transnet to approach the open market. Furthermore, challenges relating to compatibility or integration could arise if a new service provider is appointed at this late stage in the process to complete the outstanding works or services. The ground for confinement listed in PPM 15.1.2(d) is therefore applicable. The fact that the works or services previously performed were carried out under a LOA that was later found to be invalid, does not detract from the legitimacy of this ground of confinement.

30. Should you wish to obtain another view on the matter, I recommend that senior counsel be briefed to advise on the following:

- (a) Whether the letter of exemption issued by the Minister validates the award of contract to Neotel;
- (b) Whether, in light of all the circumstances of this case, Transnet may proceed to conclude the contract with Neotel;
- (c) If the answer to (a) or (b) is "no" then what are Transnet's obligations toward Neotel in respect of monies owing for services rendered?
- (d) How should Transnet deal with works or services that have yet to be completed?
- (e) How should Transnet treat expenditure that has already been made to Neotel, in light of section 81(1) (b) of the PFMA?

31. In my view, it would not be prudent to request the Acting GCE to conclude the contract with Neotel, without resolving the question whether Transnet is legally authorised to conclude the final written contract.

**Compiled by:**

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**Peter Volmink**

Executive Manager: iSCM Governance

Date:

**Recommended /Not Recommended by:**

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**Stanley Mamaregane**

General Manager: Group Legal

Date:

**Approved/Not Approved:**

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**Ndiphiwe Silinga**

Group Executive: Legal and Compliance

Date:



**ANNEXURE PV 28**

## T-SYSTEMS CONTRACT VARIATION ANALYSIS REPORT – SCOPA 06 DECEMBER 2017

No.	Service Provider	Contract Duration	Contract Duration extension	Initial Contract Value	Contract variation amount	Contract value after variation
1	T-Systems	Five (5) years with an option to extend for two (2) years 01 January 2010 – 31 December 2014		R 1 986 552 619.86		
	Variation 1 [Two (2) year extension option exercised]	01 January 2015 – 31 December 2016	Two (2) years		R 1 312 269 548.14	R 3 298 822 168.00
<p style="text-align: center;"><b>Reasons for Contract Variation</b></p> <p>The two year contract extension option was exercised on the contract. The contract duration extension also required a contract value increase and the reasons for the two (2) year contract extension were as follows:</p> <p>Transnet had just completed the independent benchmark review performed by Gartner Ireland, as benchmarking was part of the IT Outsourcing contract. Gartner are world-renowned independent Information Communications Technology (ICT) experts. The benchmarking indicated that the pricing that was paid by Transnet for the services that were procured from T-Systems was market related.</p> <p>Transnet also contracted Gartner Ireland to review all service towers procured from T-Systems through the IT Outsourcing Master Services Agreement and draft new technical specifications, technical evaluation criteria, technical scoring sheets and improved Service Level Agreements (SLAs) in line with the Transnet changing business requirements and market best practice. This process took several months to conclude as detailed business requirements had to be obtained from all Transnet Operating Divisions. The IT Data Services Sourcing Strategy also had to be approved by the Transnet Board and the new IT Data Services tender (RFP) was issued to the market on 23 November 2015. The IT Data Services Request for Proposal (RFP) took approximately twelve (12) months to conclude and adjudicate due</p>						

No.	Service Provider	Contract Duration	Contract Duration extension	Initial Contract Value	Contract variation amount	Contract value after variation
	<p>to the complicated nature of the RFP and all the above could not have been achieved without a two (2) year contract extension. In terms of Clause 8.2.1 of the Outsourcing Master Services Agreement (MSA) signed with T-Systems, Transnet had an option to extend the IT Outsourcing MSA for a maximum period of two (2) years and this extension was part of exercising that option.</p> <p>The T-Systems IT Outsourcing Agreement was established through the sale of Arivia.Kom which was sold as a "going concern" to T-Systems South Africa (Pty) Ltd. Arivia.Kom was jointly owned by Transnet and Eskom. Arivia.Kom used to provide ICT services to both state owned entities hence a five (5) year contract for provision of similar ICT services was signed with T-Systems in 2009 as part of the Sale Agreement conditions. The T-Systems contract did not stipulate any contract value at the time of its conclusion and the initial five (5) year contract spend from 01 January 2009 until 31 December 2014 was regarded as an initial contract value.</p> <p>Initially Transnet Engineering (TE) was not making use of the T-Systems contract, but for the purposes of standardization and leveraging off economies of scale, a decision was made for TE to utilize this contract for its IT Outsourcing requirements. The addition of TE to the T-Systems contract contributed to a slight increase in the T-Systems' contract spend from 01 January 2015 to date. This contract variation was approved by the Transnet Board as it was prior to the implementation of National Treasury Instruction 3 of 2016/2017 on Preventing and Combating Abuse in the Supply Chain Management System.</p>					
	<b>Variation 2</b>	01 January 2017 – 30 September 2017	Nine (9) months		R 637 705 237.30 (Zestilor R 75 442 642.90 + T-Systems R 562 262 594.40)	<b>R 3 861 084 762.40</b> (excluding Zestilor amendment of R75 442 624.90)
	<p><b>Reasons for Contract Variation</b></p> <p>The nine (9) months (month to month) contract extension was requested to enable Transnet to finalize the award of the new IT Data Services RFP, which was at the adjudication stage. This was to make provision for issuing the Letter of intent (LOI), contract negotiations and the six (6) months transition period. The six (6) months mandatory transition period from the incumbent to the successful bidder, was stated in the IT Data Services Request for Proposal (RFP).</p> <p>The nine (9) months (month to month) contract extension was recommended by the Transnet Board and approved by National Treasury on 15 December 2016. The month to month contract extension granted Transnet flexibility to terminate the T-Systems contract by providing 30 days' notice, once the contract was awarded to the successful bidder. The Transnet Board subsequently approved the IT Data Services contract award to T-Systems on 22 February 2017.</p>					

No.	Service Provider	Contract Duration	Contract Duration extension	Initial Contract Value	Contract variation amount	Contract value after variation
	Zestilor's contract expired on 30 September 2017 and was not extended further. Please refer to Annexure A for more details on the Zestilor contract and details regarding T-System's subcontractor Sechaba, both of which were T-Systems Enterprise and Supplier Development beneficiaries.					
	Variation 3	01 October 2017 – 31 May 2018	Eight (8) months		R 466 400 000.00	R 4 327 484 762.40
	<p style="text-align: center;"><b>Reasons for Contract Variation</b></p> <p>Transnet requested a twelve (12) months (month to month) contract extension from National Treasury and National Treasury only approved eight (8) months contract extension on 19 September 2017. The requested contract extension was to enable Transnet to conclude the contract award phase, which includes issuing of the Letter of Intent (LOI), contract negotiations and a mandatory six (6) months transition period from the incumbent (T-Systems) to the new service provider (Gijima). National Treasury (NT) supported the reasons for extension but reduced the requested extension period to eight (8) months.</p> <p>Transnet initially awarded the IT Data Services contract to T-Systems who were the second ranked bidder due to material risks that were identified by the tender evaluation committee during the risk assessment stage. Gijima challenged the contract award by lodging a complaint to the Transnet Procurement Ombudsman in March 2017. Gijima's complaint was subsequently forwarded to National Treasury for investigation in line with National Treasury Instruction Note 3 of 2016/2017 for Prevention and Combating Abuse in the Supply Chain Process. National Treasury conducted a review of the procurement process and upon conclusion of the review, instructed Transnet to award the bid to the highest ranked bidder (Gijima), as the bid did not prescribe risk as objective criteria on the request for proposal (RFP). As a result, National Treasury indicated that Transnet had an obligation to award the contract to the highest ranked bidder.</p> <p>A special Transnet Board meeting was convened to deliberate on the National Treasury findings, as well as consider the Legal Counsel Opinion which was solicited by Transnet Group Legal. The Board resolved to make an in-principle decision to rescind its award to T-Systems, pending T-Systems' representations and to award the contract to Gijima. T-Systems was invited to make representations on the Board's decision and after taking T-Systems' representations into consideration, the Board maintained its in-principle decision to rescind their award to T-Systems and award to Gijima.</p>					



No.	Service Provider	Contract Duration	Contract Duration extension	Initial Contract Value	Contract variation amount	Contract value after variation
	<p>Due to the legal principle of <i>functus officio</i>, Transnet cannot resort to “self-help” by amending its own decision, without first going to Court. A Declaratory Order Note was lodged with the High Court to set aside T-Systems’ contract award and to award the contract to Gijima. T-Systems has already filed Court papers opposing the rescission of their award. The Court process is underway and Transnet is awaiting the Court’s decision on the matter.</p> <p>Transnet had to extend the T-Systems contract, while the legal process is underway, for the purposes of business continuity as there would have been major disruptions on the IT Outsourcing Services if the contract was not extended. This would have a severe impact on Transnet’s operations.</p> <p><b>The following services would be impacted:</b></p> <ul style="list-style-type: none"> <li>• Pipeline system would be impacted;</li> <li>• Train operations would be impacted, due to lack of ICT systems which are managed by T-Systems in their Data Centre;</li> <li>• Port operations would be negatively affected as systems would be down, impacting the export and import operations;</li> <li>• Treasury systems would be down and no trading would take place;</li> <li>• Human Resources (HR) and financial systems would be down, impacting both employees, Transnet’s suppliers and creditors;</li> <li>• There would be no email communication throughout the organisation; and</li> <li>• Transnet would be vulnerable to malicious cyber-attacks, as there would be no software patching and malicious viruses could easily spread throughout the organisation.</li> </ul> <p>The T-Systems’ contract was extended on the same terms and conditions without any pricing increase since December 2014 and Transnet is currently negotiating further cost efficiencies with T-Systems as mandated by the GCE.</p>					
	<b>Variation 4</b>	01 June 2018 to 08 September 2018	Three (3) months		<b>R 161 666 667.00</b>	<b>R 4 489 1551 429.40</b>
	<b>Reasons for Contract Variation</b>					

No.	Service Provider	Contract Duration	Contract Duration extension	Initial Contract Value	Contract variation amount	Contract value after variation
	Transnet requested a nine (9) months contract extension from National Treasury and National Treasury only approved three (3) months contract extension on 09 June 2018. The requested contract extension was for the commencement of the Disengagement process from T-Systems (as provided for in clause 48 of the MSA).					
	<b>Variation 5</b>	09 September 2018 to 08 March 2019	Six (6) months		<b>R 474 219 051.00</b>	<b>R 4 963 370 479.74</b>
	<p style="text-align: center;"><b>Reasons for Contract Variation</b></p> <p>The IT Data Services RFP award was at the High Court to request a Declaratory Order to rescind the T-Systems' Letter of Intent (LOI) and to award the IT Data Services contract to Gijima. Transnet's External Legal Counsel lodged the request for a Declaratory Order to the High Court and was awaiting a ruling on the matter. The previous Board requested that Transnet award the contract to T-Systems and not Gijima.</p> <p>The current Transnet Board has now rescinded the award of contract to T-Systems and made an in-principle decision to award the contract to Gijima as per National Treasury's directive dated 18 July 2017.</p> <p>The requested six (6) months T-Systems contract value increase was in order to undertake disengagement services presented to the Transnet Board on 05 September 2018 to allow for the following:</p> <ul style="list-style-type: none"> <li>• Disengagement of services on the IT Outsourcing Agreement with T-Systems South Africa (Pty) Ltd and transition to Gijima with an intent to conclude a Master Services Agreement with Gijima Holdings (Pty) Ltd; and</li> <li>• Allow Transnet to engage with T-Systems South Africa (Pty) Ltd and Gijima (Pty) Ltd with a purpose of finding an amicable solution on the legal matter.</li> </ul>					



### **Annexure A – A synopsis of the relationship between Zestilor (Pty) Ltd and Sechaba Computer Services (Pty) Ltd**

Transnet entered into a five (5) year IT Outsourcing Master Services Agreement (MSA) with T-Systems SA (Pty) as part of the Sale Agreement of Arivia.kom. The IT Outsourcing Master Services Agreement (MSA) was effective from 01 January 2009. On 01 March 2010, Transnet and T-Systems signed an Addendum to include Rental and Purchase of Computer Hardware equipment on the IT Outsourcing MSA. The initial contract with T-Systems did not have Enterprise and Supplier Development (ESD) commitments as it was done through a Sale Agreement.

Transnet exercised its option to extend the T-Systems IT Outsourcing contract for a period of two (2) years. This two (2) year contract extension was duly approved by the Transnet Board on 13 February 2014. Part of the two (2) year contract extension conditions was that T-Systems has to commit to spend a minimum of 20% of their contract value on Enterprise and Supplier Development initiatives. T-Systems also committed to offer Transnet an annual price reduction of 4% per annum during the two (2) year contract extension period. T-Systems ceded the supply of Laptops and Desktops to Zestilor (Pty) Ltd and subcontracted the provision of End User Computing Services to Sechaba Computer Services (Pty) Ltd who were its ESD beneficiaries. The cession and assignment of the supply of laptops and desktops from T-Systems South Africa (Pty) Ltd to Zestilor (Pty) Ltd was approved by the then Transnet Group Chief Executive (Mr Brian Molefe) on 01 December 2014.

Zestilor's contract was due to expire at the same time as the T-Systems MSA on 31 December 2016. Transnet obtained National Treasury approval on 15 December 2016, to extend the T-Systems contract together with all contracts that originated from the IT Outsourcing MSA which includes Zestilor for a period of nine (9) months, effective from 01 January 2017 until 30 September 2017. Zestilor's laptops and desktops contract naturally terminated on 30 September 2017 and they indicated to Transnet that they are not willing to consider any further contract extensions as the negative media articles that were published in July 2017 about their business affected their reputation and funding arrangements adversely.

T-Systems sent Transnet a letter dated 02 October 2017 indicating that they have terminated their subcontracting agreement with Sechaba Computer Services (Pty) Ltd and that all services that used to be performed by Sechaba under the IT Outsourcing MSA, will be insourced to T-Systems including the transfer of staff with effect from 01 November 2017. The current T-Systems SD commitment is 28% of their contract value and Transnet is in the process of engaging with T-Systems to ensure that they continue to comply with all their SD obligations under the current IT Outsourcing MSA.

## ANNEXURE PV 29



PV 29

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**MEMORANDUM**

**To:** Brian Molefe, Group Chief Executive

**From:** Anoj Singh, Group Chief Financial Officer  
Garry Pita, Group Chief Supply Chain Officer

**SUBJECT:** Request for approval of T-Systems SA (Pty) Ltd contract extension for IT Services for a period of two years

**PURPOSE:**

1. The purpose of this submission is to request the Group Chief Executive (GCE) to:
  - Sign the the two (2) year extension of the T-Systems SA (Pty) Ltd (T-Systems) IT Services contract addendum (commencing 1 January 2015 to 31 December 2016). See Annexure A.

**BACKGROUND:**

2. Transnet sold off certain of its non-core Information Communication and Technology (ICT) assets to T-Systems through a competitive process during 2009 which was linked to a 5 year Master Services Agreement (MSA) between Transnet and T-Systems for the provision of a number of ICT infrastructure related services.
3. This 5 year MSA expires on 31 December 2014. The total contract value is estimated at approximately R1, 85 billion for the 5 year period.
4. Clause 8.2.1 of the MSA states the following "Service Recipient shall have the right to extend the Agreement beyond the Initial Term for up to 2 (two) successive renewal periods of 12 (twelve) months each." The cost of an additional 24 month extension will range between R740 million to R1, 2 billion.
5. EIMS management requested the Board Acquisition and Disposals Committee (BADC) to recommend a 24 month extension of the current T-Systems IT contract to the Board of Directors for approval. See Annexure B for the detailed proposal document.
6. The Board of Directors approved the 24 month extension to the T-Systems contract. See Annexure C for the resolution.

**DISCUSSION:**

7. Transnet entered into negotiations with T-Systems for the two (2) year extension and concluded the following:
- The current pricing will be reduced by up to 18% for the term of the contract.
  - Enterprise Supplier Development (ESD) commitments of a minimum of R180 million.
  - Improvement of Service Levels and Service Credits with commitment from T-Systems International to improve the current delivery organization within T-Systems and the introduction of a dedicated senior German representative to oversee the service delivery improvement for a minimum period of six (6) months; and
  - Provide an innovation plan for the extension period.

**FINANCIAL IMPLICATIONS:**

8. The approved estimated contract value will range between R740 million and R1,2 billion for IT Services over a period of two (2) years therefore the cumulative contract value will range between R2,59 – R3 billion.

**BUDGET IMPLICATIONS:**

9. There is sufficient budget at Transnet Group and in the Operating Divisions (ODs) to cover the costs for Transnet's IT Services requirements.

**APPROVALS AND DELEGATIONS:**

10. In terms of clause 6.2 of the Delegation of Authority Framework effective from 01 June 2013 on the latest PPM, all requests to enter into agreements with a contract value in excess of R2 billion has to be approved by the Board of Directors. The Board of Directors already approved a 24 month extension to the current T-Systems contract. See Annexure C.


  


**RECOMMENDATION:**

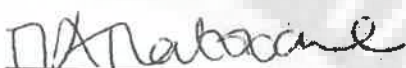
12. It is recommended that the Group Chief Executive (GCE):

- Signs the two (2) year extension of the T-Systems SA (Pty) Ltd IT Services contract addendum (commencing 1<sup>st</sup> January 2015 to 31 December 2016).  
See Annexure A.

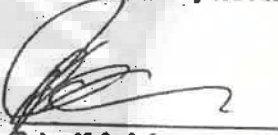
**COMPILED BY:**

  
Fanie van der Walt  
Executive Manager: Group Strategic Sourcing  
Date: 04/06/2014

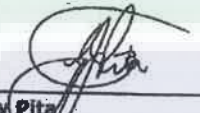
**RECOMMENDED / NOT RECOMMENDED**

  
Mantsika Matooane  
Group Executive: EIMS  
Date: 5/6/2014

**RECOMMENDED / NOT RECOMMENDED**

  
Peter Volmink  
Executive Manager: Governance and Compliance  
Date: 4 June 2014


**RECOMMENDED / NOT RECOMMENDED**

  
Garry Pita  
Group Chief Supply Chain Officer  
Date: 4/6/14


**RECOMMENDED / NOT RECOMMENDED**

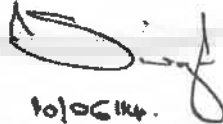
  
Ndiphiso Silinga  
General Manager: Group Legal  
Date: 05/06/2014

**RECOMMENDED / NOT RECOMMENDED**

  
Anoj Singh  
Group Chief Financial Officer  
Date: 4/6/14

**APPROVED / NOT APPROVED**

  
Brian Molefe  
Group Chief Executive  
Date: 20/06/2014

  
Achry  
Date: 10/06/14

## ANNEXURE PV 30







Pr 30

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## MEMORANDUM

**TO:** Mr. Siyabonga Gama, Transnet Group Chief Executive

**FROM:** Mr. Ndiphiwe Silinga, Group Executive: Legal Services; Mr. Peter Volmink, Executive Manager: iSCM Governance

**DATE:** 27 July 2017

**SUBJECT:** NATIONAL TREASURY RULING ON COMPLAINT BROUGHT BY GIJIMA HOLDINGS (PTY) LTD.

### PURPOSE:

1. The purpose of this memorandum to provide an opinion from Group Legal and the SCM Governance department on the ruling by National Treasury (NT) regarding a complaint lodged by Gijima Holdings (Pty) Ltd ("Gijima") in relation to the award of Transnet's IT Data Services RFP.
2. In brief, we advise as follows:
  - 2.1 We agree with NT's conclusion that the tender be awarded to Gijima, but we do so for different reasons to those stated by NT.
  - 2.2 We disagree with NT's approach with regard to the interpretation and application of the term "objective criteria" in the Preferential Procurement Policy Framework Act ("PPPFA"). However, we are of the view that the decision to award the tender to T-Systems will not withstand judicial scrutiny.
  - 2.3 Accordingly, we are of the view that the decision to award the tender to T-Systems be rescinded and that the award be made to Gijima.

### BACKGROUND:

3. On 22 February 2017, the Board of Transnet took a decision to award tender number

RFP GSM/15/08/1310 to T-Systems for the provision of IT data services ("the tender"). The tender was valued at about R1.54 billion. T-Systems is the incumbent service provider for IT data services to Transnet.

4. During March 2017, Gijima lodged a complaint with the Transnet Ombudsman regarding the award of the tender. As the complaint related to a decision taken by the Board, Transnet was obligated to refer the matter to National Treasury (NT) for investigation.<sup>1</sup>
5. Gijima's complaint raised objections to the manner in which Transnet invoked various perceived risks as "objective criteria" in order to justify its decision to overlook Gijima as the highest scoring bidder and to award the tender to the incumbent, T-Systems. Gijima requests that *"the bid decision should be set aside and awarded to Gijima and where necessary disciplinary, civil or criminal proceedings [should be] instituted against any member of Transnet who has violated their fiduciary duties and acted in violation of good corporate governance and the PFMA"*.<sup>2</sup>

#### **OBJECTIVE CRITERIA**

6. Section 2(1)(f) of the PPPFA states that a contract *must* be awarded to the tenderer who scores the highest points, unless objective criteria justify the award to another tenderer. It is clear from this provision that the mandatory, default position in public tendering is that the highest scoring bidder *must* be awarded the contract.<sup>3</sup>
7. The only reason that would justify a deviation from this rule is the existence of "objective criteria".<sup>4</sup> Although the term "objective criteria" is not defined in the Act, Transnet's Procurement Procedures Manual (PPM) provides various examples of what may be regarded as objective criteria in Transnet's tender processes. These include the existence of a "material risk" in the award of business to the top-ranked bidder.<sup>5</sup>

<sup>1</sup> Para 3.3 of SCM Instruction 3 of 2016/17 on Preventing and Combatting Abuse in the Supply Chain Management System.

<sup>2</sup> Page 26 of Gijima's complaint letter dated 20 March 2017.

<sup>3</sup> *Grinaker LTA Ltd v Tender Board (Mpumalanga)* [2002] 3 All SA 336 (T) paras 40 and 54; *Rainbow Civils CC v Minister of Transport and Public Works, Western Cape* [2013] ZAWCHC 3 (6 February 2013) para 108.

<sup>4</sup> Regulations 6(5) and 7(1) of the PPPFA regulations, 2011. These regulations, rather than the PPPFA 2017 regulations were applicable to the award of IT Data Services tender.

<sup>5</sup> PPM 18.7.3.

8. However, the PPM is clear that a factor that featured during the evaluation of a bid cannot again be revisited under the guise of "objective criteria". The PPM states that objective criteria are criteria "other than the criteria used to evaluate the bid".<sup>6</sup> The rationale behind this rule is that it would be unfair to rely on particular criteria to evaluate a bidder, say for example functionality, and then once the bidder is found to have passed the functionality threshold and scores the highest points overall, to use the very same criteria as "objective criteria" to deny the highest scoring bidder the tender award. The rule was thus put in place to avoid the danger of "double-counting". As we explain below, that is precisely what transpired in this instance, particularly with reference to the use of Supplier Development (SD) as an "objective criterion".
9. The PPM further states that 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 the top-ranked bidder.<sup>7</sup> In other words, the concept of "material risk" should not be speculative, but rather based on objective facts and clear justification. Above all, the decision to invoke "material risk" as an objective criterion must be *rational* in light of the facts placed before the decision-maker. We discuss this aspect further below.
10. In its letter dated 29 June 2017, NT stated that the objective criteria on which the Board sought to rely ought to have been stated up front in the tender document. NT concluded that since the bid document did not specify the objective criteria, Transnet has an obligation to award the bid to Gijima, as the highest scoring bidder.<sup>8</sup>
11. We do not share NT's view that there was a clear obligation on Transnet to state the objective criteria upfront in the RFP. Whilst the PPPFA regulations, 2017 specifically require organs of state to specify objective criteria in their tender documents,<sup>9</sup> this requirement was not stipulated in the Act itself, nor in the 2011 regulations that were applicable at the time the RFP was issued to market. In his letter of response to NT dated 12 July 2017, Transnet's GCE correctly highlighted this aspect.

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<sup>6</sup> PPM 18.7.3 (b).

<sup>7</sup> PPM 20.3.

<sup>8</sup> Paras 27 – 28 of NT's letter dated 29 June 2017.

<sup>9</sup> Regulation 11(2) of the PPPFA regulations, 2017.

12. Furthermore, the courts have not adopted a uniform position on whether objective criteria must be stipulated in the tender document. Certain decided cases suggest that objective criteria must be stated in the RFP document,<sup>10</sup> whilst others suggest that this was not a requirement.<sup>11</sup> In the *Simunye Developers* case, the court stated that “*There is clearly no statutory obligation on an organ of state to stipulate in the tender documents which objective criteria it may consider in a decision not to award the contract to the tenderer who has scored the highest points. In fact, it would often be impossible to provide a [closed list] of such criteria*”.<sup>12</sup>
13. At best, the law based on the 2011 regulations issued in terms of the PPPFA was unclear regarding the obligation on public bodies to state objective criteria in the RFP, and thus the categorical position adopted by NT in this regard is not supported.<sup>13</sup>
14. However, we are of the view that when an organ of state relies on objective criteria to justify its decision not to award a tender to the bidder with the highest score, it must do so in a procedurally fair manner. This should at least involve informing the highest-scoring bidder that the organ of state intends to rely on objective criteria, explaining what those objective criteria are and affording the bidder an opportunity to comment on the objective criteria before a final decision is made.<sup>14</sup>
15. In a further letter to Transnet dated 18 July 2017, NT makes the rather general statement that “risk assessment does not qualify as an objective [criterion] in terms of section 2(1)(f) of the PPPFA”. NT does not explain how it came to this conclusion.

<sup>10</sup> *WJ Building & Civil Engineering Contractors CC v Umhlathuze Municipality* 2013 (5) SA 461 (KZD) para 12; *RHI Joint Venture v Minister of Roads and Public Works* 2003 (5) SA BCLR 544 (Ck) paras 37 – 38.

<sup>11</sup> *Simunye Developers CC v Lovedale Public FET College* [2010] ZAECGHC 121 (9 December 2010) para 33; *RHI Joint Venture* (note 10 above) para 31; *Rainbow Civils* (note 3 above) paras 107 – 114.

<sup>12</sup> *Simunye Developers CC v Lovedale Public FET College* [2010] ZAECGHC 121 (9 December 2010) para 33.

<sup>13</sup> In *Westinghouse v Eskom* [2016] 1 All SA 483 (SCA), the SCA set aside a tender award on the basis that the Board of Eskom had sought to rely on certain “strategic considerations” that were not contained in the RFP. The ruling did not deal with the concept of “objective criteria” as contemplated in s 2(1)(f) of the PPPFA. The *Westinghouse* ruling was overturned by the Constitutional Court in *Areva NP v Eskom* 2017 (6) BCLR 675 (CC).

<sup>14</sup> Section 3 (2)(b) of PAJA.

As indicated above, the regulatory provisions do not provide any guidance on what may or may not be considered as objective criteria. There is certainly no indication that risk-related factors may not be taken into account as objective criteria. In fact, case law suggests the opposite. The *Simunye Developers* case states that objective criteria could include factors such as the ability of the tenderer to perform the work, the track record of the prospective tenderer, its infrastructure, available financial resources and equipment.<sup>15</sup> These are quintessentially risk-related factors.<sup>16</sup>

16. In our view, there is no good reason why the Board should be prevented from considering the risks before the award of business, in appropriate circumstances. However, if the risks are not real or material then there is no good reason why the default position should not apply, namely that business should be awarded to the highest scoring bidder, as prescribed by the PPPFA.

#### **THE BOARD'S DECISION TO AWARD BUSINESS TO T-SYSTEMS**

17. One of Gijima's complaints was that the Transnet Board was not justified in taking the risk factors into account in deciding to award the tender to T-Systems. In essence, Gijima questions the lawfulness and rationality of the decision.
18. In administrative law, a decision taken by a public body is considered to be irrational if it is not rationally related to:
- (a) the purpose for which it was taken;
  - (b) The purpose of the empowering provision;
  - (c) The information before the decision-maker; or
  - (d) The reasons given for it by the decision-maker.<sup>17</sup>
19. If the decision taken by Transnet's Board to award the tender to T Systems is taken on review, a reviewing court will scrutinise the reasons for the decision as given by the decision-maker. If the decision is not rationally related to the reasons given for the decision or the information that was placed before the decision-maker when the

<sup>15</sup> *Simunye Developers* (note 11 above) para 34.

<sup>16</sup> See also *Calibre Clinical Consultants (Pty) Ltd v NCBFI* [2010] 4 All SA 561 (SCA) para 61.

<sup>17</sup> Section 6(2)(f)(ii) of PAJA.

decision was taken, the decision will in all likelihood be regarded as irrational and be set aside. A decision is regarded as rational if it is connected *by reason* to the facts before the decision-maker, as opposed to being arbitrary.<sup>18</sup>

20. It is a settled principle of law that if a decision-maker took into account any reason for its decision which is found to be bad, or irrelevant, then the decision as a whole is tainted, even if there were also good reasons for taking the decision.<sup>19</sup> In the context of the matter at hand, if the ADC and/or the Board took a particular risk factor into account that is found to be unjustified, its decision as a whole will be tainted even if there were also good reasons for taking the decision. In any event, in our respectful view, none of the reasons provided is likely to withstand judicial scrutiny.

21. We highlight only one example. (See Annexure "A" for more detailed observations regarding the various risks that were identified). Supplier development (SD) was introduced as one of the reasons why the ADC did not support management's recommendation for the award of contract to Gijima. The Board submission stated that the ADC was concerned that *"there are also supplier development objectives to take into account and there is a 10% difference between Gijima and T-Systems with T-Systems SD % 10% higher than that of Gijima"*.<sup>20</sup> In our view, the difference in SD offer should not have been regarded as a "risk" at all. This is because the RFP dealt with SD as a prequalification criterion. It required a commitment from bidders that the monetary value of SD initiatives would not be less than 40%.<sup>21</sup> All bidders who met this prequalification criterion were allowed to participate further in the process. It is irrelevant that one bidder offered a greater SD commitment than another, provided that they both met the minimum percentage. As indicated above, the PPM stipulates that objective criteria may not include criteria that were used to evaluate the bid.<sup>22</sup>

<sup>18</sup> *Calibre Clinical* (note 16 above) para 58.

<sup>19</sup> *Westinghouse* (note 13 above) para 44; *Patel v Witbank Town Council* 1931 TPD 284, at 290.

<sup>20</sup> Board submission dated 15 February 2017 p10.

<sup>21</sup> Pages 8 and 16 of the RFP.

<sup>22</sup> PPM 18.7.3 (b).



22. Furthermore, Gijima was not afforded an opportunity to comment on the SD-related risks, as was the case with the other risks that were identified. It is procedurally unfair to take a risk into account to overlook a recommended bidder, without at least affording the bidder an opportunity to comment on the risk.<sup>23</sup>
23. Transnet regarded the SD issue as a material risk because it was also mentioned during the debriefing session as one of the reasons why Gijima was disqualified.<sup>24</sup>
24. Even if we were to assume that all the other "risks" were valid, the reliance on SD was a bad reason for the decision and thus affected the validity of the decision as a whole.
25. The submission to the ADC dated 8 February 2017, states that when the CFET conducted a due diligence exercise based solely on site observation and client reference checks, T-Systems scored marginally more points (71.59%) compared to Gijima (71.26%). Significantly, the absence of an established Data Centre (DC) did not seem to make any difference to the due diligence score given to Gijima as it scored almost the same points as T-Systems. Yet, later the absence of an established DC was raised as a major concern. Management explained, however, that business and technical risks were not factored into the due diligence exercise.
26. Gartner subsequently conducted a risk assessment of the parties which revealed various risks associated with Gijima. These included the non-establishment of the DC, the transition risk, IT Data Centre facilities, the "transition scope" and "transition project".<sup>25</sup>
27. On 5 September 2016, Gijima was requested to provide clarification on how it would mitigate the risks that Gartner had identified. Notably, Gijima's price reduction, SD offer and the issue regarding the early termination penalty were not raised as risks, nor was Gijima afforded an opportunity to comment on such risks. Gijima was later

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<sup>23</sup> Paras 48 and 58 of Gijima's complaint.

<sup>24</sup> Para 39.4 of Gijima's letter of complaint.

<sup>25</sup> See paras 31 – 32 of the Submission to ADC dated 8 February 2017.

afforded an opportunity to comment on the price reduction risk and the early termination penalty, but not the SD issue.<sup>26</sup>

28. Gijima replied in its letter dated 7 September 2016, in which it explained how the risks would be addressed. However, management found that *"Gijima's response did not adequately address the risks that were addressed",*<sup>27</sup> but did not explain which aspects of Gijima's response were regarded as "inadequate". Group Legal on the other hand found that Gijima's response was *"still vague"* as Gijima *"did not explicitly indicate how they will transition to FMO after the 6 months transition, as well as provide a plan on how they will mitigate the risk of procuring and installing equipment in their DC, as well as transferring data from the current incumbent's DC to their DC within the 6 months transition".*<sup>28</sup>

29. Group Legal, ISCM Governance and Group Risk and Compliance (GRC) then advised that it was justifiable to select the second-ranked bidder, T-Systems, based on material risks that were identified vis-a vis the first-ranked bidder, Gijima. The material risks were regarded as "objective criteria" in terms of s2(1)(f) of the PPPFA.

30. The High Value Tender (HVT) review team from Transnet Internal Audit rated the process as "satisfactory".<sup>29</sup> As a consequence, the CFET recommended T-Systems, rather than Gijima for the award of business.

31. However, the GCIO did not support the recommendation from the CFET, as she felt that the risks highlighted in the Gartner and GRC reports had to be fully tested, as these risks never emerged during the evaluation process.<sup>30</sup> As a result, the GCE requested the GCIO to engage with Gijima to obtain clarification and to assess the risks further.

32. What transpired thereafter is significant. A team comprised of representatives from Group Strategic Sourcing and the office of the GCIO engaged in "further clarifications" with Gijima. In the course of these "clarification sessions" Gijima *"provided the*

<sup>26</sup> Transnet's letter to Gijima dated 19 January 2017.

<sup>27</sup> Para 35 of the submission to the ADC.

<sup>28</sup> Para 43 of the submission to ADC.

<sup>29</sup> Ibid para 55.

<sup>30</sup> Ibid para 62.

*required clarity*<sup>31</sup> and explained in detail how it would mitigate the perceived risks.<sup>32</sup> It was further stated in the memo to the ADC that any “residual risks” could be managed through robust contract management and stringent terms and conditions of contract.

33. Based on the responses received from Gijima, the GCIO indicated that “*she is satisfied that all previously identified risks have been adequately mitigated and that the recommendation for award should be made to the first ranked bidder (Gijima)*”.<sup>33</sup> Supply Chain Management, Group Risk and Compliance as well as TIA supported the GCIO in this view.<sup>34</sup> The submission to the ADC therefore recommended the award of business to Gijima in the sum of R1,3 billion.

The Meeting of the ADC held on 13 February 2017

34. Minutes of a meeting constitute the sole record of what was discussed and the reasons why particular decisions were made. A reviewing court will in all likelihood pay close attention to what was stated in the minutes as they are meant to provide insight into the reasoning process of the decision-maker. For this reason decisions often stand or fall on the strength of what is stated in the minutes.
35. The excerpt of the minutes of the ADC meeting held on 13 February 2017 reflect that the ADC did not support the recommendation and instead resolved to recommend to the Board the award of business to T-Systems. The minutes reflect that the ADC raised its concerns regarding the following: Gijima’s reduction of price by some R500m; that the risks of changing suppliers far outweighed the risk of continuing with the current service provider; the migration from the current service provider to the next from a “transitioning risk” perspective and the risk that the proposed contract with Gijima carried with it a R468m penalty if Transnet were to terminate the contract.<sup>35</sup>

<sup>31</sup> Ibid para 66.

<sup>32</sup> Ibid.

<sup>33</sup> Ibid para 70.

<sup>34</sup> Ibid paras 71 – 73.

<sup>35</sup> See para 5.4.5 of the minutes of the ADC held on 13 February 2017.

36. The excerpt of the minutes further reflect that management had provided "assurance" to the ADC that the risks had been properly mitigated. Management also highlighted the fact that two of Gijima's associated entities, namely Vodacom and IBM, had also provided "assurance" regarding Gijima's ability to manage the identified risks. Management also expressed their misgivings about T-Systems service delivery.<sup>36</sup>

37. However, the ADC remained resolute in its view that the tender had to be awarded to T-Systems due to the perceived risks inherent in Gijima's bid. The excerpt of the minutes of the ADC meeting reflect that "*The Committee did not support the approach to closely monitor and manage the risks through contract management due to the existing challenges related to contract management that plagued the Company. The identified risks could result in the Company remaining in the same position as with the current incumbent, coupled with the challenges of migration between the current incumbent and a new service provider, and applicable penalties*". (own emphasis) There is an implied acceptance in this statement that there were significant "challenges" with T-System's service delivery that plagued Transnet. Furthermore, that the identified risks with Gijima would result in Transnet not being any better off for contracting with Gijima, especially considering the migration challenges. This is hardly a ringing endorsement of T-Systems. In fact, it is an acknowledgment that Transnet has experienced significant difficulty with T-Systems as the current provider of IT data services. Impliedly, there appears to have been a recognition that T-Systems itself poses certain risks to Transnet.

38. More importantly, there is nothing in the excerpt of the minutes of the ADC meeting that provides credible reasons for rejecting the recommendation to award business to Gijima. Technical experts, including the GCIO, conducted an in-depth review of the identified risks and concluded that the risks had been adequately mitigated. Whilst the ADC is not obliged to agree with any recommendation that is made to it, it would be reasonable to expect that where it disagrees with a well-motivated recommendation, the reasons for its disagreement would be reflected in the minutes. As stated above, the reasoning process of the decision-maker must be able to withstand scrutiny.

39. The excerpt of the minutes of the ADC meeting reflect that a "detailed discussion" was held with management regarding the risks and merits of the recommendation. It

<sup>36</sup> Ibid paras 5.4.6 – 5.4.8.

appears that the ADC remained concerned about the pricing risk, the perceived "leniency" that had been shown to Gijima, the risk of changing suppliers, the migration risk and the penalty risk.

The Board meeting held on 22 February 2017

40. Management's submission to the Board as well as the excerpt of the minutes of the Board meeting held on 22 February 2017 indicate that management supported the award of business to T-Systems.<sup>37</sup> There is no indication as to when or why management changed its stance on the matter. In fact, the minutes reflect that during the Board meeting, management actually agreed that certain risks remained material. For instance, with reference to the transition risk, the minutes reflect that management indicated that Gijima's approach regarding the transition period "*projected probable significant business and financial risks to [Transnet]*".<sup>38</sup> The change in management's stance is not explained.

41. The Board submission highlights the ADC's concerns about Gijima's price reduction, the difference in SD offering between the Gijima and T-Systems and the termination risk. The ADC had also raised concerns about Transnet's ability to manage risks, given its poor contract and supplier management processes.

42. What is noticeably absent from the minutes is whether the Board considered management's argument as set out in the Board submission that the identified risks had been adequately mitigated. It would appear that the Board accepted the ADC's reasons for overlooking Gijima and awarding the business to T-Systems.

## CONCLUSION

43. Bidders participating in a tender process are entitled to a process that is lawful, reasonable and procedurally fair.<sup>39</sup> The question is whether the decision taken by the ADC and ultimately the Board met this standard. In our respectful view, this question must be answered in the negative. We say so for the following reasons, *inter alia*:

<sup>37</sup> See submission to the Board dated 15 February 2017.

<sup>38</sup> Para 7.5.8 of the Board minutes.

<sup>39</sup> Section 33(1) of the Constitution.

- 43.1 The process was not lawful, because it contravened the principle of fairness enshrined in s 217(1) of the Constitution and the PFMA;
  - 43.2 The process was not reasonable because irrelevant factors were taken into account and the decision lacked a rational basis;
  - 43.3 The process was not procedurally fair, at least in relation to how SD was taken into account as an objective criterion, in that Gijima was not afforded an opportunity to comment on this as a perceived risk;
  - 43.4 Certain factors that were later regarded as risks had already been taken into account during the bid evaluation stage.
  - 43.5 When Gijima's bid was evaluated it was found that Gijima passed all relevant thresholds and met all the bid requirements. The same factors could not be taken into account a second time as "objective criteria" to disqualify Gijima;
  - 43.6 Gijima provided a full explanation as to how the perceived risks would be mitigated.
  - 43.7 Management, including subject matter experts, maintained that the risks had been properly mitigated;
  - 43.8 From the minutes of the meetings of the ADC and the Board, it is not possible to determine their reasons for rejecting management's view that the risks had been properly mitigated.
- 44 The relevant NT SCM Instruction states that the Accounting Authority "*must*" initiate the recommended remedial action within 14 days of receipt of the investigation report, failing which NT must implement the remedial action.<sup>40</sup> Transnet may request an extension of time to implement the recommended steps, but ultimately it has an obligation to ensure that the remedial measures are implemented.

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<sup>40</sup> Paras 5.1.4 and 5.2 of SCM Instruction 3 of 2016/17 on Preventing and Combatting Abuse in the Supply Chain Management System.



- 45 Should Transnet disagree with the recommended remedial steps, it would have to take NT's decision on review to the high court. However, we advise against this. Whilst we are of the view that NT erred in both its findings, namely, that Transnet was obliged to state the objective criteria in its RFP and that risks could not be considered as objective criteria, we nevertheless agree with its recommendations. We support NT's conclusion that Transnet is obliged in terms of s 2(1)(f) of the PPPFA to award business to Gijima, as the highest scoring bidder since, in our view, the perceived risks do not justify overlooking Gijima.
- 46 It is unlikely that the decision of the Board will withstand judicial scrutiny. It is quite likely that if challenged, the award of tender will be set aside on one or more of the grounds listed in section 6 of PAJA. We therefore recommend that Transnet implement the remedial steps recommended by NT.
- 47 A complication that exists is that T-Systems has already been informed about its preferred bidder status. It was also informed that Transnet intends to negotiate and conclude a final contract with it.<sup>41</sup> Legally, Transnet is *functus officio* — that is to say it has made a final decision to select T-Systems as the preferred bidder and communicated the decision to affected parties. It cannot simply revoke its decision without judicial authorisation, as this would amount to what the Constitutional Court has referred to as "self-help".<sup>42</sup> Transnet may have to approach the high court for an order permitting it to cancel the award of tender to T-Systems and awarding it to Gijima.

## FINANCIAL IMPLICATIONS

- 48 Should Transnet decide to proceed with the award of business to T-Systems, it could result in irregular expenditure to the value of the awarded bid. Further, there could be litigation costs, etc the full financial implications of which cannot be quantified at this stage.

## BUDGET IMPLICATIONS

- 49 Appropriate provisioning would have to be made in the relevant cost centres depending on the determined way forward.

<sup>41</sup> See Letter of Intent dated 2 March 2017.

<sup>42</sup> *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd* 2014 (3) SA 481 (CC).



## RECOMMENDATION

50 We therefore recommend the following:

50.1 T-Systems should be informed about the ruling of NT on this matter.

50.2 T-Systems must be informed that Transnet intends to abide by the ruling of NT. T-Systems must also be invited to make representation to Transnet regarding Transnet's proposed decision.

50.3 Transnet may have to approach the high court to set aside its earlier decision to award business to T-Systems.

50.4 Thereafter, Transnet should proceed to award the tender to Gijima.

### Compiled by:

\_\_\_\_\_  
Peter Volmink  
Executive Manager: ISCM Governance  
Date:

### Recommended/Not recommended by:

\_\_\_\_\_  
Ndiphiwe Silinga  
Group Executive: Legal Services  
Date:

### Noted by:

\_\_\_\_\_  
Siyabonga Gama  
Group Chief Executive: Transnet SOC Ltd  
Date:



The Identified Risk	Legal and Governance Observations
<p>(a) <i>The transition risk.</i> The minutes of the Board meeting reflect that management explained to the Board that Gijima had accepted the transition period condition in its bid submission, yet on its high level transition plan that was submitted with its BAFO, Gijima indicated that it would transition the "As - Is" Current Mode of Operation (CMO) during the proposed 6 month transition period and that enhancements and improvements (CMO+) would be done after the transition period. Management assumed this to mean that Gijima would continue to provide Transnet with CMO services as currently delivered by the incumbent, whereas the requirement was for Transnet to operate at full services (Final Mode of operation/FMO) after the 6 month transition period. This was said to be a "major risk".<sup>1</sup> The submission to the ADC also indicated that "this change in transition commitment would have resulted in a fundamental change in the RFP submission of Gijima"<sup>2</sup> and that non-compliance posed a significant risk to Transnet.<sup>3</sup></p>	<p>The statement that transition to FMO was a bid requirement is incorrect. It was never stated as a bid requirement that the successful bidder should transition to FMO within 6 months. The RFP had a prequalification requirement that bidders had to "commit to not more than six (6) months transition period from the current service provider to the new service provider".<sup>4</sup> No mention is made in the RFP of transitioning from CMO to FMO within 6 months.</p> <p>During the substantive responsiveness stage, bidders were evaluated based on their commitment to a successful 6 month transition period from the current service provider to the new service provider.<sup>5</sup> Once again, no mention was made of a transition to FMO.</p> <p>Furthermore, the main body of the MSA does not contain such a requirement either. There is a single reference to FMO in attachment "K" to the MSA which deals with "critical deliverables". However, when the reference to FMO in annexure "K" is read in context, it is clear that transitioning to FMO within 6 months was not considered as a critical deliverable. The deliverable was that "billing [should be] in accordance with service requirements as detailed in the Service Towers and in line with Service Provider monthly invoicing to Transnet fully operational 1 (one) month prior to the commencement date".<sup>6</sup> The "high level acceptance criteria" for this critical deliverable was stated as "As per the Transition Plan for full mode of operation (FMO) reporting". In our view, a single passing reference to FMO in annexure "K" could not reasonably be interpreted to mean that the bid document placed an obligation on the successful bidder to transition from CMO to FMO within 6 months. Even less, that failure to do so constituted a material risk.</p>

<sup>1</sup> Page 7 of the submission to the ADC.

<sup>2</sup> Ibid.

<sup>3</sup> Para 7.5.8 of the Board Minutes.

<sup>4</sup> Pages 16 and 22 of the RFP.

<sup>5</sup> Para 12 of the submission to ADC dated 8 February 2017.

<sup>6</sup> See item number 8 on page 4 of annexure "K" to the MSA.

The Identified Risk	<p data-bbox="188 472 220 1003"><b>Legal and Governance Observations</b></p> <p data-bbox="228 134 651 1319">The clarification letter sent to Gijima dated 5 September 2016 states "Transnet has always maintained that a successful respondent, must amongst other things, be able to transition from CMO to FMO within 6 months". The submissions to the ADC and the Board also state that bidders were informed that "after six (6) months transition period, Transnet requires to be operating on the full services in line with the RFP in order for operations to be stable with no major ICT transformational activities for at least eighteen (18) months".<sup>7</sup> But this is not what the bid document required. It merely required a transition from the current service provider to the new service provider within 6 months. As an organ of state, Transnet cannot deviate from the requirements stated in the bid document without following a procedurally fair process.<sup>8</sup> It appears that the relevant officials at Transnet laboured under a misapprehension that transitioning to FMO within 6 months was a bid requirement, whereas this was not the case.</p> <p data-bbox="730 134 906 1319">The submission to the ADC indicates that bidders were required to price for FMO and that "any pricing that is not based on FMO pricing cannot be objectively compared with other bidders' pricing as it is based on lesser service levels". However, once again, there is nothing in the pricing schedule to suggest that bidders were required to price for a transition to FMO within 6 months.</p> <p data-bbox="994 134 1209 1319">In any event, during the clarification sessions that were held, Gijima confirmed its commitment to the 6 months transition period as requested in the RFP. Gijima also confirmed that it had the necessary skills and capacity to transition all the required services within the stipulated RFP timelines and service levels.<sup>9</sup> Gijima explained that its use of acronyms such as "CMO- As IS" and "CMO+" refers to its own internal terminology and that its service would align to the full RFP and MSA requirements, including adherence to</p>
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<sup>7</sup> Page 2 of the clarification letter sent to Gijima dated 5 September 2017. See also Para 24 of the submission to ADC and para 14 of the Board submission

<sup>8</sup> *Allpay (Pty) Ltd v SASSA 2014 (1) BCLR (CC) para 40.*

<sup>9</sup> See Para 4 of Gijima's letter to Transnet dated 7 September 2017.



The Identified Risk	Legal and Governance Observations
<p>(b) <i>Price reduction risk.</i> During post-tender negotiations with Gijima and T-Systems, the bidders were requested to submit their best and final offer (BAFO). Gijima scored the highest points having provided the lowest bid. However, Gijima dropped its price by R560m "without providing any rational justification for such a significant reduction".<sup>11</sup> According to GRC, Gijima dropped its pricing in respect of Help and Service Desk by 53.8% and in respect of DC services by 31.1%. Transnet was concerned that Gijima was "low-balling" in order to get its foot in the door.</p>	<p>annexure "K".<sup>10</sup> Gijima explained that it would not risk its reputation and the livelihood of its employees by making "unconsidered commitments".</p> <p>Gijima points out that this risk was raised "out of the blue some 5 months after the submission by Gijima of its BAFO".<sup>12</sup> In its letter to Transnet dated 24 January 2017, Gijima explained that because it was not the incumbent service provider, it had to make certain pricing assumptions. However, as it gained insight into the scope, it was able to test its initial assumptions, reduce uncertainty and price accordingly. Its initial proposal included a significant amount of capex. However, it was since able to secure preferential pricing from IBM which contributed significantly to the price reduction in its BAFO response. In relation to the Help and Service Desk tower, Gijima was able to gain insight from newly appointed individuals with key domain knowledge and was thus able to reduce input costs. Gijima maintains that it signed off on a profitable BAFO.<sup>13</sup> Management proposed suitable contractual clauses to guard against the risk of low-balling. Management also pointed out that T-Systems had also reduced its pricing. During the debriefing session price reduction was once again mentioned as a reason for disqualifying Gijima, but according to Gijima, Transnet officials present could not explain why Gijima's detailed explanation for the price reduction was not accepted. Gijima also mentions that during the clarification sessions, the Group CIO, the GCSCO and the Category Manager: Group Strategic Sourcing indicated that they were satisfied with Gijima's explanation for the price reduction.<sup>14</sup> A member of Transnet's Group Strategic Sourcing whom we consulted denied that Transnet's officials expressed satisfaction with Gijima's explanation during the clarification itself, but agrees that Transnet's officials accepted Gijima's explanation during discussion, after Gijima left the meeting.</p>

<sup>10</sup> See para 2.5 of Gijima's letter to Transnet dated 24 January 2017.

<sup>11</sup> Page 11 of the ADC submission.

<sup>12</sup> Para 22 of Gijima's complaint.

<sup>13</sup> See para 2.4 of Gijima's letter to Transnet dated 24 January 2017.

<sup>14</sup> Para 39.8 of Gijima's complaint.

The Identified Risk	Legal and Governance Observations
(c) <i>Data centre (DC) risk.</i> The risk assessment conducted by Gartner revealed that the Vodacom DC that Gijima intended to use still needed to be built. <sup>15</sup> There was also outstanding equipment that had to be procured from overseas OEMs. The amount of time required to import and install the equipment raised a risk that Gijima would not be able to transition within the 6 month stipulated period.	In its letter to Transnet dated 7 September 2016, Gijima explains that “we could not be presumptuous and [equip] your dedicated space before we are announced as a successful bidder”. <sup>16</sup> Gijima confirmed that upon receipt of the award it would activate mitigation strategies in conjunction with IBM to ensure that the necessary equipment is delivered and installed on time. In its further letter to Transnet dated 24 January 2017, it stated that “pre-builds” of the equipment have been done and that the necessary equipment was pre-ordered. Furthermore, IBM, Gijima’s partner, confirmed that it has the equipment needed to complete the DC within a 4 week period. Gijima would also pre-clear the equipment at customs. <sup>17</sup>
(d) <i>Scope and Contract.</i> The clarification letter sent to Gijima dated 5 September 2016 indicates that the services that has been rendered to Gijima’s references (ArcelorMittal and FNB) did not compare with the nature and magnitude of the services required by Transnet.	In its letter dated 7 September 2016, Gijima replied that the references were selected based on “similar and/or related projects as requested in the IT Data services RFP”. These references “serve as a small window into the depth and breadth of our capability”.  It must be noted that the RFP simply called for 3 references from customers on similar and/or related projects. There is no suggestion in the RFP that the services rendered to existing customers had to be a precise match with those stipulated in the RFP.  Furthermore, the references were not required as either a “mandatory” or “essential” returnable document and played no role in the bidder’s evaluation. If Transnet was not satisfied with these references, it could have requested others.
(e) <i>Early Termination Fee.</i> Gijima’s BAFO apparently contained a provision that an early termination fee in excess of R400m was payable should Transnet elect to terminate for convenience. The CFET assumed that this amount was also payable if Transnet were to cancel the contract due to Gijima’s failure to transition the required services within 6	Gijima clarified that the early termination fee would only apply if Transnet should terminate for convenience. Gijima confirmed that the early termination fee would not be applicable in the event of breach of contract.

<sup>15</sup> Page 7 of the submission to the ADC.

<sup>16</sup> See para 3.3 of Gijima’s letter dated 7 September 2017.

<sup>17</sup> See para 2.2 of Gijima’s letter to Transnet dated 24 January 2017.

The Identified Risk	Legal and Governance Observations
months. Group Risk and Compliance (GRC) raised the early termination fee as a concern. <sup>18</sup>	
(f) <i>SD risk.</i> The 10% difference in SD between Gijima and T-Systems was raised as a risk.	<p>Reliance on SD as an "objective criterion" was unjustified since SD had already been evaluated as a prequalification criterion. Furthermore, Transnet did not follow a procedurally fair process in that Gijima was never afforded an opportunity to comment on this aspect, before it was disqualified.</p>
(g) <i>Other risks.</i> Perceived leniency. The ADC raised a concern that Transnet showed leniency towards Gijima since it was given a number of opportunities to manage risks that were highlighted by Transnet. <sup>19</sup>	<p>The GCE recommended that the GCIO had to engage further with Gijima in order to clarify and assess the business risks. He cannot be faulted for following a procedurally fair process in order to assess the risks. It is a well-established principle of public procurement that organs of state have to observe the "ever flexible duty to act fairly". As the SCA explained in the <i>Metro Projects</i> case "<i>Fairness must be decided on the circumstances of each case. It may in given circumstances be fair to ask a tender to explain an ambiguity in its tender; it may be fair to allow a tenderer to correct an obvious mistake; it may, particularly in a complex tender, be fair to ask for clarification or details required for its proper evaluation</i>".<sup>20</sup> Following a procedurally fair process should not be regarded as a demonstration of "leniency". As management explained to the ADC the purpose of engagement "is to allow delivery of a fair process".<sup>21</sup></p>
The risks of changing suppliers. The ADC raised the concern that "the risk of changing suppliers far outweighs the risks of continuing with the current service provider, who could be assisted to improve services".	<p>The possibility that suppliers may be changed is an inherent consequence of following an open tender process. This factor cannot be used as a reason not to appoint a new supplier.</p> <p>None of the risks that were believed to be inherent in Gijima's bid are likely to withstand judicial scrutiny.</p>

<sup>18</sup> Para 57 of the submission to the ADC.

<sup>19</sup> Para 5.4.5 of the minutes of the ADC meeting.

<sup>20</sup> *Metro Projects v Klerksdorp Municipality* 2004 (1) SA 16 (SCA) para 13.

<sup>21</sup> Para 5.4.6 of the minutes of the ADC meeting.

## ANNEXURE PV 31



PV 31



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1 August 2017

**MNCEDISI NDLOVU & SEDUMEDI ATTORNEYS**

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 2196

Dear Sirs,

**LEGAL OPINION IN RESPECT OF THE AWARDING OF AN IT DATA SERVICES  
 TENDER (GSM/15/08/1310)**

We thank you most sincerely for the instruction in the above matter and enclose for your kind attention, the opinion as requested. Feel free to contact us should any further clarity be sought.

We await your further instructions in this regard.

Yours truly

**LT SIBEKO (SC)**  
**ADV. B FORD**

**LEADERSHIP:** AL PLATT SC (GROUP LEADER), APS NXUMALO (DEPUTY GROUP LEADER)  
 IAM SEMENYA SC (MANAGEMENT), AP BEZUIDENHOUT (MANAGEMENT), N NHARMURAVATE (MANAGEMENT),  
 JA KITCHING (MANAGEMENT), L LIPHOTO (MANAGEMENT), G OLWAGEN-MEYER (MANAGEMENT)  
**SENIOR MEMBERS:** MG KHOZA SC, AL PLATT SC, IAM SEMENYA SC, LT SIBEKO SC, PJ VENTER SC  
**MEMBERS:** LC ABRAHAMS, LH ADAMS, G ALLY, NB BANGISI, N BEHARIE, AI CAJEE, V DE WIT, DJ ERASMUS, EJ FERREIRA, B FORD, ZE GUMEDE, MP HLABYAGO,  
 JM KILIAN, JA KITCHING, M KOETLE, LM LIPHOTO, A LOUW, TJ MACHABA, S MAGAQA, P M MAHLATSI, A MAKKA, K MAPUTLA, EL MATSHABA,  
 TM MCBAIN-CHARLES, FR MEMANI, J MERABE, PL MOKHOBO, NH MOLOTO, TJ MOSENYENI, MJ NGOBENI, N NHARMURAVATE,  
 VJ NKONDO, E NWEDO, APS NXUMALO, G OLWAGEN-MEYER, F OPPERMAN, K POTGIETER, JC PRINSLOO, JG RASETHABA,  
 M RASIVHETSHELE, B ROWJEE, A SEWPERSATH, A SHUDE, I STRYDOM, M TONYELA, SI VOBI  
**DOOR MEMBERS:** A KNOETZE, F MAGANO, SE MAYET, J VAN GARDEREN  
**ASSOCIATE MEMBERS:** AP BEZUIDENHOUT, MA JONKER, CON. COURT JUDGE M MADLANGA



## **INTRODUCTION**

1. The Consultant is Transnet SOC Ltd:

1.1. an organ of state as defined in section 239 of the Constitution, Act 108 of 1996 ("the Constitution"); and

1.2. a major public entity as set out in Schedule 2 of the Public Finance Management Act No. 1 of 1999 ("the PFMA").

2. This matter relates to the awarding of an IT DATA SERVICES TENDER (GSM/15/08/1310), "the tender", to T-Systems SA (Pty) Ltd ("T-Systems") by the Consultant as confirmed in a Letter of Intent dated 2 March 2017 ("the decision").

3. The decision was preceded by various reports set out below for purposes of chronology, but which will be discussed further in the body of this advice. They are the following:

3.1. on 8 September 2016, the Acting Executive Manager ISCM Governance issued a report recommending that the Cross Functional Evaluation Team ("CFET") request Gijima Holdings (Pty) Ltd ("Gijima") to make representations on how it intends to manage the risks that the CFET had identified ("the ISCM Governance report");



- 3.2. on 7 February 2017, the Consultant's Group Financial Officer prepared a report in which it is recommended that the tender be awarded to Gijima Holdings (Pty) Ltd ("Gijima"), ("the GFO report"); and
- 3.3. On 15 February 2017, the Consultant's Group Chief Executive Officer issued a report recommending that the Board approve the award of the tender to T-Systems ("the GCE report")
4. The Consultant's Board approved the recommendation as set out in the GCE report, leading to the aforementioned Letter of Intent being issued in favour of T-Systems.
5. On 2 March 2017, Gijima, in accordance with paragraph 24.4 of the Transnet Procurement Policy Manual ("PPM"), submitted a complaint to the Transnet Procurement Ombudsman ("TPO"). The complaint challenged, *inter alia*, the basis on which the tender was incorrectly evaluated in favour of the successful bidder.
6. Owing to the fact that the issues raised in the Gijima complaint, involved the Transnet Board ("the Board"), the TPO requested National Treasury to investigate the complaint.
7. On 29 June 2017, National Treasury, in keeping with its mandate as set out in the National Treasury SCM Instruction 3 of 2016/2017 ("the instruction"), concluded that the tender was incorrectly awarded to T-Systems as no objective

criteria was listed on the bid documents, justifying the awarding of the tender to a bidder other than the highest scoring bidder. National Treasury invited the Consultant to submit its comments to the National Treasury instruction.

8. The Consultant responded to National Treasury on 12 July 2017, qualifying the extent of its disagreement with the instruction in a number of respects, more fully discussed below. Subsequent thereto, National Treasury issued its final decision and remedial action on 18 July 2017, confirming the position adopted on 29 June 2017.

9. In the light of the above-mentioned controversy, our advice was sought, on an urgent basis, on the following questions, as formulated by the Consultant, namely:

- 9.1. Whether the decision of the Board to award the tender to T-Systems and not Gijima, based on a consideration of objective criteria, was justifiable and accordingly defensible?
- 9.2. Whether the decision by National Treasury in directing that the tender be awarded to Gijima was correct in law if not, and, what steps could be taken by the Consultant in respect of that decision?
- 9.3. To the extent that the decision by National Treasury is correct, what steps the Consultant ought to take in respect of the letter of intention that was issued to T-Systems?

10. The factual background to this matter is comprehensively set out in the voluminous documentation that was forwarded to us and is, in order to limit the prolixity of this opinion, not repeated herein, except in instances where the context and ease of reference necessitates such.

#### **BRIEF COMMENTARY ON THE VARIOUS REPORTS**

##### **A. THE ISCM REPORT**

11. The report confirms *inter alia* that the CFET commenced with tender evaluations on 28 January 2016, "*after which seven bidders met the technical threshold*". Further that a decision was taken to conduct post tender negotiations ("PTN") and due diligence with the two highest overall scorers, namely T-Systems and Ubuntu Technologies. It is explained that the reason why the due-diligence exercise and site visits were conducted, was to verify the capabilities of the bidders in order to confirm that there are no probable risks that may have an adverse impact during the delivery or performance required in terms of the contract.
12. Ubuntu Technologies withdrew, for a number of reasons and the CFET motivated to the Group Chief Executive ("GCE") for Gijima to be shortlisted together with T-Systems in order for the tender process to remain competitive. The GCE approved the inclusion of Gijima. The PTN and due diligence assessments were undertaken with both T-Systems and Gijima. On 17 August 2016, Gijima and T-

Systems submitted their best and final offers ("BAFO"). Gijima scored the highest overall points for price and preference.

13. Following the due-diligence exercise, the CFET and Gartner<sup>1</sup> compiled a report which highlighted a number of risks prevalent within Gijima's BAFO. As a result of the risks identified in the Gartner report, the CFET sought an opinion from ISCM Governance on whether or not the risks may be used as objective criteria to justify the awarding of the tender to T-Systems.
14. The ISCM held that the risks identified may constitute objective criteria justifying the award of the tender to the second ranked bidder but that Gijima be afforded an opportunity to make representations on how it intends to manage the risks identified. Further that, in the event of Gijima failing to properly address the identified risks, the CFET may award the bid to the second ranked bidder. The relevant positions of the Report recorded, *inter alia*, the following:

*"Even when Gijima did meet the technical threshold and has offered to the consultant the lowest price offer, the results of the risk assessments may justify the award of a tender to the second ranked bidder (T-Systems). Particularly, where Gijima has been afforded with an opportunity to propose remedial or mitigating measures and fails to do so adequately. However, the risks that have been identified, have to be material, in order for objective criteria to be used to award a tender. Where the*

risks are material and cannot be managed, a prudent administrator cannot be expected to award a tender to the highest overall scorer even in the presence of such material risks, as it may be cost-effective to do so."<sup>2</sup> (emphasis added)

See also:

"ISCM Governance is of the view that it would not be cost-effective to award business to a bidder that ticks all the right boxes with regards to price and preference, but cannot deliver properly"<sup>3</sup> (emphasis added)

See also:

"It was recommended that the CFET request (sic) Gijima to make representations on how it intends to manage the risks that the CFET identified. In the event that Gijima fails to properly address the identified risks, the CFET may award the bid to the second ranked bidder, only where it is lawful, reasonable and procedurally fair to do so. Furthermore, the risks that were identified must be material in order to justify the use of objective criteria. Lastly, there must not be any double counting, in that were(sic) Gijima was penalized during the evaluation stage for the same risk considerations, the risks

<sup>2</sup> ISCM Report, page 3, par 12

<sup>3</sup> *Ibid*, page 4, par 14 (last sentence)

*cannot again be considered at the award stage.*<sup>4</sup> (emphasis added)

B. THE GFO REPORT

15. The material aspects of the report confirm that the respective bidders complied with the various stages of the bid evaluation process. In this regard, the following is noted:

15.1. At stage 1, administrative responsiveness was measured and the bids were evaluated in terms of submission of the bids within the stipulated date and time and the submission of complete and valid returnable documents.

15.2. At stage 2, substantive responsiveness was measured and the bids were evaluated in terms of technical and Supplier Development pre-qualification criteria. At this stage of the process, the bidders were also evaluated on the presence of a priced offer and their commitment to a successful transition from the current service provider to the new service provider in line with the RFP Service Level Agreements.

15.3. At stage 3, the technical evaluation criteria were tested setting the threshold for further consideration at 70% which all seven bidders achieved.

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<sup>4</sup> Ibid page 5, par 17



15.4. At stage 4, during which the commercial aspects of the bids were evaluated, the CFET realised that bidders had made numerous assumptions on their initial bids regarding the Consultant's requirements. These assumptions on the bidders' pricing workbook made it difficult for the CFET to evaluate bids on a comparative basis. This led to bidders being invited to the IT Data Room, where they familiarised themselves with the Consultant's IT landscape. Subsequent thereto, the bidders were invited to a "closing the gap session" intended to clear up all assumptions in order to enable bidders to provide the Consultant with a revised pricing workbook. The bidders submitted their revised prices on 6 June 2016 after which a second commercial evaluation was conducted.

16. On 15 July 2016, subsequent to the commercial evaluation, the GCE approved that negotiations between the top two ranked bidders, T-Systems and Ubuntu be conducted. Ubuntu later withdrew and was replaced by Gijima. Both T-Systems and Gijima were subjected to risk assessment. The Gartner risk assessment revealed increased risk in respect of Gijima when compared to T-Systems, as listed below;

- 16.1. the Gijima Data Centre not being operative;
- 16.2. security risk;
- 16.3. a major transition risk in the transition period to reach the required levels of services as per the RFP;

- 16.4. pricing risk of paying for RFP required services but receiving other service levels; and
- 16.5. the risk of the Consultant and Gijima being able to commit the required number of skilled resources in order to be able to execute the transition period and to manage the contract and the supplier.

("the risks")

- 17. Based on the risks that were identified in respect of Gijima, Group Strategic Sourcing ("GSS") sent a request to Gijima on 5 September 2016 to clarify the risks identified and to provide it an opportunity to advise the Consultant on how they intended to address the risks. Gijima responded on 6 September 2016, but the response did not adequately address the risks identified. This resulted in the CFET requesting legal counsel from Group Legal on the way forward.
- 18. Group Legal reviewed the request for clarification and concluded that it was justifiable to select the second ranked bidder, based on the material risks which were identified on the first ranked bidder (Gijima) and that this decision can be legally defended in court as the Consultant would have acted in a manner that was lawful, reasonable and procedurally fair.
- 19. The Group Chief Supply Chain Officer ("GCSCO") also requested the Consultant's Group Risk and Compliance Department ("Group Risk") to conduct an independent risk assessment based on the residual risks that existed on the IT Data Project.

20. Group Risk supported the view expressed by the IT Data Services CFST that the risks raised in the report are high. They supported the view of the IT Data Services CFET that the risks raised in the Gartner report are high and should the business decide to accept these risks, a risk acceptance process should be followed.
21. The CFET's view, was that the risks that were highlighted in the Gartner and Group Risk and Compliance's reports were material enough to justify the use of objective criteria to recommend the second ranked bidder, for the following reasons; the identified risks had possible cost implications for the consultant and also had a potential to render the entire tender process unjust to the other bidders who submitted their tendered pricing based on transition from current service levels to the service levels required by RFP.
22. The CFET's recommendation, for awarding the tender to T-Systems based on objective criteria as a result of the business risks that were highlighted, was submitted to the Group Chief Information Officer ("GCIO") for recommendation to the GCE. The GCIO did not support the CFET recommendation. The GCIO was of the view that the risks that were highlighted in both the Gartner and the Group Risk reports needed to be fully tested as they did not emerge during the RFP evaluation process. The GCE recommended that the GCIO engage the first ranked bidder to clarify and assess the identified business risks and assess their response with a view to confirm, together with SCM, that the pricing that was submitted by the first ranked bidder on the BAFO submission, constituted a valid bid.

23. The GSS, in consultation with the office of the GCIO and GCSCO, drafted clarification questions which were sent to Gijima on 19 January 2017. Gijima was also invited to attend a clarification meeting on 23 January 2017. Given the clarification furnished, the GCIO advised that she was satisfied that –

*“all previously identified risks have been adequately mitigated and that the recommendation for award should be made to the first ranked bidder (Gijima in line with the 90/10 principle)”<sup>5</sup>* (emphasis added)

24. Supply Chain Management perused Gijima’s clarification response letter and did not find any grounds for non-responsiveness based on the first ranked bidder not having priced for the full scope of services as required in the RFP.
25. The report confirms further that Group Risk also reviewed Gijima’s clarifications request letter, together with their response letter and was satisfied that the risks highlighted in the Risks Report have been adequately addressed.
26. The report concluded with the assertion that given the GCIO’s satisfaction that the risks have been adequately mitigated, the first ranked bidder be recommended for the award of the contract as preferred bidder on the PPM principle of 90/10.

<sup>5</sup> GCFO Report, page 14, par 70

### C. THE GCE REPORT

27. The material aspects of the GCE report, apart from what is contained in the other reports, seems to suggest that the GCE relied on the position adopted by the ADC, who did not support the management recommendation to award the tender to the second ranked bidder owing to the risks which have been identified. This position was tabled at a Board meeting on 22 February 2017 and it was resolved that the tender be awarded to the second ranked bidder.

### THE GIJIMA COMPLAINT

28. When Gijima was notified of the Board's decision to award the tender to T-Systems, it lodged a complaint with the TPO, whereafter it was escalated to National Treasury. Gijima's principle complaints as set out in its letter of complaint dated 20 March 2017, can briefly be summarised as follows:

- 28.1. the Consultant deviated from awarding the tender to the highest scoring bidder on grounds that objective criteria justified the deviation;
- 28.2. the Consultant had not, beforehand, published what the objective criteria were and had failed to formulate such objective criteria clearly and specifically;

- 28.3. the Consultant never identified the definition of objective criteria and ultimately adjudicated Gijima's bid on new criteria which Gijima was not afforded an opportunity to address;
- 28.4. the risk factors raised by the Consultant were adequately addressed during a debriefing session;
- 28.5. that the issue regarding the price reduction had been addressed at the clarification meeting and in its letter of 24 January 2017, and at no point prior to the clarification meeting was Gijima's price reduction at BAFO raised as a concern for the Consultant; and
- 28.6. that a further reason for its disqualification, is the fact that there was a 10% difference in Supplier Development commitment provided by Gijima and T-Systems which contributed to the Consultant's decision to select T-Systems as the preferred bidder. However, Supplier Development commitment was a pre-qualification criterion which was considered during the evaluation process.
29. As stated earlier, Gijima's complaint was escalated to National Treasury who issued an instruction that it be awarded the tender.



## **THE LEGAL POSITION**

30. The awarding of public tenders is governed by section 217(1) of the Constitution, which provides that such awards must be made in accordance with a system that is:

- 30.1. fair;
- 30.2. equitable;
- 30.3. transparent;
- 30.4. competitive; and
- 30.5. cost-effective.

31. Section 217(2) of the Constitution provides further, that a procurement system may provide for categories of preference and for the advancement of categories of persons.

32. Section 217(3) of the Constitution provides that national legislation must prescribe the framework for the implementation of any preferential policy. This was done by the promulgation of the Preferential Procurement Policy Framework Act, 5 of 2000 ("the PPPFA"), which provides that organs of state must determine their preferential procurement policy based on a points system.

33. Section 2(1)(f) of the PPPFA provides that once the bids have been scored in terms of the PPPFA, the contract:

*"must be awarded to the bidder who scored the highest points, unless objective criteria in addition to those contemplated in paragraphs (d) and (e) justify the award to another bidder".*  
(emphasis added)

34. Regulation 9 of the PPPFA Regulations states that an award can be made to a bidder other than the highest scorer "on reasonable and justifiable grounds". The aforementioned issues are canvassed at length below.

**ANALYSIS - WHETHER THE BOARD'S DECISION WAS CORRECT OR INCORRECT**

35. The Board's decision not to award the tender to Gijima was informed, in the main, by the risks identified by Gartner.
36. The risks identified, and as presented by the ADC, satisfied the Board that such constituted objective criteria as provided for in terms of Regulation 7 of the PPPFA and paragraph 18.7.3 of the Transnet PPM ("PPM"), justifying the awarding of the tender to T-Systems.
37. The objective determination of the level at which the risks arose and whether such risks did in fact constitute objective criteria for purposes of Regulation 7 and par 18.7.3 of the PPM, is critically important and requires further scrutiny.

38. The entire procurement process can broadly be categorised in two main phases, comprising various interrelated parts, namely the functionality assessment phase and the award phase.
39. The Preferential Procurement Regulations, 2011<sup>6</sup>, define functionality as follows:

*"functionality" means the measurement according to predetermined norms, as set out in the tender documents, of a service or commodity that is designed to be practical and useful, working or operating, taking into account, among other factors, the quality, reliability, viability and durability of a service and the technical capacity and ability of a tenderer."*

40. Functionality forms an integral part of the first phase of the procurement process and is, as a qualification criterion, essential to ensure that only bidders who can effectively perform under the envisaged procurement contract are evaluated. The question whether functionality should be considered as both a qualification and award criterion has on several occasions come into the purview of our courts. In one such decision, the court held that functionality ought not to be used as both qualifying criteria and award criteria. This legal position, was confirmed in *Sizabonke Civils CC t/a Pilcon Projects v Zululand District Municipality* ("Sizabonke Civils").<sup>7</sup>

<sup>6</sup> Reg 1(k), GN R502 in GG 34350 of 8 June 2011 (hereafter the Preferential Procurement Regulations, 2011), issued under the PPPFA

<sup>7</sup> Municipality 2011 4 SA 406 (KZP)

41. In *Sizabonke Civils*, the court held that the Preferential Procurement Regulations, 2001 were inconsistent with the PPPFA to the extent that they purported to grant contracting authorities a discretion to employ functionality as an award criterion, whereas the Act restricts award criteria to price and preference points. The court also held that "*price*" as used in the PPPFA could not be interpreted to include functionality as these "*are entirely distinctive concepts*".
42. The court concluded, that the award of a tender on the basis of this adjudication method was contrary to the PPPFA and had to be set aside. The court held further that the relevant provisions of the Preferential Procurement Regulations, 2001, which purported to introduce functionality as an award criterion were unlawful and thus invalid.
43. The role of functionality as a qualification criterion was however formalised in the new Preferential Procurement Regulations, 2011. Regulation 4 of the 2011 regulations provides that functionality should be assessed as a qualification criterion during the first stage of the adjudication with only bidders meeting the minimum threshold score for functionality being allowed to proceed to the second round of adjudication. Consequently, at the second round of adjudication, only price and preference points were to be taken into account in ranking bidders. This regulation thus effectively put in place the approach of National Treasury's Instruction Note of 2010.
44. Importantly, Regulation 4 also settled the issue pertaining to the legal basis for the two-stage adjudication approach and the employment of functionality as a

qualification criterion. Following the full implementation of the 2011 regulations in December 2012, all public entities were from then on subjected to the PPPFA and its regulations, consequently nullifying the reasoning adopted in the *Sizabonke Civils* case.

45. The Preferential Procurement Regulations, 2011 thus ostensibly settled the role of functionality in tender adjudication and restricted it to a qualification criterion, but this was short-lived.
46. In a judgment departing significantly from the position formulated in *Sizabonke Civils*, the court held in *Rainbow Civils CC v Minister of Transport and Public Works, Western Cape*<sup>8</sup> ("*Rainbow Civils*") that functionality should be considered as award criteria as well. In that matter, the contracting authority invited bids for the management of building maintenance services.
47. The tender specifications provided that bids were to be evaluated for functionality, with bidders having to score a minimum threshold of 60 out of 100 points to proceed to the next round of adjudication during which, a ranking of bids would be done. The tender documents similarly indicated that the standard tender conditions would be used in adjudication, which involved awarding points in the second stage of adjudication for price, preference and quality, and awarding the contract to the tenderer scoring the highest number of points. However, in a separate part of the tender documents, a different approach to

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<sup>8</sup> 2013 ZAWCHC 3 (6 February 2013)

adjudication was provided for, which mirrored the approach following the PPPFA and Preferential Procurement Regulations, 2011.

48. The latter approach provided that functionality would be assessed as a qualification criterion with tenderers having to score 60 out of 100 points to proceed to the second stage of adjudication, during which only price and preference points would be considered in order to arrive at a ranking of bids and on which basis the contract would be eventually awarded.
49. The contracting authority followed the second adjudication approach, in which functionality constituted only a qualification criterion. The adoption of this approach eventually culminated in a review application, where the issue to be determined was essentially the method in which functionality was applied. The major difference between the two applicable methods related to the role of functionality: (a) as a qualification and award criterion on the one hand; versus only (b) as a qualification criterion in the latter. The court held that these methods were contradictory and that since both appeared in the tender documents without an indication of how the apparent conflict between the two would be resolved, the tender documents were materially vague and uncertain. This, in the court's view, offended the principles of fairness and transparency, since tenderers would not know with reasonable certainty on what basis their bids were to be evaluated and further that decision-makers would not know with reasonable certainty, which method to follow in adjudicating tenders.



50. The court found that the tender award offended the principles espoused in section 271(1) of the Constitution, the legality principle as well as the administrative-law rule against vagueness. The award was accordingly reviewable on the basis of section 6(2)(i) of the Promotion of Administrative Justice Act, Act 3 of 2000.
51. The *Rainbow Civils* judgment is important because it confirms the incompatibility of taking functionality into account in the award stage alongside price and preference points in order to arrive at a final ranking of bids, on the one hand, and the adjudication approach prescribed by the PPPFA and Preferential Procurement Regulations, 2011, which now apply to all contracting authorities, on the other hand.
52. The applicant in the *Rainbow Civils* matter held that functionality should be considered as an objective criterion justifying the award of the tender to a bidder other than the highest scoring one, in terms of section 2(1)(f) of the PPPFA. This argument resonated well with the court, which held in that regard that it is a constitutional imperative under section 217(1) of the Constitution, particularly the cost-effectiveness principle, for functionality to be taken into account in deciding which bidder should be awarded the contract. The court held thus (at par 61 and portion of 62)<sup>9</sup> –

*“To my mind it is self-evident that it is not cost effective to award a tender to a party who ticks the right boxes as regards*

<sup>9</sup> *Rainbow Civils* para 109-110.

*price and preference, but is unable to get the job done properly - whether through lack of experience, adequate personnel or financial resources.*

And also:

*... constitutional imperative that the procurement system be cost-effective, means that functionality must necessarily be taken into account in the adjudication of competing tenders and should not be relegated to a mere qualifying criterion."*

53. The court held further that within the context of the PPPFA, section 2(1)(f) would be the requisite mechanism to take functionality into account after the scoring of the bids on price and preference as an objective criterion that may determine the award. The court considered it obligatory for the administrator to take into account the difference in functionality between competing bidders before awarding the contract.

54. When functionality is taken into account during the award stage, in order to potentially play a determinative role in awarding the tender, after it has already been used as a qualification criterion, it effectively alters the basis upon which public contracts are awarded in South Africa<sup>10</sup>. By promulgating PPPFA, the legislature and the executive, through the Preferential Procurement Regulations,

<sup>10</sup> Potchefstroom Electronic Law Journal: The Role of Quality in the Adjudication of Public Tenders [2014] PER 32 – G. Quinot

2011 opted for a system in terms of which price and preference will be the determinative factors in deciding whom to award public contracts to.

55. In *Nexus Forensic Services (Pty)Ltd v Chief Executive Officer of SASSA and Others*<sup>11</sup>, the court held, at paragraph 23;

*"By referring to objective criteria, in addition to those contemplated in paragraph (e), the decision maker is therefore enjoined not to reconsider those criteria which had already been considered, but additional objective factors, other than those already included in the terms of reference."* (emphasis added)

56. If it was the intention for functionality to be considered both during the assessment phase as well as the award phase, then the tender documents ought to have made that clear. In *Premier, Free State & others v Firechem Free State (Pty) Ltd* <sup>12</sup>, Schutz JA stated the proposition as follows:

*"One of the requirements . . . is that the body adjudging tenders be presented with comparable offers in order that its members should be able to compare. **Another is that a tender should speak for itself. Its real import may not be tucked away, apart from its terms...**"* (emphasis added)

<sup>11</sup> (14708/2015) [2016] ZAGPPHC 579 (21 June 2016)

<sup>12</sup> 2000 (4) SA 413; [2000] ZASCA 28 (SCA) para 30

57. In the present instance, a careful study of the RFP presented to us, seems to confirm that there appears to be an intention to have evaluation criteria considered at PTN level, but this runs contrary to the PPM as set out herein below. Page 10 of the PFR states the following:

*"Transnet reserves the right to undertake Post Tender Negotiations (PTN) with selected respondents or any number of shortlisted respondents, such PTN to include, at Transnet's option, any evaluation criteria listed, in the RFP document"*

58. There is however no material evidence before us to come to a determination that the Consultant, advised Gijima and/or other bidders that the functionality requirement will be used at the award stage as well. The risks, more fully set out in Gartner's report, do not in our mind emanate at the award stage. This view is consistent with the sentiments espoused in the GCIO's report.
59. The identified risks ought to have been, and, it appears, were in fact considered during the functional assessment phase. What further mitigates against such being considered as a determining factor in the award of the tender, is the fact that notwithstanding these risks being applied, effectively on a double-counting basis, Gijima still provided a reasonable and nuanced response to how such risks would be addressed, which representations satisfied the Consultant's internal experts that the risks so identified, would be ably dispensed with.

60. In light of the foregoing, we can find no basis in law or fact, to arrive at a conclusion that there was a reasonable basis not to award the tender to Gijima, certainly not on the strength of the reasons advanced for such a decision. The Board's considered opinion that the identified risks constitute objective criteria for departing from the requirement to award the tender to the highest scoring bidder is not justifiable for the reasons advanced therefor. In our view, the decision is susceptible to attack on a number of grounds set out in section 6(2) of the PAJA.
61. The risks identified by Gartner do not arise beyond the factors already weighted and in respect of which Gijima scored the highest. It can therefore not be used for purposes of bestowing on it objective criteria status applicable at the award stage. Moreover, in addressing the role of the AC during the adjudication process, the PPM is quite clear about the fact that bidders must be evaluated against the **evaluation criteria stated in the RFP**. Further that, a decision to award a contract to another bidder, other than the highest scoring bidder, such be based on **other** objective criteria.<sup>13</sup> A reading in, with regard to "other" within the context of the evaluation criteria having been limited to the RFP can only be interpreted to mean, such criteria falling outside the RFP's evaluation criteria.
62. We have not been furnished with any documentation asserting that the risk assessment which was done at the award stage came as a consequence of such risk not having been considered at the evaluation stage as contemplated in the

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<sup>13</sup> Procurement Procedure Manual, page 194, paragraph 20.2.4 and 20.2.6

PPM. Nor were the two considered bidders advised that this was indeed the case.

63. The only instance where the AC can call for risk evaluation on a bidder is, if it holds the view that this was not done during the evaluation stage.<sup>14</sup> The documents presented to us, did not advance the reason for the risk assessment as done by Gartner, as a consequence of risk assessment not having been done during the evaluation stage. The AC had thus not complied with its own processes and that in itself renders the process procedurally flawed.
64. In any event, the assessment of risk as an evaluation criterion post the bidders' BAFO is also incongruent with the PPM. The PPM provides that the final criteria against which BAFO will be scored, will be strictly on price and preference in terms of the applicable preference point system.<sup>15</sup> We hold the view that by applying functional criteria twice over is nothing short of double-weighting or what is commonly referred to as double-dipping.<sup>16</sup>
65. It is further our view that the Board erred when it failed to award the tender to Gijima, having obtained the highest score in terms of the PPPFA in that the reasons advanced for that decision are unsustainable on either the law or the facts. In *Patel v Witbank Town Council*<sup>17</sup>, and in amplification of the aforementioned argument, the court held that if one of a multiplicity of reasons given for a decision is bad the entire decision must be set aside.

<sup>14</sup> Procurement Procedure Manual, page 199, paragraph 20.3

<sup>15</sup> Procurement Procedure Manual, page 193, paragraph 19.4.8

<sup>16</sup> *Grinaker LTA v Tender Board (Mpumalanga)* 2002 All SA 336 (T)

<sup>17</sup> 1931 TPD 284



66. For the reasons set out above it is respectfully submitted that the decision by the Board to award the tender to T-Systems and not Gijima on grounds of objective criteria, is not justifiable in law and is not defensible.

**WHETHER THE TREASURY DECISION, DIRECTING THAT THE TENDER BE AWARDED TO GIJIMA, WAS CORRECT**

67. National Treasury was requested by the Acting TPO, in a letter dated 3 April 2017, to investigate Gijima's complaint.
68. The report submitted by National Treasury, correctly sets out the history of the matter. A material consideration in the 29 June 2017 instruction letter was the fact that National Treasury concluded that there was no evidence that the Board complied with Regulation 6(5) of the PPPFA, which states that the contract must be awarded to the tenderer who scored the highest total number of points.
69. Further that Regulation 7(1) of the PPPFA 2011, states that a contract may be awarded to a tenderer who did not score the highest total number of points, only in accordance with section 2(1)(f) of the Act, and that objective criteria should have been stipulated in the tender documents.
70. The instruction letter further found that the bid did not prescribe objective criteria and therefore, the consultant had an obligation to award the bid in terms of

PPPFA Regulation 6(5) to the tenderer who scored the highest total number of points.

71. It is immediately apparent, regard being had to which Regulation was applicable that National Treasury erred in respect of which Regulation was applicable. At the time the of the bid, Regulation 7(1) of the 2011 PPPFA Regulations applied and not the 2017 Regulations. The correct application of the applicable Regulation confirms the following:

71.1. Regulation 6(5) provides as follows –

Subject to regulation 7, the contract must be awarded to the tenderer who scores the highest total number of points.

71.2. Regulation 7(1) provides as follows –

A contract may be awarded to a tenderer that did not score the highest total number of points, only in accordance with section 2 (1) (f) of the Act.

71.3. Section 2(1)(f) of the Act provides as follows –

2. (1) An organ of state must determine its preferential procurement policy and implement it within the following framework:

(a) ...

(b) ...

(c) ...

(d) ...

(e) ...

(f) the contract must be awarded to the tenderer who scores the highest points, unless objective criteria in addition to those contemplated in paragraphs (d) and (e) justify the award to another tenderer;

72. From the aforestated, it is immediately apparent that Regulation 6(5) must be read together with and is subject to Regulation 7(1).

73. The applicable Regulations at the time of the bidding were the 2011 Regulations, which provided as follows, in respect of specifying objective criteria –

**Evaluation of tenders on functionality**

4. (1) An organ of state must indicate in the invitation to submit a tender if that tender will be evaluated on functionality.
- (2) The evaluation criteria for measuring functionality must be objective.
- (3) When evaluating tenders on functionality; the
  - (a) evaluation criteria for measuring functionality;
  - (b) weight of each criterion;
  - (c) applicable values; and
  - (d) minimum qualifying score for functionality, must be clearly specified in the invitation to submit a tender.

74. This requirement is mirrored in the 2017 Regulations, which provides as follows–

**Tenders to be evaluated on functionality**

5. (1) An organ of state must state in the tender documents if the tender will be evaluated on functionality.
- (2) The evaluation criteria for measuring functionality must be objective.
- (3) The tender documents must specify
  - (a) the evaluation criteria for measuring functionality
  - (b) ....
  - (c) ....

75. It is evident that, apart from semantics, the requirements for specifying objective criteria are present in both the 2011 and 2017 Regulations and further to that, both sets of Regulations place supremacy on section 2(1)(f) of the Act. However, the reference to objective criteria is in relation to functionality and not objective criteria in relation to assessment done at the award stage.

76. When objective criteria are used during the award stage, in terms of the 2017 Regulations, it must be specified on the tender documents, but this is not the

case in respect of the 2011 Regulations. The 2017 Regulations provide as follows, in this regard –

**Award of contracts to tenderers not scoring highest points**

- 11.(1) A contract may be awarded to a tenderer that did not score the highest points only in accordance with section 2(1)(f) of the Act.
- (2) If an organ of state intends to apply objective criteria in terms of section 2(1)(f) of the Act, the organ of state must stipulate the objective criteria in the tender documents.

77. From the aforesaid, it is further apparent that National Treasury applied the incorrect Regulation to support its conclusions and that its finding in paragraph 28 in the letter of instruction, and providing thus, is wrong;

*"This bid did not prescribe objective evaluation criteria, therefore, Transnet has an obligation to award the bid in terms of the PPPFA Regulation 6(5) which states that, the contract must be awarded to the tenderer who scored the highest total number of points."*<sup>18</sup>

78. A further motivation for Treasury's decision to award the tender to Gijima is premised on the notion that risk assessment does not qualify as an objective criterion in terms of Section 2(1)(f) of the PPPFA. This conclusion is not sustainable, for the reasons set out below.

<sup>18</sup> Letter of instruction, dated 29 June 2017, paragraph 28

79. Apart from anything else, there is no explanation in the Treasury Instruction, setting out the basis for its reasoning or conclusion that risk assessment does not qualify as objective criteria or differently stated, why it excluded risk assessment as a factor.
80. Objective criteria with reference to s 2(1)(f) of the PPPFA referred to *supra* can be defined as those (a) not listed in paragraphs (d) and (e) of section 2(1) of the PPPFA, (b) which are objective in the sense that they can be ascertained objectively and their existence or worth does not depend on someone's opinion and (c) bear some degree of rationality and relevance to the tender or project.
81. What constitutes objective criteria cannot be limited to matters falling outside risk factors relevant to a tender in question. In certain circumstances, it may be that risk as a factor may constitute objective criteria for the purposes of the PPPFA. In *Road Mac Surface (Pty) Ltd v MEC for the Department of Transport and Roads*<sup>19</sup> the court held that objective criteria are "*those goals which are not specified and not contained in the PPPFA and which would usually become apparent when the tenders are considered and weighed against each other.*" These objective criteria do not have to be stated in the tender documentation.
82. From the aforesaid, it is clear that any criteria which, other than those already provided for in the tender documents, are objective in the sense that they can be ascertained objectively and their existence or worth does not depend on someone's opinion and bear some degree of rationality and relevance to the

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<sup>19</sup> 2006 ZANWHC 54.

tender or project, constitute objective criteria. The Treasury Instruction, excluding risk factors from the parameters of objective criteria is neither legally or factually sustainable.

83. In as much as we accept that the decision Treasury arrived at is correct, we disagree with the basis on which it arrived at that decision for the following reasons in brief:

83.1. the wrong Regulation was used in forming the conclusion that objective criteria ought to have been specified in the bid documents; and

83.2. the conclusion that risk factors do not constitute objective criteria is not sustainable and arbitrary.

**WHAT STEPS IF ANY, THE CONSULTANT CAN TAKE IN RESPECT OF NATIONAL TREASURY'S DECISION**

84. The National Treasury is established in terms of section 5 of the PFMA.

85. The functions of the National Treasury are set out in section 6 of the PFMA, which provides that –

(1) *The National Treasury must -*

(a) *promote the national government's fiscal policy framework and the co-ordination of macro-economic policy;*



- (b) *co-ordinate intergovernmental financial and fiscal relations;*
  - (c) *manage the budget preparation process;*
  - (d) *exercise control over the implementation of the annual national budget, including any adjustments budgets;*
  - (e) *facilitate the implementation of the annual Division of Revenue Act;*
  - (f) *monitor the implementation of provincial budgets;*
  - (g) ***promote and enforce transparency and effective management in respect of revenue, expenditure, assets and liabilities of departments, public entities and constitutional institutions; and***
  - (h) *perform the other functions assigned to the National Treasury in terms of this Act.*
- (2) ***To the extent necessary to perform the functions mentioned in subsection (1), the National Treasury -***
- (a) *must prescribe uniform treasury norms and standards*
  - (b) ***must enforce this Act and any prescribed norms and standards, including any prescribed standards of generally recognised accounting practice and uniform classification systems, in national departments;***
  - (c) ***must monitor and assess the implementation of this Act, including any prescribed norms and***

***standards in provincial departments, in public entities and in constitutional institutions;***

*(Section 6(2)(c) substituted by section 3 of Act 29 of 1999)*

- (d) may assist departments and constitutional institutions in building their capacity for efficient, effective and transparent financial management;*
- (e) may investigate any system of financial management and internal control in any department, public entity or constitutional institution;*
- (f) must intervene by taking appropriate steps, which may include steps in terms of section 100 of the Constitution or the withholding of funds in terms of section 216(2) of the Constitution, to address a serious or persistent material breach of this Act by a department, public entity or constitutional institution; and*
- (g) may do anything further that is necessary to fulfil its responsibilities effectively.*

***(3) Subsections (1)(g) and (2) apply to public entities listed in Schedule 2 only to the extent provided for in this Act."***

86. The list of institutions in respect of which subsection 1(g) and 2 apply, includes the Consultant.

87. Section 76(4) of the PFMA provides that the National Treasury may make regulations or issue instructions applicable to all institutions to which the PFMA applies, concerning any matter that may be prescribed for all institutions in terms of the PFMA. In terms of National Treasury SCM Instruction 3 of 2016/2017, issued in terms of the aforementioned section, the Consultant is enjoined to abide by such instruction. The letter from National Treasury dated 18 July 2017, constitutes an instruction and compliance therewith is mandatory.
88. To the extent that the Consultant takes the view that the instruction and the motivation therefore constitutes an unreasonable decision, the Consultant would be entitled to approach the court for relief in setting the instruction aside. We strongly advise against this approach, on the basis that a correct decision was arrived at, albeit that the reasons advanced are wrong. It would be prudent for the Consultant to abide by the decision and implement the remedial action owing to the fact that the Consultant's own decision to award the tender to the second ranked bidder was equally not justifiable on the face of the prevailing evidence and may be reviewable on any of the grounds set out in section 6(2) of PAJA.
89. The compliance with remedial action issued by an institution deriving its powers from the constitution is not a matter for debate. This position was clarified in a recent constitutional court decision.<sup>20</sup> (See: *Economic Freedom Fighters v*

<sup>20</sup> (CCT 143/15; CCT 171/15) [2016] ZACC 11; 2016 (5) BCLR 618 (CC); 2016 (3) SA 580 (CC) (31 March 2016)

*May remedial action be ignored?*

[72] It has been suggested, initially by both the President and the National Assembly, that since the Public Protector does not enjoy the same status as a Judicial Officer, the remedial action she takes

*Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others)*

**STEPS THE CONSULTANT OUGHT TO TAKE, IN RESPECT OF T-SYSTEMS, TO THE EXTENT THAT NATIONAL TREASURY'S INSTRUCTION IS CORRECT**

90. The Consultant is in receipt of an instruction from National Treasury, directing it to award the contract for Bid number: RFP GSM/15/08/1310 FOR THE PROVISION OF I.T. DATA SERVICES TO TRANSNET, to Gijima. The

cannot have a binding effect. The President has since changed his position but it appears, only in relation to this case, not necessarily as a general proposition. By implication, whomsoever she takes remedial action against, may justifiably and in law, disregard that remedy, either out of hand or after own investigation. This very much accords with the High Court decision in *DA v SABC* to the effect that:

"For these reasons I have come to the conclusion that the findings of the Public Protector are not binding and enforceable. However, when an organ of state rejects those findings or the remedial action, that decision itself must not be irrational." [77]

It is, of course, not clear from this conclusion who is supposed to make a judgement call whether the decision to reject the findings or remedial action is itself irrational. A closer reading of this statement seems to suggest that it is the person against whom the remedial action was made who may reject it by reason of its perceived irrationality. And that conclusion is not only worrisome but also at odds with the rule of law. [78]

[73] The judgment of the Supreme Court of Appeal is correct in recognising that the Public Protector's remedial action might at times have a binding effect. [79] When remedial action is binding, compliance is not optional, whatever reservations the affected party might have about its fairness, appropriateness or lawfulness. For this reason, the remedial action taken against those under investigation cannot be ignored without any legal consequences.

[74] This is so, because our constitutional order hinges also on the rule of law. No decision grounded on the Constitution or law may be disregarded without recourse to a court of law. To do otherwise would "amount to a licence to self-help". [80] Whether the Public Protector's decisions amount to administrative action or not, the disregard for remedial action by those adversely affected by it, amounts to taking the law into their own hands and is illegal. No binding and constitutionally or statutorily sourced decision may be disregarded willy-nilly. It has legal consequences and must be complied with or acted upon. To achieve the opposite outcome lawfully, an order of court would have to be obtained. This was aptly summed up by Cameron J in *Kirland* as follows:


"The fundamental notion – that official conduct that is vulnerable to challenge may have legal consequences and may not be ignored until properly set aside – springs deeply from the rule of law. The courts alone, and not public officials, are the arbiters of legality. As Khampepe J stated in *Welkom*. . . '(t)he rule of law obliges an organ of state to use the correct legal process.' For a public official to ignore irregular administrative action on the basis that it is a nullity amounts to self-help. And it invites a vortex of uncertainty, unpredictability and irrationality." [81] (Footnotes omitted.)

[75] The rule of law requires that no power be exercised unless it is sanctioned by law and no decision or step sanctioned by law may be ignored based purely on a contrary view we hold. It is not open to any of us to pick and choose which of the otherwise effectual consequences of the exercise of constitutional or statutory power will be disregarded and which given heed to. Our foundational value of the rule of law demands of us, as a law-abiding people, to obey decisions made by those clothed with the legal authority to make them or else approach courts of law to set them aside, so we may validly escape their binding force.

Consultant is advised to comply with that instruction and inform T-Systems accordingly.

91. We advise further that the Consultant is, as a result of the instruction, duty bound to withdraw the letter of intent and/or any such further extensions thereto, citing the decision of National Treasury as motivation.

92. We advise accordingly.



**L.T. SIBEKO SC  
ADV. B FORD  
CHAMBERS, JOHANNESBURG  
1 AUGUST 2017**

**EX PARTE: TRANSNET SOC LIMITED**

**IN RE: AWARD OF IT DATA SERVICES BID NO. GSM/15/08/130**

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**ADDENDUM TO OPINION**

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**Prepared by:**

**L.T. SIBEKO SC**

**ADV. B FORD**

Pitje Chambers

Johannesburg

Tel: (011) 223-8000

**To:**

**MNCEDISI NDLOVU & SEDUMEDI ATTORNEYS**

2<sup>nd</sup> Floor 16 Fricker Road Illovo 2196

Tel: 011 268 5225

Fax: 011 268 6805

Ref: MAT1334/NDLOVU/SEATE

Attention: Mesdames P MTHEMBU / K SEATE



## **INTRODUCTION**

1. The Consultant is Transnet SOC Ltd.
2. On 01 August 2017, we prepared and submitted an opinion regarding the issues that were raised with us as described fully in the body of the opinion.
3. We concluded the opinion by advising:
  - 3.1. the Consultant should comply with the remedial action set out in the letter from the Chief Director: SCM Governance, Monitoring and Compliance, dated 18 July 2017, in terms of which the Consultant was directed "*to award the contract*" to Gijima; and
  - 3.2. that the Consultant should send out a letter to T-Systems in terms of which it gave notice of its intention to withdraw the letter of intent issued to it on 02 March 2017, on the basis of which it was informed that it had been identified as a preferred bidder to enter into negotiations to provide the services which form the subject matter of the bid, in compliance with the remedial action set out in the letter from the National Treasury referred to in 3.1 above.
4. Following the delivery of the opinion, on 02 August 2017, we were requested to advise the Consultant on the practical implementation of the remedial action issued by National Treasury as described above. To this extent, our advice was sought on two issues, namely:

4.1. whether the remedial action set out in the letter from National Treasury in terms of which the Consultant is directed to award the tender to Gijima has the same status as an order of Court? and

4.2. whether the Consultant first has to go to court in order to give effect to the remedial action?

5. Properly construed, the two issues raised in paragraph 4 above, appear to be two sides of the same coin. In providing an answer to these questions, we believe it may be prudent to have regard to the text of the National Treasury Instruction which provides for remedial action in relation to the determination of complaints referred to it in circumstances of the present matter.

6. Paragraph 5 of the Treasury Instruction provides as follows:

**"5. IMPLEMENT REMEDIAL ACTION**

**5.1 The Accounting Officer/ Accounting Authority *must*:**

...

**5.1.4 Initiate the implementation of the recommended remedial actions ... [which] may include:**

**5.1.4.1 rejecting the bid;**

**5.1.4.2 cancellation of the contract;**

**..." (Emphasis supplied)**

7. Paragraph 6 provides for the reporting of outcomes of investigations, alternatively, complaints that are contemplated in the Treasury Instruction, and enjoins Accounting Officers/ Accounting Authorities of institutions such as the

Consultant to submit reports of the remedial actions set out in the Treasury's directives to Parliament or provincial legislatures on a quarterly basis.

8. It is worth mentioning that a proper reading of the provisions of the National Treasury Instruction are peremptory and should be complied with within the time provided for in the letter in which the determination of the complaint and the recommended remedial action have been set out.
9. In the light of the judgement of the Constitutional Court in the EFF v Speaker of the National Assembly and Others,<sup>1</sup> read with sections 76 (4) of the PFMA it is our considered view that compliance with the remedial action recommended in the letter from the National Treasury does not require a court order, as the provisions of the instruction are peremptory.
10. It is accordingly our view that the Consultant must comply with the remedial action without any recourse of having to go to court to obtain authority therewith. Accordingly, the Consultant must advise both T-Systems and Gijima:
  - 10.1. of the outcome of the determination of the complaint by the National Treasury;
  - 10.2. the remedial action recommended in the letter; and
  - 10.3. its intention to abide the decision of National Treasury, thereby implementing the remedial action within the time contemplated in the directive from Treasury.

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<sup>1</sup> 2016 (3) SA 580 (CC).

11. In the light of the foregoing, it may not be unreasonable to anticipate that T-Systems would be aggrieved by the notification that the Consultant intends to abide the decision of National Treasury, as a consequence of which it may no longer proceed to give effect to the letter of intention furnished to it. This may result in litigation being instituted by T-Systems in an effort to assert whatever right it may claim has been infringed by the Consultant's compliance with the remedial action recommended by Treasury.
12. It is our considered view that the anticipated litigation might have the effect of extending T-System's existing contract by default, as it may seek to obtain a preservation order, pending the final determination of an application to review the remedial action by Treasury and the concomitant award of the contract to Gijima.
13. We hope that this clarifies the questions raised in the instructions received subsequent to the furnishing of the opinion.
14. We advise accordingly.

02 AUGUST 2017

**EX PARTE: TRANSNET SOC LIMITED**

**IN RE: AWARD OF IT DATA SERVICES BID NO. GSM/15/08/130**

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**SECOND ADDENDUM TO OPINION**

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Prepared by:

**L.T. SIBEKO SC**

**ADV. B FORD**

Pitje Chambers

Johannesburg

Tel: (011) 223-8000

To:

**MNCEDISI NDLOVU & SEDUMEDI ATTORNEYS**

2<sup>nd</sup> Floor 16 Fricker Road Illovo 2196

Tel: 011 268 5225

Fax: 011 268 6805

Ref: MAT1334/NDLOVU/SEATE

Attention: Mesdames P MTHEMBU / K SEATE

## INTRODUCTION

1. The Consultant is Transnet SOC Ltd.
2. On 01 August 2017, we prepared and submitted an opinion regarding the issues that were raised with us as described fully in the body of the opinion.
3. We concluded the opinion by advising, *inter alia*, that:
  - 3.1. the Consultant should comply with the remedial action set out in the letter from the Chief Director: SCM Governance, Monitoring and Compliance, dated 18 July 2017, in terms of which the Consultant was directed "*to award the contract*" to Gijima; and
  - 3.2. the Consultant should send out a letter to T-Systems in terms of which it gave notice of its intention to withdraw the letter of intent issued to it on 02 March 2017, through which it was informed that it had been identified as a preferred bidder to enter into negotiations to provide the services which form the subject matter of the bid, in compliance with the remedial action set out in the letter from the National Treasury referred to in 3.1 above.
4. Following the delivery of the opinion and on 3 August 2017, we were requested to advise further on the extent to which the Consultant would be at risk of any claim for damages at the instance of T-Systems, in the event that it elected to comply with the National Treasury's instruction and the recommended remedial action.



5. In the light of the foregoing the question to be answered in respect of the issue raised in paragraph 4 above, essentially raises the following concerns, namely:

5.1. whether a claim for damages can arise as a result of the Consultant's election to abide the National Treasury instruction and the concomitant withdrawal of the letter of intent issued by it in favour of T-Systems? And

5.2. the circumstances under which such claim, if at all, may arise?

6. Before addressing the issues referred to above, it is worth pointing out that the letter of intention dated 02 March 2017, expressly records the following:

*"The purpose of this Letter Of Intent [LOI] is to document the intentions of the Parties in respect of the negotiation of the MSA and these will remain in effect until the MSA is negotiated and signed by both Parties, or until No. 120...calendar days have elapsed from the date of issue of the LOI, whichever event should occur first. Should the parties fail to reach agreement or conclude the MSA within 120...calendar days, then Transnet reserves the right to extend the validity period of the LOI or to approach the next ranked bidder."*

7. The paragraph of the LOI referred to above, properly construed, has the effect that the LOI has lapsed by effluxion of time. The consequence thereof is that, save for the award of the tender to T-Systems, there is presently no agreement between the parties to proceed with the negotiations of the terms of the MSA contemplated therein. This is more so given the fact that we have not been

advised if the validity of the LOI has been extended beyond the lapse of the 120 calendar days from the date on which it was accepted.

8. In respect of the interim arrangements contemplated in the LOI, the following is recorded at paragraph 2 thereof:

**"2. INTERIM SERVICE REQUIREMENT**

2.1 *The Service Provider agrees to promptly commence with the provision of the Services as detailed in the IT DATA Services RFP, after this LOI's confirmation date, an incompliance with the Transnet interim purchase/work order(s), including adherence to the additional conditions set out in this LOI, until such time that either, the MSA is formally concluded or the 120...calendar days LOI validity period expires or is dully extended.*

2.2 *Should negotiations between the parties breakdown for any reason, the Service Provider may immediately invoice Transnet for all reasonable, actual costs incurred prior to that date and such amount shall become due and payable by Transnet."*

9. It is against the backdrop of the express provisions of the LOI set out above that we address the questions raised.

**WHETHER A CLAIM FOR DAMAGES CAN ARISE AS A RESULT OF THE WITHDRAWAL OF THE AWARD OF THE TENDER TO T-SYSTEMS?**

10. It is trite law that a decision, by a public entity, resulting in the award or refusing a tender constitutes administrative action,<sup>1</sup> owing to the fact that the decision is

<sup>1</sup> See: Section 1 of PAJA which defines conduct which constitutes "administrative action"

one taken by an organ of state, exercising public power or performing a public function in terms of the Constitution or legislation, and the resultant decision may materially and directly affect the legal interests or rights of tenderers involved in the process which forms the subject matter of that decision.<sup>2</sup>

11. The procurement process ultimately results in the award of a tender to a successful party and the concomitant conclusion of a contract contemplated in such tender. It would follow, axiomatically, that the party not successful, may, for whatever reason, justifiably or otherwise feel aggrieved thereby, and wish to assert such right it may have under the laws that regulate procurement by public entities. The law, however, has developed to a point where the failure to award a tender to the unsuccessful party/parties may not justifiably lead to a claim for damages against the public entity involved in such procurement process.
12. In *Olitzki Property Holdings v State Tender Board and Another*<sup>3</sup> the court considered the issue of an unsuccessful tenderer who sought to claim loss of profits from a state tender board. Cameron JA, in *Olitzki*, held that that the focal point in determining whether a tender board may be liable to a tenderer in the course of exercising its function is a question of the interpretation of the empowering constitutional and statutory provisions. The court also considered the question whether the breach of the procurement provisions in the [interim]

<sup>2</sup> *Greys Marine Houtbay (Pty) Ltd and Others v Minister of Public Works and Others* [2005] ZASCA 43; 2005 (6) SA 313 (SCA); *Logbro Properties CC v Bedderson N.O. and Others* 2003 (2) SA 460 (SCA); *Transnet Ltd v Goodman Brothers (Pty) Ltd* [2000] ZASCA 151; 2001 (1) SA 853 (SCA)

<sup>3</sup> [2001] ZASCA 51; 2001 (8) BCLR 779 (SCA); 2001 (3) SA 1247 (SCA)

constitution give rise to a civil claim in damages for lost profit? This question was answered in the negative, at paragraph 31:

*"I agree with the observations of Davis J in Faircape Property Developers (Pty) Ltd v Premier, Western Cape<sup>[31]</sup> that in deciding whether a statutory provision grounds a claim in damages the determination of the legal convictions of the community must take account of the spirit, purport and objects of the Constitution, and that the constitutional principle of justification embraces the concept of accountability.<sup>[32]</sup> This in turn must of course weigh in the balance when determining legal responsibility for the consequences of public malfeasance. The proceedings in Faircape, however, involved an ordinary statute, not a constitutional provision creating legislative duties, and the damages at issue were for out-of-pocket expenses, not for lost profit. The principle of public accountability is central to our new constitutional culture, and there can be no doubt that the accord of civil remedies securing its observance will often play a central part in realising our constitutional vision of open, uncorrupt and responsive government.<sup>[33]</sup> What precise remedy or remedies within the range available, including interdict (mandatory or prohibitory), review and the award of damages (whether for out-of-pocket losses or more), will be appropriate to secure that vision, depends however on the context of the statutory provision in question; and in section 187 I can find no basis of interpretation and no applicable principle of public policy entitling the plaintiff to claim its lost bargain. It must follow that Claim A was rightly set aside."*

13. In *Steenkamp NO v Provincial Tender Board, Eastern Cape*,<sup>4</sup> the pivotal question to be determined was whether a successful tenderer whose tender award was subsequently withdrawn, may claim damages from the relevant tender board for out-of-pocket expenses incurred in reliance on and subsequent to the award.
14. The Supreme Court of Appeal held, after considering a number of judgments, including the *Olitzki Property Holdings v State Tender Board and Another*, that the empowering constitutional provisions, read with the governing statute, do not contemplate affording a disappointed tenderer the right to delictual damages.
15. The judgment of the Supreme Court of Appeal in the *Steenkamp* case referred to above was confirmed by the Constitutional Court.<sup>5</sup> In addressing the issue before it, the Constitutional Court set out the following *dicta* in relation to the questions raised in this regard:

*"[47] I must at the outset say that the submissions of the applicants are attractive but not sustainable. The mainstay of the applicant's case is that the controlling legislation does not expressly prohibit recourse by the successful tenderer to action for damages. That may be so. But that alone cannot be decisive. One must keep in mind that the*

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<sup>4</sup> 2006 (3) SA 151 (SCA)

<sup>5</sup> Reported in 2007 (3) SA 121 (CC)

*statute does not grant a right of action for damages. I agree with the Supreme Court of Appeal that the empowering constitutional provisions read with the governing statute do not contemplate affording a disappointed tenderer the right to delictual damages. As we have seen earlier, the Constitution envisages that decisions on procurement should reside in a body the operative statute creates. In turn the statute confers on the tender board the exclusive power to procure goods and services for the provincial government and a wide discretion in the exercise of its powers to solicit, evaluate and award tenders. The statute requires that the power must be exercised within the framework of principles set out in the guidelines. The guidelines are a set of principles determined by national government within which the procurement process should function. What is more, the statute confers independence on the tender board and immunises its decisions and operations from external interference. Nothing in the overall constitutional and legislative scheme explicitly or by the implication contemplates that an improper but honest exercise of the discretion of the tender board must attract a delictual right of an action in favour of a disappointment tenderer. In the words of Cameron JA, '[in] these circumstances to infer a*



*remedy judicially would be venture far beyond the field of statutory construction or constitutional interpretation'.*

...

[50] *Second, in my view a prudent successful tenderer may, after winning the tender and if required by the tender board to incur expenses in reliance on the award, negotiate the right to restitution of out-of-pocket expenses should the tender award be set aside. Once the tender is awarded the State and the tenderer are no more than equal contracting parties in an imminent sale. In daily commerce purveyors of goods and services strike bargains, which seek to mitigate their respective risks and to regulate restitution should the bargain falter. A negotiated or contractual remedy of this order is likely to be effective because it would be tailored to the peculiar facts connected to the actual delivery of supplies and services to the State. This avenue is bound to be better suited than a blunt remedy of recognising a generic duty of care in relation to out-of-pocket expenses incurred on the back of a tender award.*

...

[53] *The applicant made much of the distinction between the position of an unsuccessful tenderer and of an initially successful tenderer whose award is later invalidated. He was also at pains to distinguish his claim of out-of-pocket expenses from one for lost profits as was considered and disallowed in Olitzki. It is clear that his claim is not for loss of profit and not for*

*out-of-pocket expenses in preparing the tender. In any event the latter class of expenses is always irrecoverable whatever the fate of the tender is. On any outcome, expenses for preparing a tender have to be incurred.*

*...*

*[55] It is unnecessary to traverse every ground canvassed by the Supreme Court of Appeal in its judgment. I agree with several significant findings and the conclusion of that Court on why a duty of care is not owed to Balraz and in particular that:*

- (a) Compelling public considerations require that adjudicators of disputes, as of competing tenders, are immune from damages claim in respect of their incorrect or negligent but honest decisions. However, if an administrative or statutory decision is made in bad faith or under corrupt circumstances of completely outside the legitimate scope of the empowering provision, different public policy considerations may well apply.*
- (b) Legislation governing the tender board in this case is primarily directed at ensuring a fair tendering process in the public interest. Where legislation has a manifest purpose to extend protection to individual members of the public or groups, different considerations may very well apply again whether or not delictual liability ought to attach even in that case will be dependent on the factual context and relevant policy considerations.*

- (c) *Imposing delictual on the negligent performance of functions of tender boards would open the prospect of potential claims of tenderers who had won initially. This will be to the detriment of the invaluable public role of tender boards. A potential delictual claim by every successful tenderer whose award is upset by a court order would cast a long shadow over the decisions of tender boards. Tender boards would have to face review proceedings brought by aggrieved unsuccessful tenderers. And should the tender be set aside it would then have to contend with the prospect of another bout of claims for damages by the initially successful tenderer. In my view this spiral of litigation is likely to delay, if not to weaken, the effectiveness of or grind to a stop of tender process. That would be to the considerable detriment of the public at large. The resources of our State Treasury, seen against the backdrop of vast public needs, are indeed meagre. The fiscus will ill-afford to recompense by way of damages disappointed or initially successful tenderers and still remain with the need to procure the same goods or service."*

16. On the strength of the authorities referred to above, it is our considered view that no claim for damages, either for pure economic loss or out-of-pocket

expenses may follow on account of the Consultant giving effect to the remedial action of the National Treasury.

17. The view expressed above may, however, on the facts of the present case, need to be qualified with the proviso that T-Systems may be entitled to recover such amounts as are contemplated in paragraph 2 of the LOI which provides for the interim arrangements. Consequently, its claim, if any, would be limited to recover for the services contemplated in the interim arrangements.
18. In view of the approach we have adopted above, it is not necessary to consider the second leg of the legal question raised above.

#### **CONCLUSION**

19. We advise accordingly.

**8 AUGUST 2017**

## ANNEXURE PV 32



PV 32

## REPUBLIC OF SOUTH AFRICA



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

CASE NO: 40361/17

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVISED.
12/12/2015 <i>R. K. Highley</i> DATE SIGNATURE	

In the matter between:

TRANSNET SOC LTD

Applicant

and

T-SYSTEMS (PTY) LTD

1<sup>st</sup> Respondent

GIJIMA HOLDINGS (PTY) LTD

2<sup>nd</sup> Respondent

UBUNTU TECHNOLOGY

3<sup>rd</sup> Respondent

WIPRO TECHNOLOGIES SOUTH AFRICA (PTY) LTD

4<sup>th</sup> Respondent

BUSINESS CONNEXION (PTY) LTD

5<sup>th</sup> Respondent

EOH MTHOMBOLO (PTY) LTD

6<sup>th</sup> Respondent

MOBILE TELEPHONE NETWORKS (PTY) LTD T/A

7<sup>th</sup> Respondent

MTN

NATIONAL TREASURY

8<sup>th</sup> Respondent



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## JUDGMENT

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### **KEIGHTLEY J.**

#### *Introduction*

1. Between November 2015 and February 2017 Transnet Soc Ltd ("Transnet") conducted a tender process for the provision to it of IT data services ("the tender"). At the final stage of the tender process only two bidders remained in contention. These were the first respondent, T-Systems South Africa (Pty) Ltd ("T-Systems"), and the second respondent, Gijima Holdings (Pty) Ltd ("Gijima"). After some internal to-ing and fro-ing, on 22 February 2017, Transnet's Board decided to award the tender to T-Systems. A letter of intent was duly dispatched to this effect to T-Systems on 2 March 2017, and shortly thereafter a letter of regret was dispatched to Gijima. It is important to record at the outset that the tender was awarded to T-Systems despite the fact that Gijima was the highest-scoring bidder.
2. Gijima took issue with the award of the tender to T-Systems, and initiated a complaint with Transnet's Procurement Ombudsman. This resulted in the involvement of National Treasury ("Treasury"). Treasury expressed the view that the award of the tender to T-Systems was not in accordance with Transnet's legal obligations under the Preferential Procurement Policy Framework Act<sup>1</sup> ("the PPPFA"). This was because under that Act it was obliged to award the tender to the highest-scoring bidder. Treasury's view was that the deviation from this basic obligation was not justified on the grounds advanced by Transnet.

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<sup>1</sup> Act 5 of 2000

3. Although Transnet initially took issue with Treasury's stance, it ultimately accepted that it had acted incorrectly in awarding the tender to T-Systems. The Board took an "in-principle" decision to rescind the award to T-Systems, subject to T-Systems being invited to make representations as to why the in-principle decision should not be made final. T-Systems delivered its representations to Transnet and they were considered by the Board. On 27 September 2017 Transnet's Board decided that it would rescind its award of the tender to T-Systems, and would award the tender to Gijima, subject to a declaratory order being granted as to its entitlement to do so.
4. Consequent on this decision, Transnet instituted the present application. In its Notice of Motion it sought an order in the following terms:
  - (a) Declaring its decision to award the tender to T-Systems to be invalid and unlawful;
  - (b) Alternatively, declaring that Transnet had a right to rescind its decision to award the tender to T-Systems on the basis that that decision was invalid and unlawful;
  - (c) The review and setting aside of the tender to T-Systems;
  - (d) A direction that the tender be awarded to Gijima "in terms of the remedial action recommended by (Treasury) as set out in paragraph 7 of its letter dated 18 July 2017"
5. All of the bidders who had successfully participated in the early rounds of the tender process were joined in the application. Save for T-Systems and Gijima, they elected not to participate in the proceedings. Treasury was also joined. It did not oppose the application, but filed an explanatory affidavit for the assistance of the court. Initially T-

Systems opposed the application, and instituted a counter-application regarding the Board's later decision to award the tender to Gijima. Gijima, in turn, opposed the counter-application and instituted one of its own. Despite the early deeply contested status of the application, as things transpired, on 31 October 2018 T-Systems withdrew its opposition and recorded that it would abide the decision of the court. Gijima subsequently took the same route. Consequently, Transnet's application now stands unopposed.

6. There are two issues I wish to raise about the relief sought by Transnet in its notice of motion. The first relates to its relief for a declarator to the effect that it had a right to rescind its initial decision to award the tender to T-Systems. The second relates to the prayer that the court should direct Transnet to give effect to the remedial action recommended by Treasury in ordering that the tender be awarded to Gijima.

*Can the court declare that Transnet has a right to rescind its award to T-Systems?*

7. This is the question that arises from the first of the two issues I have identified, viz. the declarator that Transnet is entitled to rescind its original award. Part of its motivation for seeking this relief rested on the contention made in the founding affidavit that it was not *functus officio* when it made the decision to award the tender to T-Systems. When the matter came before me for hearing, counsel for Transnet advised the court that it did not pursue this relief, nor did it rely on its earlier contention that it was not *functus officio*. Instead, it sought simply to review and set aside its own decision on the basis that it was unlawful and invalid, and to seek an order confirming the award of the tender to Gijima.
8. Transnet acted properly in abandoning this as an alternative form of relief. The Constitutional Court held, in *MEC for Health, Eastern Cape v Kirland Investments (Pty)*

*Ltd t/a Eye and Lazer Institute*<sup>2</sup> that an organ of state cannot withdraw its own decisions even in circumstances where those decisions have no lawful basis. Once the decision is made, the organ of state is *functus officio*. It is bound, in those circumstances, to approach the court to exercise its powers of judicial review, and to set the impugned decision aside. Until it has done so, the decision, even if unlawful, has legal effect. This being the case, Transnet's contention that it was not *functus officio*, and its assumption that it could thus rescind its own decision was clearly incorrect. It would not have been appropriate for this court to consider making an order recognizing Transnet's right to rescind its order, as Transnet simply has no right to do so. The proper remedy is one of review, and the order sought from the court should follow the remedies available on review.

*What is the nature and effect of Treasury's recommendation to Transnet?*

9. This question arises from the second issue I identified earlier. Transnet wants this court to direct that Transnet must give effect to the remedial action recommended by Treasury. It says that Treasury advised it to award the tender to Gijima.
10. Transnet contends that the direction by Treasury constituted an instruction in terms of section 76(4) of the Public Finance Management Act<sup>3</sup> ("the PFMA"), and that in accordance with National Treasury Instruction Note 3 of 2016/2017: Preventing and Combating Abuse in the Supply Chain Management System ("Treasury Instruction Note 3"), Transnet is enjoined to abide by such instruction. In other words, Transnet says that this instruction is peremptory, and thus, it follows as an *"unassailable conclusion"* that this court must direct that the tender be awarded to Gijima.

<sup>2</sup> 2014 (3) SA 481 (CC) at paras [64], [88] & [89]

<sup>3</sup> Act 1 of 1999

11. As I indicated earlier, Treasury became involved in the matter after Gijima had lodged a complaint in terms of Transnet's own internal Procurement Ombudsman process. On 3 April 2017 the Acting Transnet Procurement Ombudsman requested Treasury to investigate the complaint. In doing so, Transnet was acting in accordance with its obligations under paragraph 3.3 of Treasury Instruction Note 3.
12. In Treasury's first response to the referral of the complaint, it drew Transnet's attention to Regulation 6(5) of the 2011 Regulations under the PFMA, which states that in the procurement process the contract must be awarded to the tenderer who scored the highest points. Regulation 7(1) of the Regulations permits an award to a tenderer who did not score the highest points only where this is based on objective criteria. Treasury advised Transnet that it had not stipulated what objective criteria would be used in the tender documents. For this reason, Transnet had breached its obligation to award the contract to the highest bidder.
13. Transnet responded, taking issue with Treasury's interpretation of the relevant provisions, and asserting that it had correctly taken into account objective criteria based on a risk assessment carried out at the award stage of the tender process. Its view was that this was in accordance with Regulation 7(1), that it had acted properly in making the award to the second-highest bidder, and that it had not breached the procurement rules.
14. Treasury's final letter at this stage was dated 18 July 2017. In it, Treasury reiterated that the Regulations and section 2(1)(f) of the PPPFA require that a tender must be awarded to the tenderer that scores the highest points, unless objective criteria justify the award to another tenderer. In Treasury's view, risk assessments did not qualify as objective criteria in terms of this section. Any risks identified at the award stage of the process should have been factored into the contract offered to the highest scoring bidder by way

of risk mitigating clauses. Only if the highest scoring bidder refused to accept those clauses could it be disregarded as the successful tenderer.

15. Treasury further advised that the accounting authority of a public entity like Transnet would commit an act of financial mismanagement if it failed to comply with the PFMA by permitting an irregular and wasteful expenditure. Treasury concluded that Transnet had an obligation under section 2(1)(f) of the PPFA, Section 51(1) of the PFMA, and Section 217(1) of the Constitution to award the contract to the highest scoring bidder.

16. It is this letter that Transnet characterises as the peremptory instruction to Transnet to award the tender to Gijima.

17. I have fundamental issues with this characterisation by Transnet, and hence with Transnet's request that this court should make an order giving effect to what it regards as being Transnet's binding instruction. My concern is not with the correctness of Treasury's advice to Transnet as contained in its 18 July 2017 letter. From what appears later in this judgment, I am in agreement with that advice. Instead, my concern flows, firstly, from the fact that Treasury itself disavows Transnet's characterisation of the 18 July 2017 letter as constituting binding remedial action in terms of Treasury Instruction Note 3. In the affidavit filed by Treasury, it made the following important submissions:

- (a) Treasury's mandate in terms of the procurement process of public entities is to monitor and assess compliance.
- (b) It does not usurp the power of public entities, like Transnet, to make tender awards.



- (c) Its letter of 18 July 2017 did not constitute binding remedial action, nor did it amount to an administrative decision (presumably within the meaning of "administrative action" under PAJA).
- (d) Its letter was solely aimed at informing Transnet of the outcome of its investigation.
- (e) Critically, Treasury's mandate was to investigate, and to provide its response to, the conduct of the relevant accounting officer or accounting authority.
- (f) Thus, Treasury did not purport to exercise any power in its letter of 18 July 2017 to take action having any direct effect on the rights of the tenderers concerned.

18. These submissions are consistent with the scheme of investigations set out in Treasury Instruction Note 3. Under paragraph 3.3, where a complaint implicates an accounting officer or authority, it must be reported to the relevant treasury. In this case, the relevant treasury was the National Treasury. It was for this reason that Transnet's Acting Ombudsman referred the complaint to Treasury: it involved the decision by the Board to award the tender to T-Systems, and its delegation to the General Chief Executive Officer to sign the letter of intent to give effect to this decision. In terms of paragraph 4.3 of Treasury Instruction Note 3, Treasury had a duty to inform Transnet of the proposed action flowing from its investigation. It did so in its letter of 18 July 2017.

19. Paragraph 5.1.4 of Treasury Instruction Note 3 refers to the duty of an accounting officer to implement recommended remedial action. Significantly, it specifies that remedial action is taken "against the supplier". It may include rejection of a bid; cancelation of a contract; restriction of a supplier from doing business with the state; or claiming damages from a supplier.

20. It is quite clear that in this case there was no complaint against a supplier that warranted remedial action under Treasury Instruction Note 3. It was a complaint against a decision to empower the accounting authority to enter into a contract with T-Systems through the award of the tender. Accordingly, Treasury was correct in its submission that its 18 July 2017 did not constitute recommended remedial action aimed at affecting the rights of T-Systems or any of the other tenderers. It was plainly aimed at the conduct of the accounting authority. In effect, it advised Transnet's accounting authority that it would be committing an act of financial misconduct if it proceeded with the decision to award the tender to T-Systems in breach of its obligation to award the tender to the highest scoring bidder. In other words, the accounting authority would be answerable to the executive, and would face possible financial misconduct proceedings, if Transnet ignored Treasury's conclusion that the award to T-Systems was in breach of Transnet's obligations under the PPPFA.
21. Seen in its proper context, Transnet is incorrect in characterising the 18 July 2017 letter as placing it under a peremptory obligation to award the tender to Gijima. Of course, to avoid committing an act of financial mismanagement, Transnet would have to act in accordance with Treasury's recommendation. But this does not mean that it must follow, as a necessary consequence, that this court must order Transnet to award the tender to Gijima. To proceed on that assumption is to blur the distinction between the purpose of the relevant statutory instruments regulating Treasury's role in monitoring compliance by public entities with their supply chain management obligations, and the scope and purpose of judicial review by the courts of the exercise of public power.
22. It is this blurring of the lines that gives rise to my second concern about Transnet's prayer for this court to order the award of the tender to Gijima "*in terms of the remedial action recommended*" by Treasury. If this court is to make an order directing that Gijima should

be awarded the tender, this will be because it is an appropriate order for the court to make in the exercise of its powers of review. It will not be because Transnet is bound by a directive to this effect from Treasury.

23. If that were the case, it would imply that that this court is similarly bound to give effect to Treasury's recommendation. This would be constitutionally untenable. Public powers must be exercised in accordance with the Constitution and with the relevant statutory framework regulating those powers. Section 217 (1) of the Constitution obliges organs of state to follow fair, equitable, transparent, competitive and cost-effective procurement processes. In terms of section 172(1)(a) of the Constitution, it is the courts that are ultimately obliged to declare conduct inconsistent with the Constitution to be invalid. In the context of the review of the exercise of public powers, the courts carry out this duty either under the umbrella of the Promotion of Administrative Justice Act,<sup>4</sup> ("PAJA"), or directly under the Constitution itself, depending on the particular circumstances at hand.

24. My point here is simply that in exercising its powers of review, this court cannot be bound by Treasury's recommendation. Furthermore, Treasury's recommendation is not itself subject to review in the proceedings before me. Accordingly, this court cannot, through its review powers, uphold and give effect to that recommendation. This court is faced solely with the question of whether Transnet's decision to award the tender to T-Systems was invalid and, if so, what appropriate relief might be granted. Whether or not an order should be made directing that Gijima be recognised as the successful tenderer will depend on whether this court considers such relief to be just and equitable. I will revert to this issue later when I consider the question of relief.

*The legal basis for review in this case*

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<sup>4</sup> Act 3 of 2000

25. Transnet's founding affidavit does not make it clear whether it relies on PAJA as the basis for its review, or directly on the Constitution by way of legality or rationality review. In fact, there is very little said in its founding affidavit about the review at all. At most, the deponent submits that contrary to Transnet's earlier view, Treasury was correct in finding that the risk assessment did not constitute a lawful basis to depart from the fundamental obligation to award the tender to the highest scoring bidder. On this basis, the further submission is made that the decision to award the tender to T-Systems is invalid and unlawful and falls to be reviewed and set aside.
26. There appears to be an assumption in the founding papers that PAJA applies to the review. This can be gleaned from Transnet's application for an extension of the time-limit prescribed in section 7(1) of PAJA for the institution of review proceedings. There is no other reference to PAJA in the founding affidavit or the notice of motion, and no specific sections of PAJA are referred to as providing specific bases for review. In short, the founding papers are not very helpful in this regard.
27. Be that as it may, recent developments in our law have clarified what the proper basis is for a review in circumstances where an organ of state seeks to set aside its own decision on the grounds that it was unlawful. The Constitutional Court confirmed, in *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd*,<sup>5</sup> that in these circumstances, the legal basis for review is not PAJA. An organ of state in this position must apply to set aside its own decision on the basis of the founding principle of the rule of law prescribed in section 2 of the Constitution. The court held as follows in this regard:
- "The conclusion that PAJA does not apply does not mean that an organ of state cannot apply for the review of its own decision; it simply means that it cannot do so

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<sup>5</sup> [2017] ZACC 40, hereafter "*SITA*"

under PAJA. In *Fedsure* this Court said that “[i]t seems central to the conception of our constitutional order that the Legislature and Executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law”. .... *Pharmaceutical Manufacturers* tells us that the principle of legality is “an incident of the rule of law”, a founding value of our Constitution. In *Affordable Medicines Trust* the principle of legality was referred to as a constitutional control of the exercise of public power. ... What we glean from this is that the exercise of public power which is at variance with the principle of legality is inconsistent with the Constitution itself. In short, it is invalid. That is a consequence of what section 2 of the Constitution stipulates. Relating all this to the matter before us, the award of the DoD agreement was an exercise of public power. The principle of legality may thus be a vehicle for its review. The question is: did the award conform to legal prescripts? If it did, that is the end of the matter. If it did not, it may be reviewed and possibly set aside under legality review.”<sup>6</sup>

28. It is on this basis that Transnet’s application to set aside its decision to award the tender to T-Systems must be determined.

*Was the award of the tender to T-Systems within legal prescripts or does it fall to be set aside under legality review?*

29. Transnet submits that it acted unlawfully in deciding to award the tender to T-Systems, which was not the highest scoring bidder. Although this contention is no longer opposed by T-Systems, in exercising my power of review I must apply my own mind to, and make a proper determination on, this issue.

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<sup>6</sup> *SITA*, at paras [38] - [40]

30. The crux of the review is that T-Systems was not the highest scoring bidder. Transnet acted on its own understanding of its authority to act in terms of the proviso to section 2(1)(f), which permits a deviation from the basic principle that the award must be made to the highest scoring bidder. That section provides that once the bids have been scored (at the award stage of the process), the contract:

*"must be awarded to the bidder who scored the highest points, unless objective criteria in addition to those contemplated in paragraphs (d) and (e) justify the award to another bidder." (my emphasis)*

31. It is not disputed that Gijima was the highest scoring bidder on price and preference, with the remaining bidder, T-Systems, falling below it. This scoring was based on the best and final offers ("BAFO") submitted by both bidders. In terms of the basic principle contained in section 2(1)(f), this ought to have secured the award for Gijima. However, what Transnet proceeded to do was to undertake a further process of risk assessment in respect of both bidders. It commissioned Gartner Consultants ("Gartner") to conduct the assessment. Gartner was tasked with assessing and reporting on the ability of both bidders to render the services contemplated in the tender.

32. In its report, it identified and rated what it considered to be risks associated with each bidder. It found that there were more risks associated with Gijima (it identified 5 risks). Two of these risks were ranked as being "likely" or "almost certain" to materialise. On the other hand, it identified far fewer risks as regards T-Systems, with those not being likely to materialise. Gartner concluded that these identified risks posed material operational and financial risks to Transnet. What then followed was a sequence of memoranda between various internal departments in Transnet, with no clear path forward on whether Gijima or T-Systems should be awarded the tender. In view of the unopposed nature of the application, it is not necessary to set out the details of what transpired. In summary,



Gijima was provided with at least two opportunities to address Transnet on how it proposed to address or mitigate the risks identified by Gartner. It responded, in detail to these invitations, both in writing and in a subsequent meeting between Transnet and Gijima.

33. Following this process, in February 2017, various departments in Transnet, including Group Risk and Compliance, and the Group Chief Information Officer, indicated that they were satisfied that Gijima had adequately addressed the risks identified. In a memorandum of 7 February 2017, Transnet management recommended that Gijima be awarded the tender. Significantly, the memorandum noted (with attendant detail) that Gijima had provided the required clarity requested of it. It further noted that: *"any residual risks that are remaining should be mitigated through robust contract management and stringent Service Level Agreements to be negotiated and signed with Gijima. The residual risks and their proposed mitigation's are set out ... below. ... the Group Chief Information Officer ... indicated that she is satisfied that all the previously identified risks have been adequately mitigated and that the recommendation for award should be made to the first ranked bidder (Gijima) in line with the 90/10 principle."*

34. The recommendations were rejected by Transnet's Acquisitions and Disposals Committee ("ADC"). In a memorandum dated 14 February 2017, the ADC indicated that it did not support the recommendation based on a number of concerns. It is not necessary to list these concerns. Suffice to say that many of them appear not to have been identified in the Gartner report. In addition, the ADC gave as a concern Transnet's ICT department's own inability to manage the envisaged enhanced risks. The ADC recommended that the contract be awarded to T-Systems, as it had a lower risk profile. The ADC was of the view that these concerns amounted to objective criteria warranting an award to the less risky, but lower-scoring bidder.

35. Transnet now contends that it acted unlawfully in using the risk assessment undertaken at the award stage of the procurement process to justify a deviation from the basic requirement that tenders be awarded to the highest scoring bidder. There is merit in Transnet's contentions. In the first place, the procurement process is divided into two main phases, viz. the functionality assessment phase,<sup>7</sup> and the award phase. The functionality assessment phase occurs first. Only those bidders who are assessed as being able effectively to perform under the envisaged contract qualify to proceed to the next phase.<sup>8</sup> Thus, risk factors associated with the ability to perform under the envisaged contract ought properly to form part of the functionality phase of the assessment. Transnet says that the risk factors subsequently identified by Gartner were already under consideration in the functionality phase. At the second phase of the process, viz. the award phase, only price and preference points are taken into account. It is at this stage that Transnet is ordinarily required to award the contract to the highest scoring bidder on price and preference. It was on the basis of price and preference that Gijima was the highest scoring bidder.
36. Transnet acted outside of this prescribed procurement framework by using functionality phase risk assessment factors to deviate from the required price and preference assessment at the award phase. This being the case, the risk assessment factors it relied on could never properly be regarded as being "objective criteria" within the meaning of section 2(1)(f) of the PPPFA. Consequently, its award to T-Systems was not lawfully justifiable under that section.

<sup>7</sup> The 2011 Preferential Procurement Regulations define "functionality" as: *"the measurement according to predetermined norms, as set out in the tender documents, of a service or commodity that is designed to be practical and useful, working or operating, taking into account, among other factors, the quality, reliability, viability and durability of a service and the technical capacity and ability of the tenderer."* (my emphasis)

<sup>8</sup> Regulation 4 of the 2011 Preferential Procurement Regulations.

37. It is also quite clear from a consideration of the concerns listed by the ADC in recommending the award to T-Systems rather than Gijima that many of them appear to have been based on the ADC's own subjective considerations of risk. The ADC also appears to have completely ignored the fact that the line-managers, who had interacted with Gijima on the actual risks identified by Gartner, were satisfied that they had been addressed, or that they could be mitigated by way of relevant contract provisions.

38. One is left wondering whether the ADC was not being driven by extraneous considerations in its insistence, despite management's satisfaction with Gijima's responses, that the tender should be awarded to the lower-scoring bidder. This is not merely a fleeting fancy. Transnet annexed to its papers a transcript of the meeting of the ADC held in February 2017 shortly before the decision to recommend the award of tender to T-Systems. The transcript reflects the chair of the committee, Mr Shane, making the following comments, among others:

"To go and source to Gijima or anybody else in my opinion, would be tantamount to suicide. That is my perspective on it. That is the newspaper article that I will rather have, with no disrespect to Gijima who are not alien to suing their customers. I will say that again slowly, they are not alien to suing their customers, okay. I am happier with the risk of getting sued by Gijima who did not get the contract than us getting rid of the incumbent we helped to create."

And:

"The last thing I want to do guys, with due respect, is change my mainframe supplier and my data supplier and my IT supplier, the last thing I want to do. I will tell you what my understanding at the time of putting this thing out to tender was that we wanted to keep T-System, honest. That was the actual motivation." (my emphasis)

39. In light of these remarks, the recommendation by the ADC, which was ultimately adopted by the Board and implemented, was not only clearly irrational, but also tainted by bias in favour of the incumbent supplier of IT services, T-Systems. To permit such a tainted decision to stand would be inimical to the constitutional requirement that tender processes should be fair, equitable, transparent, competitive and cost-effective. For this reason too, I am satisfied that Transnet acted unlawfully in deciding to award the tender to T-System.

40. It follows, in my view, that the award must be reviewed and set aside. The question that remains is whether I should go further and direct that the tender should be awarded to Gijima as the highest scoring bidder.

*Should Transnet be ordered to award the tender to Gijima?*

41. Under the common law, and under PAJA, the prudent and proper course<sup>9</sup> on review is to remit the matter back to the decision maker for reconsideration. Substitution of the court's decision for that of the decision maker is the exception rather than the rule.<sup>10</sup> However, where, as in this case, the court is concerned with legality review under section 2 of the Constitution, the remedial powers of the court derive directly from the Constitution itself. Section 172(1)(b) provides that when deciding a constitutional matter a court may make any order that is just and equitable. In *Economic Freedom Fighters v Speaker of the National Assembly*<sup>11</sup> the Constitutional Court made the point that:

“... this Court's remedial power is not limited to declarations of invalidity. It is much wider. Without any restrictions or conditions, section 172(1)(b) empowers courts to make any order that is just and equitable. ... The power to grant a just and equitable

<sup>9</sup> *Gauteng Gambling Board v Silverstar Development Ltd* 2005 (4) SA 67 (SCA) at para [29]

<sup>10</sup> Cora Hoexter *Administrative Law in South Africa* (2nd edition) at p552 and the cases cited in n271.

<sup>11</sup> 2018 (2) SA 571 (CC) at paras [210] & [211]

order is so wide and flexible that it allows courts to formulate an order that does not follow prayers in the notice of motion or some other pleading. This power enables courts to address the real dispute between the parties by requiring them to take steps aimed at making their conduct to be consistent with the Constitution."

42. The question for me to consider is whether it would be just and equitable to direct that the tender should be awarded to Gijima, or whether it would be just and equitable to remit the matter back to Transnet for a new decision? In my view, it is the former, rather than the latter remedy that accords most properly with justice and equity.

43. As an organ of state, Transnet's operations involve the use of public resources. The present tender process was of long duration. It commenced in November 2015 and was subject to various extensions along the way. Transnet's failure to act lawfully in awarding the tender to T-Systems caused a further delay in its finalisation. Three years down the line the tender process is not yet complete. In the interim, Treasury has, reluctantly it appears, approved the extension of the pre-existing contract with T-Systems on a month-to-month basis. It has advised Transnet that as from 1 June 2018, any expenditure flowing from this extension will be regarded as irregular. Accordingly, from a public resources point of view, it seems to me to be imperative that finality is achieved on the matter as soon as possible. To refer the matter back to Transnet for a new decision undoubtedly would entail further irregular use of public resources and for this reason would be untenable.

44. It is also relevant that T-Systems has elected not to proceed with its opposition to the application. In effect, it has abandoned the submissions it made that Gijima did not properly qualify to be considered in the final phase of the tender process. All the other bidders who were eliminated in the earlier rounds were cited in these proceedings. If they wished to object to Transnet's stated intention to ask this court to direct that the tender be

awarded to Gijima, they had ample opportunity to do so. None of them elected to participate in the proceedings. I must conclude that they have no further interest in the matter. There is thus no reason for this court to query the tender process any further. I must proceed on the basis that Gijima was properly scored as the highest bidder on price and preference. The only obstacle to it being awarded the tender was Transnet's unlawful reliance on the risk factors. As those having fallen away, there would seem to me to be no justifiable reason for this court not to give effect to the outcome of the tender process.

45. For these reasons, I conclude that it is just and equitable to direct that Transnet award the tender to Gijima.

*Delay and condonation?*

46. In its notice of motion Transnet sought an order that, insofar as it may be necessary, the court should grant an extension of time for the filing of the application under section 9 of PAJA. PAJA specifies a period of 180 days for the filing of an application for review. Of course, we are not dealing here with a PAJA review, and the 180 period does not apply. It is the common law that applies.<sup>12</sup> Under the common law, an application for review must be instituted within a reasonable time, or without unreasonable delay.

47. The impugned decision was made on 22 February 2017, and Transnet instituted the application for review on 23 October 2017. Clearly, this was not a case where Transnet failed to act with reasonable speed to correct its unlawful decision. In the circumstances, there is no need to consider the question of condonation under either PAJA or the common law.

<sup>12</sup> *Sifwambo Rail Leasing v PRASA* (1030/2017) [2018] ZASCA 167 (30 November 2018)

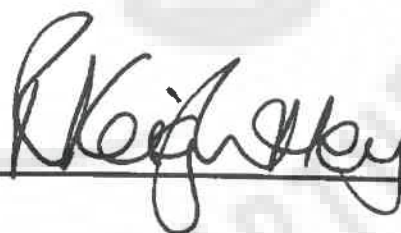


**Conclusion and Order**

48. For the above reasons, I am satisfied that Transnet's application to review and set aside its decision to award the tender to T-Systems must succeed.

49. I make the following order:

1. The decision by the applicant's board of directors taken on or about 22 February 2017, to award the **IT DATA SERVICES TENDER (GSM/15/08/1310)** for the provision of **DATA SERVICES** to the applicant (hereinafter referred to as "the tender"), to the First Respondent, as confirmed in a letter dated 2 March 2017 ("the decision"), is invalid and unlawful.
2. The decision taken by the applicant's board of directors on or about 22 February 2017, to award the tender to the first respondent is reviewed and set aside.
3. The Applicant is directed to award the tender to the second Respondent.
4. There is no order as to costs.



**R M, KEIGHTLEY**  
**JUDGE OF THE HIGH COURT OF SOUTH**  
**AFRICA, GAUTENG LOCAL DIVISION, JOHANNESBURG**

**DATE OF HEARING : 07 DECEMBER 2018**

**DATE OF JUDGMENT : 12 DECEMBER 2018**

**APPEARANCES**

**APPLICANT'S COUNSEL : L.T SIBEKO**

**: B FORD**

**INSTRUCTED BY : MNCEDISI NDLOVU & SEDUMEDI**  
**ATTORNEYS**

**SECOND RESPONDENT'S COUNSEL : C HARDING (Watching brief)**

**INSTRUCTED BY : FLUXMANS ATTORNEYS**

**2<sup>ND</sup> RESPONDENT'S ATTORNEYS : NICQUI GALAKIOU INC**



## ANNEXURE PV 33



## MEMORANDUM

www.transnet.net

TO: Transnet Board Acquisitions and Disposals Committee (BADC)

FROM: Mr Brian Molefe, Group Chief Executive, Transnet SOC

DATE: 15 October 2013

**SUBJECT: MITIGATION OF MDS VOLUMES AT RISK THROUGH THE INVESTMENT IN AND PROCUREMENT OF 100 CLASS 19E EQUIVALENT DUAL VOLTAGE ELECTRIC LOCOMOTIVES AND 60 CLASS 43 DIESEL LOCOMOTIVES.**

## PURPOSE

1. The purpose of this submission is to request the Transnet Board Acquisitions and Disposals Committee to recommend to the Transnet Board of Directors the following:
  - a) Note the risk to TFR MDS volumes through insufficient traction power resulting from the delay in the procurement of the 1064 locomotives:
  - b) To approve the investment in and procurement of 100 Class 19E equivalent electric locomotives required for the Coal Export Line in the amount of R3 871 m (excluding borrowing costs):
  - c) To approve the confinement and award of the procurement for the 100 Class 19E equivalent electric locomotives.
  - d) To approve the investment and change in the fleet plan to procure of 60 Class 43 diesel locomotives for General Freight in the amount of R1 826 m (excluding borrowing costs):
  - e) To approve an extension of the current Class 43 diesel locomotives contract for 60 additional locomotives:
  - f) The GCE be delegated the power to sign and conclude all relevant documents to give effect to the above resolutions.

## EXECUTIVE SUMMARY

2. The TFR locomotive fleet plan was first approved by the Transnet Board in April 2011 and updated with the 1064 GFB locomotive submission. The proposed locomotive acquisitions are in line with the fleet plan and have been budgeted for in the *7 Year Market Demand Strategy (MDS) 2013/14 - 2019/20*. The delay in the 1064 fleet acquisition has put General Freight Business (GFB) MDS volumes at risk.
3. This risk will be mitigated by the urgent acquisition of these locomotives.
  - a) The heavy haul 100 Class 19E locomotives will be deployed in the Coal Export Line and will release 125 locomotives that will be used on GFB pending delivery from the 1064 program. The 100 locomotives form part of the already approved Fleet Plan:
  - b) The 60 Class 43 diesel locomotives also fill the gap pending delivery from the 1064 program. These 60 locomotives do not form part of the approved Fleet Plan and this submission requests an amendment to the Fleet Plan to include these 60 locomotives

4. The Class 19E dual voltage electric and Class 43 diesel locomotives recently delivered are modern capable locomotives. They have proven themselves in service and will improve service quality through improved reliability and reduced maintenance costs.
5. This submission proposes an accelerated procurement to mitigate General Freight MDS volumes at risk by confining 100 Class 19E electric locomotives to MARS and extending the current Class 43 Contract with GESAT by 60 locomotives. The accelerated acquisition will mitigate the MDS shortfall by at least a year with its full effect realised commencing 2014/15. The volumes mitigated increase from 6.2 mt (14/15) to 15.1 mt (16/17) and the cumulative income protected is R9 197 m (13/14 - 16/17).
6. The confinement to MARS and extension of the GE contract is motivated on the basis of urgency.
7. This accelerated acquisition does not put the MDS cash flow at risk and the 1064 acquisition remains unaffected. The acquisitions are funded from the current MDS. The delay in the 1064 will extend its funding to beyond the 7 year period.
8. The 60 Class 43 locomotives are in addition to the approved Locomotive Fleet Plan but accord with the fleet strategy. With the year delay in the 1064 procurement, the 60 locomotives fill the gap of the first year. Post the 1064 procurement, the sustaining fleet requirements based on a 30 year life are approximately 80 locomotives per annum and the last year of the 1064 procurement moves into the sustaining phase.
9. The programmatic element of the 1064 procurement enables locomotive quantities per annum to be adjusted to circumstances.
10. The proposed transactions do not increase the risk related to the 1064 tender process.
11. Socio-economic benefits will be realised in line with existing commitments and expectations.
12. The context and arguments are presented as follows:
  - a) History and Status of the TFR Fleet Plan
  - b) Status of the 1064 Procurement
  - c) Impact of the 1064 delay
  - d) MDS Risk Mitigation
  - e) Project Benefits
  - f) Procurement Strategy
  - g) Financial and budget Implications

## BACKGROUND

13. The history and status of the TFR Fleet Plan and 1064 Procurement are presented to show that a genuine unforeseeable urgency has arisen and that the urgency is not attributable to a lack of proper planning. (Item 67 "Extract from Procurement Procedures Manual" refers)

### History and Status of the TFR Fleet Plan

14. The TFR Locomotive Fleet and Modernisation Plan was presented to the new Board in April 2011 and predicated 776 GF locomotives by 2015/16 for GF volumes of 155.8 mt. The plan was modified in August 2011 when a further 426 locomotives were requested as the volumes increased to 176 mt by 2018/19. To mitigate the immediate shortage and facilitate the volume ramp up, 138 locomotives (95 electrics and 43 diesels) were approved by the Board in August 2011. Minor adjustments were made to the locomotive fleet plan for GFB with the presentation of the business case of the 1064 locomotives in April 2013.



15. The history and status of the TFR Fleet Plan is summarised in the table below:

Loco Fleet History and Plan	Tons	Comment and Update
<b>Coal Fleet (26 ton axle)</b>		
112  (100 19E)	97.5	<ul style="list-style-type: none"> <li>• Probable downward volume revision. Contracts currently being signed for 10 years for 80 mt as coal reserves, sources and Eskom demand are evaluated.</li> <li>• 112 targeted for expansion to 97.5 mt</li> <li>• Current fleet of 10E, 7E and 11E require near term replacement.</li> <li>• 100 (off the 112) switched to fleet replacement pending finality of and commitment to long term coal export expansion and requested per this submission</li> <li>• Feasibility studies investigating expansion of Coal Line to Waterberg as 26ton per axle heavy haul line. This is not currently included in the Locomotive Fleet plan.</li> </ul>
<b>GFB (22 ton axle)</b>		
50 EMD		<ul style="list-style-type: none"> <li>• 50 "like new" EMD diesels were delivered between December 2009 and March 2010 on open tender.</li> </ul>
100 GE (Class 43)		<ul style="list-style-type: none"> <li>• In 2008 these locomotives were identified as a "quick fix" with 81 to sustain the aging fleet and 19 for volume expansion.</li> <li>• GE won the tender, which was confined to three companies, and the locomotives were delivered between May 2011 and January 2013.</li> </ul>
776	155 mt	<ul style="list-style-type: none"> <li>• In April 2011 the Fleet Plan was presented to the "new" Transnet Board for 776 GFB locomotives for 155.8 mt.</li> </ul>
95 CSR and 43 GE		<ul style="list-style-type: none"> <li>• In June 2011 the Board approved 138 locomotives (95 electric and 43 diesels). The electrics were for open tender. A new confined contract was entered into with GE for the 43 diesels.</li> <li>• The 95 and 43 locomotives were determined and limited by the uncommitted funds in the then Five year Capital program</li> <li>• The diesels were delivered between January 2013 and June 2013.</li> <li>• The 95 CSR are planned for delivery March 2014 to March 2015.</li> </ul>
1064	170 mt	<ul style="list-style-type: none"> <li>• August 2011 the locomotive requirements for 176 mt were presented being 1202 locomotives (776+446).</li> <li>• With the 138 already approved the balance of the GFB fleet plan was 1064 locomotives. (1202 -138)</li> <li>• In March 2012 the 1064 approval process commenced in tabling the business case at Transnet Freight Rail Investment Committee.</li> <li>• The 1064 procurement is expanded in the body of the document below.</li> </ul>
60		<ul style="list-style-type: none"> <li>• 60 Class 43 requested to fill the gap in the first year of the 1064 resulting from the delay in procurement.</li> </ul>

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Loco Fleet History and Plan	Tons	Comment and Update
<b>Ore Export Line (30 ton axle)</b>		
44 <del>32</del> 76	44 mt  60 mt	<ul style="list-style-type: none"> <li>• 44 15E bought open tender (Toshiba / Mitsui) to replace / supplement existing 9E locomotives and Class 34 GE Diesels with an option for a further 18 locomotives.</li> <li>• The option to extend by 18 locomotives was not exercised.</li> <li>• A new confined contract was entered into with Mitsui for a total of 32 locomotives to take the Ore Export Line to 60 mt. This confinement was motivated on standardisation of the fleet.</li> <li>• ~ 110 Class 34 GE diesels returned to General Freight and replaced with 30 Class 43 GE.</li> <li>• Potential General Freight traffic may materialise from 2013/14 on the Ore Export line and 4 9E locomotives may be retained for this traffic.</li> </ul>
23 15E and 3 Diesels	80 mt	<ul style="list-style-type: none"> <li>• The volumes are not likely to materialise in the 7 year MDS program. The FEL feasibility study is on hold and there is currently no commitment to the increased volumes.</li> <li>• The locomotives are also put on hold.</li> <li>• The 15E production line has shut down. As and when required, the procurement options will be evaluated against standardisation, cost and interoperability.</li> <li>• Diesels, if required, will be provided from the GFB fleet</li> </ul>

16. The essential points relating to this proposal are:

a) The 100 Class 19E locomotives are for the coal line and were always part of the TFR locomotive fleet plan. See Para 35 and following. They release locomotives that can be used on GFB for the year that the 1064 program is delayed.

b) The 60 Class 43 diesel locomotives are not part of the 1064 locomotive program.

i. They are in addition to the approved Locomotive Fleet Plan but accord with the fleet strategy. With the year delay in the 1064 procurement, the 60 locomotives fill the gap of the first year. Post the 1064 procurement, the sustaining fleet requirements based on a 30 year life are approximately 80 locomotives per annum and the last year of the 1064 procurement moves into the sustaining phase.

17. The programmatic element of the 1064 procurement enables locomotive quantities per annum to be adjusted to circumstances and this flexibility has been built into the tender and will be carried forward in the ultimate contracts.

18. The rationale for the 100 Class 19E and 60 Class 43 Diesel not being part of the 1064 locomotive process are covered under the Procurement Strategy Para 58.a) and following.

19. The future acquisitions for the expansion of the Coal Export line to 97.5 mt and the Ore Export line to 80 mt will depend on market conditions and development of the full supply chain across all stakeholders.

#### **History and Status of the 1064 Procurement**

20. TFR's Corporate Plan sets out the *7 Year Market Demand Strategy (MDS) 2013/14- 2019/20* to virtually double General Freight volumes to 170 mt by 2019/20. This requires an integrated and synchronised approach across locomotives, wagons, infrastructure and personnel and these aspects were covered in the 1064 business case submission.

21. The history of the 1064 procurement is depicted in the exhibit below.

	2011/12	2012/13	2013/14	2014/15	2015/16	2016/17	2017/18	2018/19	2019/20	2020/21	2021/22
1064											
Current GP Fleet Report	1720	1740	1860	1850	1840	1820	1770	1680	1590		
March 2012			800	100	230	230	195	144			1064
Assumptions	Anticipating current state a two year delay is probable					100	165	230	230	195	144
65 Class				95							

22. The approval process of the 1064 locomotives started in March 2011 when the business case was tabled at the Transnet Freight Rail Investment Forum.

23. Two approaches were used to shorten delivery times of the new locomotives as far as possible:

- An aggressive approach was taken with the maximum locomotives delivered per month cognisant of local conditions and
- Approval was obtained in July 2012 to go out on an RFP before the acquisition was finally approved or PFMA approval obtained.

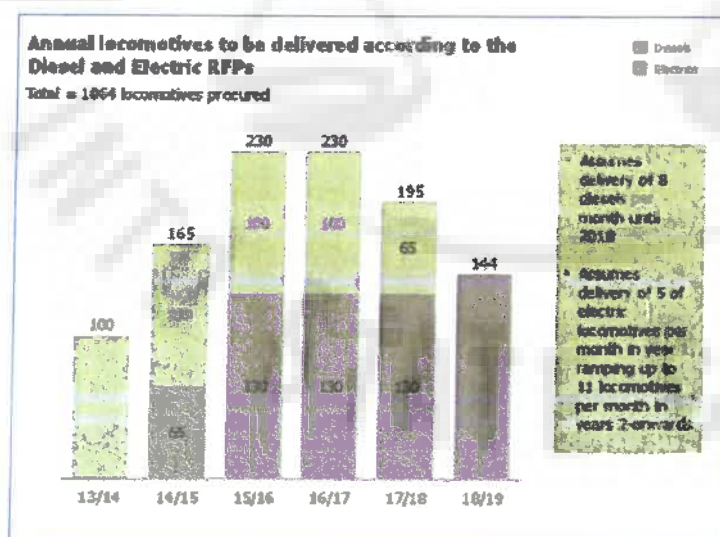
24. Transnet adopted a cautious approach because of the value of the acquisition and appointed external consultants to evaluate the business case.

25. Board approval was obtained in April 2013 and PFMA approval in August 2013.

26. The tenders closed in April 2013 but negotiations with tenderers could not commence till PFMA approval had been obtained.

27. It is expected that adjudication will be finalised by February 2014 and contracts awarded by May 2014.

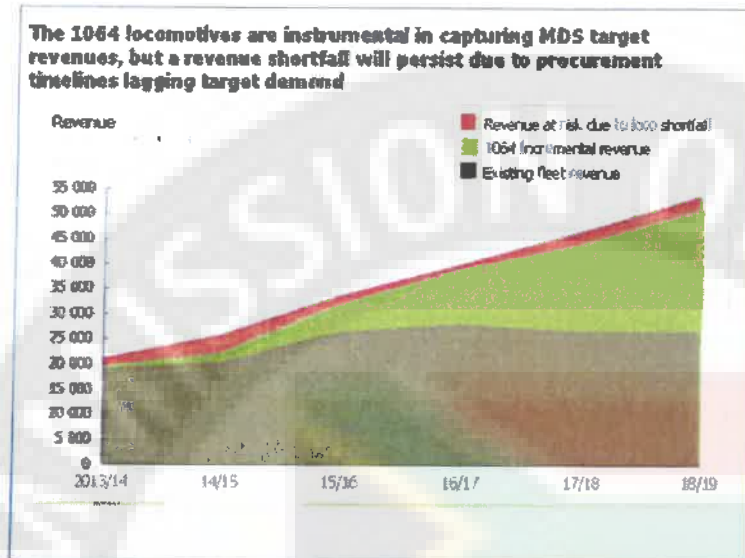
28. At the time of the tabling the 1064 business case, the 465 diesel and 599 electric delivery timelines were based on the RFP then in the market. The exhibit below details the locomotive delivery timelines that were modelled as per the RFPs and used as the base case assumption.



29. The 1064 program has slipped by at least a year against original expectations. The current RFP timelines are being reviewed by the Locomotive Steering Committee to ensure a compressed timetable to further mitigate volume risks to the MDC.

#### Impact of the 1064 Delay

30. Even with the 1064 business case being approved, there is a revenue shortfall which is exacerbated by the delay in locomotive delivery. This is depicted in the graph below extracted from the 1064 locomotive business case.



31. The MDS shortfalls are tabled below for a one and two year delay.

#### a) One Year Delay:

Shortfall	MDS Shortfall Scenario - One Year Delay						
Locomotives	2013/14	2014/15	2015/16	2016/17	2017/18	2018/19	2019/20
No Delay	33	138	314	533	763	946	1040
Year Delay	0	57	202	405	638	828	972
<b>Impact</b>							
Locomotives #	33	81	112	129	125	118	68
Tons Mt	1.6	5.2	9.8	13.7	14.0	13.3	7.6
Revenue Rm	363	1286	2610	3639	4073	4188	2584
Capital Rm	-1725	-1248	-1641	276	381	20	5249
Mtce. Rm	36	91	132	159	162	160	96
Fuel and Elec. Rm	67	183	331	440	469	471	290

Shortfall Total	2013/14
One Year Delay	- 16/17
Tons Mt	30
Revenue Rm	7 900
Mtce. Rm	417
Fuel and Elec. Rm	1021



## b) Two Year delay:

Shortfall	MDS Shortfall Scenario - Two Year Delay						
Locomotives	2013/14	2014/15	2015/16	2016/17	2017/18	2018/19	2019/20
No Delay	33	138	314	533	763	946	1040
Year Delay	0	0	57	177	302	415	465
Impact							
Locomotives #	33	138	257	331	358	309	212
Tons Mt	1.6	7.9	18.1	28.6	33.0	31.3	23.8
Revenue Rm	363	1955	4831	7593	9604	9899	8057
Capital Rm	-2183	-3910	-4014	-1807	1292	2003	6480
Mtce. Rm	36	155	302	409	465	418	301
Fuel and Elec. Rm	67	303	678	1004	1194	1153	903

Shortfall Total Two Year Delay	2013/14 - 16/17
Tons Mt	56
Revenue Rm	14 743
Mtce. Rm	901
Fuel and Elec. Rm	2052

## c) Notes to tables:

- The locomotives per year in the tables are mid-year numbers representing productive capacity and are lower than the total "delivered" during the course of the year.
- The shortfall is totalled to 2016/17 on the assumption that other mitigating strategies will be put in place for the subsequent years.

## MOTIVATION

MDS Risk Mitigation

32. The program and motivation below partially addresses the above MDS shortfall in the early years protecting tons and income per the table below.

Income Protected	2013/14	2014/15	2015/16	2016/17	Cumulative Total
Avg. Rand / Ton	225.4	244.7	255.4	264.0	
100 19E - Tons Protected	2.4	2.4	4.4	7.2	16.44 Tons
Income Protected Rm	R 541	R 587	R 1 134	R 1 901	R 4 163
60 Diesels Tons Protected		3.8	7.9	7.9	19.6 Tons
Income Protected Rm		R 930	R 2 018	R 2 086	R 5 033
<b>Total Tons</b>	<b>2.4</b>	<b>6.2</b>	<b>12.3</b>	<b>15.1</b>	<b>36.04 Tons</b>
<b>Income Protected Rm</b>	<b>R 541</b>	<b>R 1 517</b>	<b>R 3 152</b>	<b>R 3 987</b>	<b>R 9 197</b>

33. Note that this submission is not a full risk mitigation. Further the benefit in 2013/14 is from Project Shongololo which are the new operating procedures introduced on the Coal Export Line.

34. The prime motivators for this submission are to:

- Protect General Freight volumes through delivering diesel and electric locomotives earlier than is possible through the 1064 program.
- Ensure delivery earlier than the 1064 program by:

- i. Confining the procurement of the electric locomotives
- ii. Extending the current diesel locomotive contract.

**MDS Shortfall – 100 Class 19E Dual Voltage Electric Locomotives:**

35. The 100 Class 19E locomotives will be deployed on the Coal Export Line which will enable the release of 125 locomotives to the General Freight network protecting approximately 16.4 million tons (cumulative 13/14-16/17) of General Freight in the 7 Year MDS volume targets and thus allowing growth in the GFB market which would not have been possible because of the 1064 locomotive procurement delay.
36. The locomotive fleet plan presented to the Transnet Board in April 2011 proposed 112 new locomotives to meet an unconstrained coal export demand of 97 mt by 2015/16 with a proposed fleet of 308 electric locomotives. The "Capital investment for Export Coal 81 mt" predicated replacing the aged fleet with Class 19E equivalent locomotives. The updated locomotive fleet plan of April 2013 accompanying the 1064 General Freight locomotive business case also predicated 112 new locomotives for the Coal Business.
37. Subsequent to the Fleet Plan, the operational model was revised to take full advantage of the dual voltage capability of the Class 19E locomotive. The changeover to the new operational model commenced in July 2013 and will build up as drivers are trained on Radio Distributed Power operations on the current fleet and new the locomotives become available. This changes the future mix of the Coal Fleet. The new operational model is bringing about greater efficiencies and creating capacity.
38. The 112 locomotives were for expansion and replacement. Due to the volume shortfall in MDS it was decided to accelerate the acquisition of 100 electrics to enable the cascade of 125 locomotives to GFB and mitigate the MDS volume risk.
39. Cascading locomotives to General Freight will assist in mitigating the delay currently experienced in the 1064 program. In all cases the cascading will facilitate growth though to 2017/18 when the 1064 delivery begins to have significant impact. The class 7E and Class 10E series of the current coal fleet are facing imminent run outs, increasing maintenance costs and decreasing reliability and the cascade to General Freight is an interim measure.
40. The 100 Class 19E locomotives will sustain the Coal Line electric fleet for 81 million tons per annum capacity and standardize the coal fleet on Class 19E type locomotives with significant operational and cost advantages.
  - a) To achieve this operational efficiency requires 200 wagon trains to bypass Ermelo Yard and couple parallel to the main line eliminating shunting and standing time in the yard.
41. The cumulative cascade program for the Class 10E and Class 7E locomotives depends on the acquisition of the 100 Class 19E locomotives which we envisage can be cascaded to GFB, as an interim measure, as follows;
  - a) 40 in 2013/14
  - b) 74 end 2015/16
  - c) 120 end 2016/17
42. The first locomotives are cascaded in 2013/14. There are no or minimal cascades in 2014/15 as the locomotives are being delivered and commissioned. The effectiveness of the cascade is felt in 2015/16 and beyond.



43. Using the rule of thumb for General Freight that 100 locomotives generate approximately 6 mt per annum, the 125 released locomotives will protect approximately 7.2 mt per annum of general freight.

44. The exact allocation to the areas below will be determined at the time of cascading according to operational priorities.

a) **Manganese exports through Ngqura:** Manganese exports from the Northern Cape through Ngqura are expected to grow according to the *7 Year Business Plan* to 12 mt (and to 16 mt thereafter). The Class 7E series released from the Coal Line to General Freight traffic will supplement this service till the full complement of class 20E locomotives have been delivered where after the Class 7E series will be retired.

b) **Thabazimbi – Pyramid South:** This is an AC electrified section served by Class 7E series locomotives and the predicted volume growth is:

Year	2013/14	2014/15	2015/16	2016/17	2017/18	2018/19	2019/20
M Tons	8.868	10.347	15.135	17.056	18.446	22.897	22.912

c) Cascading the Class 7E Series will facilitate volume growth through to 2015/16 as well as the potential life extending / technology changing modification on the cascaded Class 10E series.

d) **Maputo Export:** This is a DC electrified section suitable for Class 18E locomotives only. The cascaded Class 10E will release Class 18E locomotives from other sections which will be transferred into this section. The tonnage increase is:

Year	2013/14	2014/15	2015/16	2016/17	2017/18	2018/19	2019/20
M Tons	6.421	8.353	12.469	13.499	16.446	21.168	21.598

e) **General Freight on the Coal Line:** This traffic uses DC traction or Diesel locomotives to Ermelo and then AC electrification to Richards Bay. Currently Class 7E3 locomotives are designated for this traffic south of Ermelo. Releasing Class 11E locomotives from the export coal operation will enable the additional traffic and also substitute for the current Class 7E3 which will be cascaded.

Year	2013/14	2014/15	2015/16	2016/17	2017/18	2018/19	2019/20
M Tons	10.702	11.901	13.404	15.036	15.733	16.032	16.470

45. The TFR Business Plan volume projections for the Coal Export Line are:

	Actual	Actual	Budget	Projections					
	2011/12	2012/13	2013/14	2014/15	2015/16	2016/17	2017/18	2018/19	2019/20
Export Coal Mt	67.7	69.21	77.00	81.00	81.00	84.00	95.00	97.50	97.50

46. The 100 Class 19E business case articulates the benefits of the earlier than previously planned delivery of the locomotives to the Coal Export Line.

47. The market analysis and infrastructure investment for "Capital investment for Export Coal 81 mt" was recommended by Transnet Board on 16 February 2011 and approved by the Shareholder (Minister of Public Enterprises) on 20 June 2012.

48. Other aspects more fully covered in the 100 Class 19E Locomotive submission are:

- a) Reliability and Operational efficiency
- b) Savings on operational expenditure and capitalised maintenance
- c) Energy Savings
- d) Locomotive Fleet Plan and Standardisation and its benefits which include:
  - i. The fleet is standardized with operational interoperability
  - ii. Standard maintenance practices are propagated
  - iii. Reduction in spares holdings and special tools

#### **MDS Shortfall – 60 Class 43 Diesel Locomotives**

49. TFR is in the process of acquiring 143 class 43 Diesel locomotives from GESAT which have been delivered over the past two years which are have proven to be a capable locomotive. Given the MDS volume shortfall, it is proposed that 60 class 43 locomotives be acquired to further mitigate the volume risk as those in the 1064 program are now likely to come on stream in 2015.
50. The efficiency utilization of the locomotives will be comparable to that currently achieved on the Phalaborwa – Richards Bay flow of 7 262 GTK per locomotive month. This flow powered by new class 43 Diesels already exceeds the national fleet efficiency targeted for 2018/19. This represents a 24% increase on the targeted 2013/14 efficiency.
51. The 60 locomotives have a potential mitigation of 3.8 – 7.9 mt at an average 8 149 GTK's per loco per month exceeding the current Phalaborwa – Richards Bay flow. The potential income protection is R5 033 m (cumulative 2014/15 - 2015/16). The exact allocation of the 60 locomotives will be confirmed at the time of deployment over the following flows:
- a) Botswana Coal to Bulk Connexion and Richards Bay.
    - i. Potential 1.8mt – 3.8mt
    - ii. Diesels required: 35 inclusive of technical allowance.
    - iii. Potential GTK's per loco per month: 5 957
  - b) Elitheni Coal from Sterkstroom to East London
    - i. Potential 1mt to 2.5mt
    - ii. Diesels required: 15 inclusive of technical allowance
    - iii. Potential GTK's per loco per month: 12 784
  - c) Manganese from Postmasburg to Bloemfontein / Bloemcon
    - i. Potential 1 - 1.6mt mostly from new entrant miners.
    - ii. Diesels required: 10 inclusive of technical allowance.
    - iii. Potential GTK's per loco per month : 7 821

#### **PROJECT BENEFITS**

52. Protection of GFB MDS Income and targets amounting to R4 163 m for the 100 Class 19E and R5 033 m for the 60 Class 43 Diesels over the period 2013/14-2016/17 .
53. Coal Export volumes and income are protected though improved reliability.

54. Sustainability objectives as per the Transnet Sustainability framework are met threefold:

- a) Sustainability from an **economic perspective** is met by offering a long term cost effective, low cost rail solution that addresses the needs of industry to remain globally competitive and allows emerging miners to enter the coal export market.
- b) Sustainability from a **social perspective** is met through the optimisation of manufacturing facilities, job creation and proactive stakeholder engagement.
- c) Sustainability from an **environmental perspective** in energy savings through (i) the improved efficiency of the new locomotives and (ii) the overall energy saving through the regenerative capability of the locomotives.

55. The programme will support the shift from road to rail as the cascaded locomotives take up the shortfall in the General Freight market.

56. Benefits specific to the 100 Class 19E include:

- a) Energy savings will be achieved with an 18% improvement in KVA requirements over the old technology Class 7E and Class 10E locomotives.
- b) The regenerative capability of the new locomotives introduces further energy savings of between 22% and 26%.
- c) Quantifiable savings in maintenance of the new locomotives over the older series.
- d) Not quantified but direct and indirect savings with uninterrupted operations due to fewer failures.

57. Benefits specific to the 60 Class 34 Diesels include:

- a) Fuels savings of 8% over the older diesel fleet.
- b) Significantly reduced failures compared to the current diesel fleet improving availability and reliability.
- c) Standardisation of maintenance regimes with current Class 43 fleet.
- d) Virtual elimination of significant damage to rail infrastructure (skid-marks) which are prevented by the modern traction control system.
- e) The characteristics of the locomotive more closely match that of the electric fleet enabling optimum use of traction capability when worked in multiples with electric locomotives using RDP.

## PROCUREMENT STRATEGY

### Rationale for not being part of the 1064 process

58. The procurement process was carefully considered and was not taken into the 1064 locomotive process. Aspects considered were:

- a) **Type:** The 100 19E equivalents are 26 ton per axle locomotives for heavy haul use to be deployed on the coal line. The 599 electric locomotives in the 1064 tender are 22 ton per axle locomotives for GFB use.
- b) **Delivery:** The 60 diesels are equivalent to the 465 of the 1064 but the motivation below for extension is one of urgency because of the overall delay in the 1064 program. Including the diesels in the 1064 does not address the delay or urgency.

### Analysis and Implications of Procurement Options

59. The following options were considered and reasoned:

- a) Go out on tender

- b) Do Nothing
- c) Confine / Extend Contract
- d) Extend current 20E contract for 95 CSR Locomotives
- e) Leasing

60. **Go out on tender:** With this option the locomotives become available beyond the 1064 timeframe and hence this is not a viable option as it does not address the urgency. It is however the best option insofar as public perceptions, fairness and transparency are considered.

61. **Do Nothing:** This option puts the MDS volumes at risk that this proposal wishes to mitigate. The implications are:

Base case R'm	Budget	Projections				
2013-14 Corporate Plan	2013/14	2014/15	2015/16	2016/17	2017/18	2018/19
Revenue	36 690	45 382	53 852	62 146	72 541	81 622
Operating Expenses	20 616	22 640	25 057	28 279	31 434	35 336
EBITDA	16 074	22 742	28 796	33 866	41 107	46 286

One Year Delay R'm	Budget	Projections				
2013-14 Corporate Plan	2013/14	2014/15	2015/16	2016/17	2017/18	2018/19
Revenue	36 327	44 096	50 512	56 163	64 513	72 480
Operating Expenses	20 514	22 367	24 594	27 680	30 802	34 704
EBITDA	15 813	21 729	25 917	28 483	33 711	37 776

62. **Confine / Extend contract:** This addresses the urgency of the proposal but has potential negative implications regarding public and business sentiment. For these reasons (and as outlined above) this is not part of the 1064 process and will not impact on that process.

- a) The locomotives are known, meet requirements and prototyping is not required
- b) Extension of the GE contract is the fastest way to procure the diesel locomotives.
- c) The MARS facilities are available for immediate production which will result in significant savings.
- d) Both the extension and confinement are acceptable procurement mechanisms per the PPM for this instance.

63. **Extend current 20E contract for 95 CSR Locomotives:** The 20E currently on order is a 22 ton per axle GFB locomotive and is not intended for heavy haul use on the Coal Export Line. The first delivery is awaited, the locomotive has still to be tested and it is at present unproven. Only after extensive type testing will it be possible to say whether and to what extent it can replicate the heavy haul capabilities of the 19E. Additionally, extension would not be an acceptable procurement mechanism per the PPM given the material amendment to contract which could be challenged.

**Leasing:** Leasing is not considered as an option having being covered in the Fleet Plan submissions and the options for the 1064. There is no viable external market for 1064mm dual voltage electric locomotives. South African circumstances are (historically) unique requiring bespoke electric designs. Even if leased the conditions would be that TFR take ownership after a period of time.

64. **Implications:** The 1064 tender is currently under adjudication. It is one of the largest procurement processes within Transnet and while it seeks (inter alia) to launch a South African



locomotive industry, it will be closely scrutinised by the losing bidders seeking any loophole to press an advantage. The tender calls for programmatic procurement and it is possible to reduce the final quantities. The following implications were considered in adjusting the (diesel locomotive) quantities.

- a) The tenders have closed and asking respondents for revised submissions would delay the process further.
- b) The perceptions that may be generated by "backtracking" on and reducing a visibly stated need and objective to "favour" a supplier, the urgency argument notwithstanding.
- c) Proceeding with the proposed contract extension and announcing the reduction in diesel quantities at the time of award may be perceived as an underhanded manner of "favouring" a supplier.

#### **Procurement Recommendation**

- 65. For reasons of urgency, the confine / extend contract option is the recommended option.
- 66. This will procure the locomotives in the shortest possible time and, by so doing, best mitigates the potential shortfall in MDS volumes. The reasons of urgency have been set out as well as the complementary benefits of the recommended option.

#### **Confinement of 100 Electric Locomotives**

- 67. An extract from the latest approved Procurement Procedures Manual, dated 01 October 2012, stipulating grounds for confinement which are relevant to this submission, reads:

**"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. However, where a genuine urgency has been created by the lack of proper planning, urgency can still be relied upon as a ground for Confinement. 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."

- 68. The project is motivated on the basis of Para (a) where a genuine unforeseeable urgency has arisen.

- a) Item 13 et al covering the "History and Status of the TFR Fleet Plan" and the "History and Status of the 1064 Procurement" demonstrates the reasonable and timeous steps taken to address to the Board the run out of the current fleet and the locomotive requirements required to address the volume ramp up of GFB.
- b) Item 11 et al further indicates that the delay was not attributable to a lack of proper planning as the GFB locomotive requirements have remained consistent throughout.
- c) Considering (a) and (b), no individual or group of individuals is responsible for bad planning.

69. Addressing the urgency:

- a) The locomotives requested have been through the teething phase with most initial manufacturing and operational faults rectified. Present models are operating optimally and have exceeded their design parameters
- b) Re-starting of these production lines will be quick; the designs are finalised so delivery lead times will be kept to a minimum and set up costs reduced.
- c) Crew (drivers and assistants) are already trained on these locomotives.
- d) Confinement will realize the quickest delivery and existing facilities previously used for the assembly of the 110 x Class 19E.

70. Complementing the urgency (a) is the standardisation (c) and goods largely identical to those previously executed (d). Inter alia:

- a) Locomotives are highly specialised with limited suppliers worldwide.
- b) The locomotives would be largely identical with those already supplied as:
  - i. In 2009, Transnet Freight Rail (TFR) entered into a contract with Mitsui & Co African Railway Solutions (PTY) LTD (MARS for the procurement of 110 new Class 19E electric locomotives for the Coal Export Line; TFR took delivery of the last locomotive in August 2012. MARS are also delivering the Class 15E locomotives for the Ore Export line and the last one is due to come of the factory line in September 2013:
- c) Transnet would incur wasted time and money in approaching the market as:
  - i. The specialised tender specifications take time to prepare; prospective tenderers need time to respond and there is the time to adjudicate. This process takes at least 12 months by which time the urgency has passed and the 1064 deliveries will start to kick in.
  - ii. Furthermore a new supplier would necessitate a new design, design review and prototyping and type testing. This is a further 15 months before production commences.
- d) Standardisation of locomotives has two elements. (i) Operational standardisation and (ii) Maintenance standardisation.
  - i. Operational standardisation requires locomotives of the same class to operate as a consist (i.e. two or more locomotives coupled together operating as a single unit). This is not negotiable but is implemented through de facto industry standards.  
After many years these standards have now changed and TFR is evaluating the impact of these changes.
  - ii. Maintenance standardisation addresses:



- Reduced spares holdings and simplified and standardised inventory.
  - Standardised tools and diagnostic instruments serving a common fleet
  - Unified training and for maintenance staff.
  - Simplified maintenance practises resulting in shorter Mean Time to Repair.
- iii. TE is currently maintaining and repairing the Class 19E Series which means that no additional training will be required and optimum utilisation of the current maintenance facilities.
71. In light of the foregoing concerning standardisation, specialisation and similar locomotives already supplied and further considering that:
- a) the Class 19E locomotives are performing well and have proven to be both efficient and reliable and
  - b) the Class 19E is a modern locomotive and the proposed 100 locomotives will be an extension of the current design and no prototyping or type testing is required conservatively saving 15 months or more and
  - c) the limited quantities of each type of locomotive:

It is submitted that it is not in the best interest of Transnet to solicit other offers for the 19E locomotives.

72. From a social-economic perspective the following jobs will be retained in assembly facilities:
- a) Approximately 186 jobs will be retained at the TE assembly facility and further jobs will be retained in downstream enterprises
  - b) Approximately 400 jobs will be created over the period at the Union Carriage Works assembly facility and further jobs will be retained in downstream enterprises
  - c) Toshiba has indicated its serious intent in building a **traction motor assembly facility** in SA and this could be expedited through the SD obligations that would be linked to this contract.

73. The Japanese Yen has weakened marginally against the South African Rand. The Rand in turn has weakened significantly against the US Dollar. The foreign component of the original 110 x Class 19E contract was 40% Yen based and a contract on similar terms would be considerably cheaper than a new US Dollar based contract.

74. The original 110 Class 19E contract was entered into in 2006. The SD terms and conditions required today are significantly different and more stringent. This calls for a new procurement event via a confined tender.

75. Considering the volumes at risk and the urgent requirement for the coal line locomotives to cascade the current fleet to General Freight, it is proposed that the procurement be confined to MARS Railway Solutions, a subsidiary of Japan's Mitsui & Co Limited.

#### **Contract Extension with GESAT for 60 Class 43 Diesels**

76. The arguments for an extension to the GESAT contract are similar to those for confinement and are motivated on:
- a) the basis of urgency (a) as outlined above
  - b) and complemented by standardisation (c) and goods largely identical to those previously executed (d).

77. The project is motivated on the basis of Item 67 Para (a) where a genuine unforeseeable urgency has arisen. The arguments are per Items 68 and 69 above are also applicable to the 60 Class 43 Diesels.
78. The latest approved Procurement Procedures Manual, dated 01 October 2013, par 22.5.3, allows for a contract extension. In this instance the request is for a material contract amendment to a previously confined event. The reasoning for the original confinement of the additional 43 loco's is still applicable given that there is a genuine unforeseeable urgency which has arisen due to the delay in the 1064 tenders and such urgency is not be attributable to a lack of proper planning.
79. Complementing the urgency is that the goods are largely identical to those previously executed by that supplier and standardisation is a benefit for the specialized locomotives.
80. Addressing the urgency:
- a) In December 2009, Transnet concluded a contract with General Electric South Africa Technologies (GESAT) PTY Ltd for the Supply of 100 Diesel Locomotives through a limited tender process confined to three potential suppliers. In 2011, through a confinement process, TFR concluded a contract with GESAT for an additional 43 Class 43 diesel locomotives. The completion date of the 43 Locomotives was end June 2013 in line with the Transnet planned schedule. The last few locomotives to roll out of assembly will be tested by 30 September 2013, where after they may be accepted.
  - b) As the production line is currently operational and design is finalised, delivery lead times will be reduced by approximately 12 months and Transnet will save by not requiring set up costs of facilities and production runs.
  - c) GESAT and TE have the ability to roll out between 8 to 10 locomotives per month.
  - d) No prototyping or type testing is required.
81. Complementing the urgency (a) is the standardisation (c) and goods largely identical to those previously executed (d). Inter alia:
- a) Locomotives are highly specialised with limited suppliers worldwide.
  - b) The locomotives would be identical with the 143 Class 43 Diesels already supplied or about to be commissioned.
  - c) Transnet would incur wasted time and money in approaching the market as:
    - i. The specialised tender specifications take time to prepare; prospective tenderers need time to respond and there is the time to adjudicate. This process takes at least 12 months by which time the urgency has passed and the 1064 deliveries will start to kick in.
    - ii. Furthermore a new supplier would necessitate a new design, design review and prototyping and type testing. This is a further 12 months for diesels before production commences.
  - d) Standardisation of locomotives has two elements. (i) Operational standardisation and (ii) Maintenance standardisation.
    - i. Operational standardisation requires locomotives of the same class to operate as a consist (i.e. two or more locomotives coupled together operating as a single unit). This is not negotiable but is implemented through de facto industry standards.

After many years these standards have now changed and TFR is evaluating the impact of these changes.

ii. Maintenance standardisation addresses:

- Reduced spares holdings and simplified and standardised inventory.
- Standardised tools and diagnostic instruments serving a common fleet
- Unified training and for maintenance staff.
- Simplified maintenance practises resulting in shorter Mean Time to Repair.

iii. TE is currently maintaining and repairing the Class 43 Series which means that no additional training will be required and optimum utilisation of the current maintenance facilities.

82. In light of the foregoing concerning standardisation, specialisation and similar locomotives already supplied and further considering that:

- a) the Class 43 diesel is a modern locomotive that is performing well and has proven to be both efficient and reliable and
- b) the proposed 60 locomotives will identical to the current design and no prototyping or type testing is required conservatively saving 15 months or more and
- c) the limited quantities required:

It is submitted that it is not in the best interest of Transnet to solicit other offers for the 60 Class 43 diesel locomotives.

83. In both transactions, Transnet Engineering (TE) was appointed as GESAT's subcontractor for the local assembly of the locomotives and the contractual obligations have been met.

84. The time and cost to localise production to comply with local content and SD requirements has to be amortised over the anticipated production run. The smaller the run, the more expensive the overhead. To breakeven point to set up new facilities is marginal for the 100 Class 19E but mitigates against new facilities for the 60 Class 43 diesels.

85. Given that a contract is already in place and that the additional 60 loco requirement will be largely on the same terms and conditions as the 43 loco confinement, this warrants extension.

**Contracting strategy**

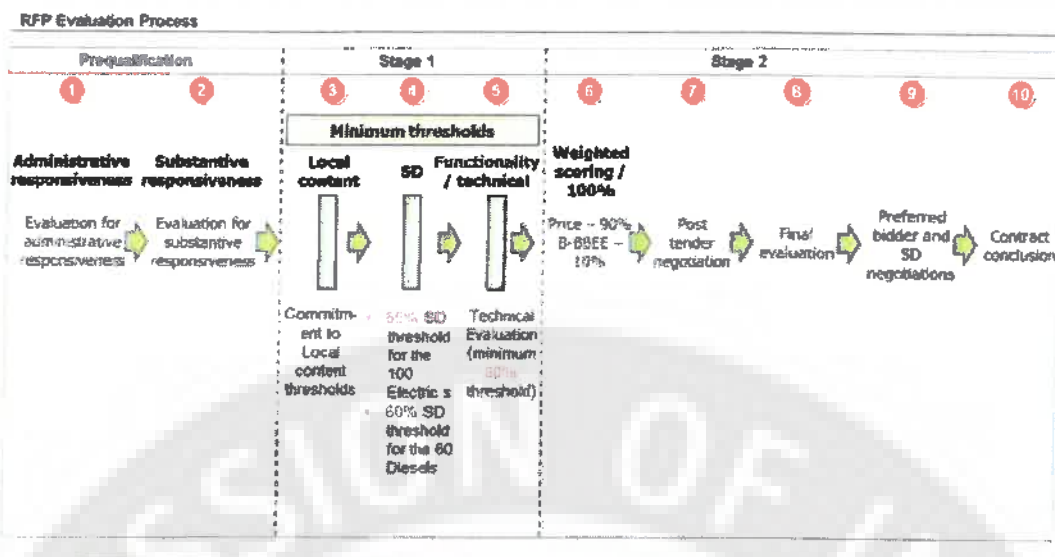
86. Extend the current contract with General Electric South African Technologies (GESAT) for 60 Class 43 Diesel Locomotives.

87. Confine and award to Mitsui & Co African Railway Solutions (PTY) LTD (MARS) for 100 Class 19E locomotives.

88. The reasons for the different confinement and extension strategies have been highlighted in the sections above.

**Evaluation Methodology**

89. The Request for Proposals (RFP's) for the confinement to Mars and extension to GESAT respectively will be issued and their respective proposals will be assessed as described below. The normal open tender process would follow the evaluation methodology indicated below.



90. The Evaluation Methodology for an open tender comprises the following steps:

- 1) **Administrative responsiveness** – bidders will need to pass the administrative responsiveness to enable them to be evaluated further. This includes evaluating all returnable documents were submitted and the bid documents were duly signed by the bidders
- 2) **Substantive responsiveness** – bidders must ensure that all pre-qualification criteria, the pricing schedule is completed, their bid materially complies with the scope/specification and that all material terms and conditions in the bid documents have been met
- 3) **Local Content** – bidders must comply to the minimum local content thresholds for Electric and Diesel locomotives as stipulated in the PPPFA
- 4) **SD thresholds** – the SD thresholds of 65% and 60% set for Electric and Diesel locomotives respectively must be met for bidders to proceed to the next step of the evaluation.
- 5) **Technical evaluation** – bidders will need to pass the minimum technical thresholds of 80% for both Electric and Diesel locomotives to proceed to the final phase (stage 2) of evaluations.
- 6) A **weighted scoring** approach for Price (90%) and B-BBEE – scorecard (10%) will be used determine final award
- 7) **Post tender negotiations** – post tender negotiation requesting preferred bidders to provide their Best and Final Offers
- 8) **Final evaluation** – preferred bidders to undergo final evaluation based on the 90/10 as stipulated by the PPM
- 9) **Preferred bidder negotiations** – selection of the preferred bidder and negotiation of various aspects including final SD commitments and the B-BBEE improvement plan (FRC Future)
- 10) **Conclude contract** – the parties sign a contract and addendums to formalize the agreement.

91. The above process is modified for the proposed confinement and extension in that:

- a) Administrative response (1) is simplified to essential documentation such as tax clearance certificate, BEE certificate etc.



- b) Substantive response (2) will be required on to ensure that all material terms and conditions in the bid documents have been met
- c) Local content threshold must be met
- d) SD threshold must be met
- e) Technical evaluation (5) is simplified to ensure that all modifications / improvements made over the life of the locomotives (Class 43 and Class 19E's) for incorporation.
- f) Weighted Scoring Approach (6) and
- g) Final Evaluation (8) is not required due to confinement and extension to one party although evaluation against expected SD, BEE improvement and price ranges will be conducted to ensure the deals meet Transnet's expectations.,

#### **Local Content, Designated Components and Supplier Development (SD)**

92. Meeting Local Content (3) is a prerequisite to proceeding to SD threshold (4) evaluation.
93. The targets per PPPFA National Treasury Instruction Note (dated 16-07-2012) on 'Invitation and Evaluation of Bids Based on a Stipulated Minimum Threshold for Local Production and Content for the Rail Rolling Stock Sector' (Section 3 (3.1)) are compulsory and are elaborated in following table:

<b>Local Content - Section 3 (3.1)</b>	
<b>Category</b>	<b>Weighting</b>
<b>Local manufacturing:</b> Threshold: 60% for Electric and 55% for Diesels)	100% of PPPFA
<b>Total</b>	<b>100%</b>

94. In addition, the progressive Local Content for Designated Components (Section 3 (3.2)) will also be applicable to both Electric and Diesel locomotives as per the table below though they may not materialize as the contracts will be fulfilled before three years and they are not programmatic.

<b>Designated Component / Activity</b> <b>Heading Only - Section 3 (3.2)</b>	<b>% Local Content</b> <b>3-5 Years</b>	<b>% Local Content</b> <b>6 Years and above.</b>
Assembly of Locomotives and EMU	100%	100%
Car Body	100%	100%
Bogie (including wheels)	100%	100%
Coupling Equipment	100%	100%
Suspension	100%	100%
Heat, Ventilation and Air Conditioning	60%	70%
Braking System	70%	80%
Alternators	90%	100%
Traction Motors	65%	80%
Electric Systems	80%	90%

95. The Supplier Development targets are set out in the table below. They are considered realistic and achievable without posing a risk to the project.

Supplier Development (SD)	
Category	Weighting
Investment in plant – bidders monetary commitment to investment in plant and equipment	10%
Downstream procurement – bidders commitment to supporting 2 <sup>nd</sup> , 3 <sup>rd</sup> tier suppliers, etc.	15%
Skills development – supplier's commitment to skills development (number of people and monetary)	20%
Job creation / preservation – supplier's commitment to number of jobs maintained/created	30%
Small business promotion – supplier's commitment to usage of small businesses (monetary)	10%
ED/SD – bidders commitment to SD initiatives and ED development	15%
<b>Total &amp; Threshold &gt; 65% for Electric and &gt; 60% for Diesels</b>	<b>100%</b>

#### **Award Conditions – 100 Class 19E Equivalent**

96. Approval to award the business to MARS is requested subject to SD compliance with the following:
- Local content meeting or exceeding 60% by value
  - Compliance with **new** SD commitments with a minimum of 65% as measured in the SD Value Summary which forms part of the RFP
  - Transnet will also request a price range of between R30.5m and R32m for the purposes of negotiation with the objective of coming in within the R34.34m per loco.

#### **Award Conditions – 60 Class 43 Diesels**

97. Approval to award the business to GESAT is requested subject to SD compliance with the following:
- Local content meeting or exceeding 55% by value
  - Compliance with **new** SD commitments with a minimum of 60% as measured in the SD Value Summary which forms part of the RFP
  - Transnet will also request a price range of between R22.5m and R24m for the purposes of negotiation with the objective of coming in within the R26m per loco.

### **FINANCIAL AND BUDGET IMPLICATIONS**

- The financial motivation and budget implications for the 100 Class 19E and 60 Class 43 Diesels are discussed in detail in the respective submissions.

#### **100 Class 19E Equivalent**

- The 100 Class 19E Locomotives are summarized below:
  - A base price per locomotive price of R 34.34 m (2013/14 - Yen 385 m @ Rand/Yen 0.09823)
  - Capital Investment Summary:



Year / Rm	13/14	14/15	15/16	16/17	17/18	18/19	Contingency	Total
Project Plan Payment	R 343	R 1 737	R 1 439				R352	R 3 871
Delivery		56	44					100

- c) Based on the original Coal 81 mt model, the acquisition of the 100 Class 19E sustaining locomotives has a net present value (NPV) of R98.49m over 10 years.
- d) The present value (PV) of the Total Cost of Ownership using the 1064 locomotive model is R59.1m.
- e) Approved Infrastructure investments supporting the project totals R3 974 million.

#### **60 Class 43 Diesels**

3. The 60 Class 43 Diesels are summarized below:
4. The 60 Class 43 locomotives **are over and above** the 465 diesels of the approved 1064 locomotives.
- a) The delays in the 1064 will result in the delivery of the 1064 locomotives extending beyond the current 7 year MDS capital plan. The diesels in particular will not meet the originally planned delivery.
- b) The fleet plan and the 1064 locomotive business case stress sustaining the fleet beyond the seven year period in the order of 60 to 80 locomotives per year.
- c) The 60 Class 43 diesels will be funded from the 1064 locomotive budget for the first year.
- d) The 1064 locomotive budget will be adjusted commencing the 2014/15 7 year cycle for the delayed delivery of the 1064 beyond the current 2013/14 7 year cycle. This adjustment is in line with the stated intent of sustaining the fleet through a continuous replenishment of new locomotives.
- e) A price per locomotive price of R 26m @ Rand / USD (R9.59/USD) (R27.67 m @ R10.4/USD for 2014/15).
- f) Capital Investment Summary:

Year / Rm	13/14	14/15	15/16	16/17	17/18	18/19	Contingency	Total
Project Plan Payment	R 156	R 1 504					R166	R 1 826
Delivery		60						60

- g) The acquisition of the 60 Class 43 Diesel preserves an NPV of R1 529 m based on the 1064 Locomotive Model.
- h) The PV of the Total Cost of Ownership using the 1064 Locomotive model is R59.1m.

#### **Financial Impact to Group**

5. The proposed procurement has limited impact on Group finances and the critical ratios are maintained.

6. For no delay the ratios are:

Ratios: Transnet Group - As is	Budget 2013/14	Projections				
		2014/15	2015/16	2016/17	2017/18	2018/19
- Operating margin %	24.9	29.1	31.5	32.5	35.4	36.3
- EBITDA %	42.9	46.7	49.1	49.7	51.8	52.6
- Return on average total assets (%)	8.0	10.0	11.3	12.4	14.2	14.5
- Gearing (%)	46.6	47.7	47.7	47.0	45.2	41.6
- Net debt to EBITDA (Times)	3.04	2.70	2.53	2.40	2.17	1.94
- Asset turnover (Times)	0.30	0.33	0.34	0.37	0.38	0.38
- Cash interest cover (Times)	3.3	3.6	4.0	4.1	4.5	4.8

7. For a one (1) year delay the ratios are:

Ratios: Transnet Group One (1) Year Delay	Budget 2013/14	Projections				
		2014/15	2015/16	2016/17	2017/18	2018/19
- Operating margin %	24.8	28.5	29.6	29.0	31.3	32.0
- EBITDA %	42.7	46.2	47.6	47.1	48.7	49.5
- Return on average total assets (%)	7.9	9.7	10.4	10.6	11.8	12.0
- Gearing (%)	46.2	47.3	47.8	48.7	48.7	47.1
- Net debt to EBITDA (Times)	3.01	2.71	2.67	2.75	2.64	2.49
- Asset turnover (Times)	0.30	0.33	0.33	0.35	0.36	0.36
- Cash interest cover (Times)	3.3	3.6	3.8	3.7	3.7	3.9

8. For a two (2) year delay the ratios are:

Ratios: Transnet Group Two (2) Year Delay	Budget 2013/14	Projections				
		2014/15	2015/16	2016/17	2017/18	2018/19
- Operating margin %	24.8	28.3	29.3	29.1	31.6	32.6
- EBITDA %	42.7	45.9	47.2	47.1	48.9	50.0
- Return on average total assets (%)	7.9	9.6	10.3	10.7	12.0	12.3
- Gearing (%)	46.0	46.6	46.8	47.4	47.7	46.3
- Net debt to EBITDA (Times)	2.99	2.67	2.61	2.64	2.55	2.41
- Asset turnover (Times)	0.30	0.33	0.34	0.35	0.36	0.36
- Cash interest cover (Times)	3.3	3.6	3.9	3.8	3.9	4.0

### SOCIO-ECONOMIC BENEFITS

9. The transaction will be aligned with the Government of South Africa's socioeconomic policy framework, including CSDP, NGP, NDP, SSI, and IPAP2.
10. Meeting the MDS growth targets supports the National Development Program in the industrialisation of SA's mineral resources.
11. The program supports the sustainable development of a South African locomotive production industry.
12. Economic benefits include:
  - a) Using idle capacity available in South Africa
  - b) In terms of the National Treasury Instruction note the local content for designated sector (rolling stock - locomotives) for electric locomotives is 60% and for diesel locomotives is 55%.
  - c) Ability to reinstate / retain local jobs as the skills pool already exists

- d) Approximately 2 900 indirect and direct South African jobs will be preserved which include approximately 186 direct jobs at the TE assembly facility and 1076 (first, second and third tier) at MARS with further jobs retained in downstream enterprises

### PROJECT RISKS

13. Both projects face several risks that could affect their overall economic viability:
14. **Locomotive Delivery:** This could arise if (i) the confinement is not approved (ii) unforeseen circumstances on the part of supplier including not complying with CSDP conditions.
15. **Lower volumes:** MDS volumes may not materialise per plan negating the need to cascade locomotives and / or the class 43 diesels not being fully or optimally utilised.
16. The coal line locomotives are nonetheless still nearing their end of life and these will require replacement in the short term to sustain coal exports at 81 mt. Long term coal contracts are currently being negotiated for 81 mt and there are sufficient coal reserves to sustain this tempo. The model and NPV is further based on 95% of the coal export volumes materialising. There is no risk to this project if volumes do not ramp up to 97.4 mt.
17. **Exchange Rate Fluctuations:**
  - a) For the 100 Class 19E confined to MARS, the Yen / Rand Rate is forecast to be more stable than the Rand / Dollar rate. Localisation is already set at 60%, thus mitigating exchange fluctuation risks.
  - b) For the 60 Class 43 confined to GESAT the base price is taken R10/USD. The rate is forecast to strengthen in the short term which includes the duration of the contract before weakening.
18. **Tariffs not being realised:**
  - a) For the coal line current FOB prices for RBCT coal are around US\$90 per ton, well below the peak of over US\$150 per ton. At R9.50/USD and a tariff of R126 per ton, transport accounts for ~13% of the FOB price. Pressure on tariffs will remain till there is a long term sustainable uptick in the FOB price.
  - b) For General Freight increases linked to inflation are not seen as a risk while increases above inflation will be subject to scrutiny and downward pressure.
19. **Tariff exposure to commodity downturns:**
  - a) In the short term this could impact the viability of emerging miners for export coal. This will affect only 3 mt as the rest are based on long term contracts being negotiated. The model is also based on 95% of the volumes realising.
  - b) Locomotives have a 30 year life-cycle which transcends economic cycles. In the short to medium term the global economic recovery is seen as slow but sustained. The economic environment for General Freight locomotives was fully set out in the 1064 business case.
20. **Over Capitalisation of the Coal Line:** This is not seen as a risk as the locomotives sustain current volumes of 81 mt for which long term contracts are being negotiated. The reserves in the Mpumalanga basin are also acknowledged to be able to sustain this tempo for the long term. There is thus little risk of stranded assets. The locomotives being replaced are at the end or very close to the end of their economic life and would require replacement in the very short term even if they were not cascaded to General Freight.
21. **Project interdependencies:**
  - a) Crucial to the new operations and achieving 81mt on the Coal Export Line with the additional 100 a Class 19E equivalent requires constructing the Ermelo bypass line. This

line enables two 100 wagons trains from the mines to be coupled together enabling the train to proceed as a single 200 wagon Radio Distributed Power (RDP) train without going into Ermelo Yard.

- b) An interdependency for the 100 Class 19E locomotives is cascading locomotives to general freight. The 60 Class 43 Diesels do not have other project interdependencies

22. Project risks will be mitigated during implementation by a **dedicated cross-functional project team** to manage the contract.

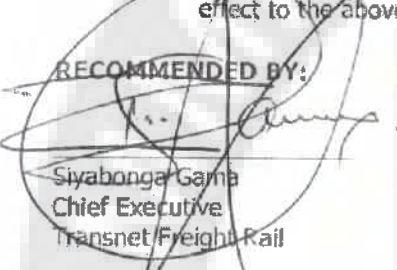


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**RECOMMENDATION:**

1. It is recommended that the Transnet Board Acquisitions and Disposals Committee recommends to the Transnet Board of Directors the following:
  - a) Note the risk to TFR MDS volumes through insufficient traction power resulting from the delay in the procurement of the 1064 locomotives:
  - b) To approve the investment in and procurement of 100 Class 19E equivalent electric locomotives required for the Coal Export Line in the amount of R3 871 m (excluding borrowing costs):
  - c) To approve the confinement and award of the procurement for the 100 Class 19E equivalent electric locomotives.
  - d) To approve the investment and change in the fleet plan to procure of 60 Class 43 diesel locomotives for General Freight in the amount of R1 826 m (excluding borrowing costs):
  - e) To approve an extension of the current Class 43 diesel locomotives contract for 60 additional locomotives:
  - f) The GCE be delegated the power to sign and conclude all relevant documents to give effect to the above resolutions.


**RECOMMENDED BY:**

  
 Siyabonga Gama  
 Chief Executive  
 Transnet Freight Rail

Date:

2013-10-11

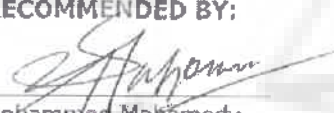
**RECOMMENDED BY:**

  
 Garry Pienaar  
 Group Chief Supply Chain Officer  
 Transnet SOC

Date:

11/10/13


**RECOMMENDED BY:**

  
 Mohammed Mahomed  
 Group General Manager Capital Integration  
 Transnet SOC

Date:

11.10.2013

**RECOMMENDED BY:**

  
 Anoj Singh  
 Group Chief Financial Officer  
 Transnet SOC

Date:

11/10/13

**RECOMMENDED BY:**

  
 Brian Molefe  
 Group Chief Executive  
 Transnet SOC

Date:



## ANNEXURE PV 34







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PV 3 L

**MEMORANDUM**

**TO:** Transnet Board of Directors

**FROM:** Mr Brian Molefe, Group Chief Executive, Transnet SOC

**DATE:** 21 January 2014

**SUBJECT:** **MITIGATION OF MDS VOLUMES AT RISK THROUGH THE INVESTMENT IN AND PROCUREMENT OF 100 DUAL VOLTAGE ELECTRIC LOCOMOTIVES AND 60 CLASS 43 DIESEL LOCOMOTIVES.**

**PURPOSE**

1. The purpose of this submission is to request the Transnet Board of Directors to approve the following:
  - a) Note the risk to TFR MDS volumes through insufficient traction power resulting from the delay in the procurement of the 1064 locomotives:
  - b) To approve the investment in and procurement of 100 electric locomotives required for the Coal Export Line in the amount of R3 871 m (excluding borrowing costs):
  - c) To approve the confinement and award of the procurement for the 100 electric locomotives.
  - d) To approve the investment and change in the fleet plan to procure of 60 Class 43 diesel locomotives for General Freight in the amount of R1 826 m (excluding borrowing costs):
  - e) To approve an extension of the current Class 43 diesel locomotives contract for 60 additional locomotives:
  - f) The GCE be delegated the power to sign and conclude all relevant documents to give effect to the above resolutions, including the award and process approval.

**EXECUTIVE SUMMARY**

2. The TFR locomotive fleet plan was first approved by the Transnet Board in April 2011 and updated with the 1064 GFB locomotive submission. The proposed locomotive acquisitions are in line with the fleet plan and have been budgeted for in the *7 Year Market Demand Strategy (MDS) 2013/14 - 2019/20*. The delay in the 1064 fleet acquisition has put General Freight Business (GFB) MDS volumes at risk.
3. This risk will be mitigated by the urgent acquisition of these locomotives.
  - a) The heavy haul 100 Electric locomotives will be deployed in the Coal Export Line and will release 125 locomotives that will be used on GFB pending delivery from the 1064 program. The 100 locomotives form part of the already approved Fleet Plan
  - b) The 60 Class 43 diesel locomotives also fill the gap pending delivery from the 1064 program. These 60 locomotives do not form part of the approved Fleet Plan and this submission requests an amendment to the Fleet Plan to include these 60 locomotives
4. The Class 43 diesel locomotives recently delivered are modern capable locomotives. They have proven themselves in service and will improve service quality through improved reliability and reduced maintenance costs.

5. This submission proposes an accelerated procurement to mitigate General Freight MDS volumes at risk by confining 100 electric locomotives to CSR (China South Rail) and extending the current Class 43 Contract with GESAT (General Electric South Africa Technologies) by 80 locomotives. The accelerated acquisition will mitigate the MDS shortfall by at least a year with its full effect realised commencing 2014/15. The volumes mitigated increase from 6.2 mt (14/15) to 15.1 mt (16/17) and the cumulative income protected is R9 197 m (13/14 - 16/17).
6. The confinement to CSR and extension of the GE contract is motivated on the basis of urgency.
7. This accelerated acquisition does not put the MDS cash flow at risk and the 1064 acquisition remains unaffected. The acquisitions are funded from the current MDS. The delay in the 1064 will extend its funding to beyond the 7 year period.
8. The 60 Class 43 locomotives are in addition to the approved Locomotive Fleet Plan but accord with the fleet strategy. With the year delay in the 1064 procurement, the 60 locomotives fill the gap of the first year. Post the 1064 procurement, the sustaining fleet requirements based on a 30 year life are approximately 80 locomotives per annum and the last year of the 1064 procurement moves into the sustaining phase.
9. The programmatic element of the 1064 procurement enables locomotive quantities per annum to be adjusted to circumstances.
10. The proposed transactions do not increase the risk related to the 1064 tender process.
11. Socio-economic benefits will be realised in line with existing commitments and expectations.
12. The context and arguments are presented as follows:
  - a) History and Status of the TFR Fleet Plan
  - b) Status of the 1064 Procurement
  - c) Impact of the 1064 delay
  - d) MDS Risk Mitigation
  - e) Project Benefits
  - f) Procurement Strategy
  - g) Financial and budget Implications

## BACKGROUND

13. The history and status of the TFR Fleet Plan and 1064 Procurement are presented to show that a genuine unforeseeable urgency has arisen and that the urgency is not attributable to a lack of proper planning. (Item 68 "Extract from Procurement Procedures Manual" refers)

### History and Status of the TFR Fleet Plan

14. The TFR Locomotive Fleet and Modernisation Plan was presented to the new Board in April 2011 and predicated 776 GF locomotives by 2015/16 for GF volumes of 155.8 mt. The plan was modified in August 2011 when a further 426 locomotives were requested as the volumes increased to 176 mt by 2018/19. To mitigate the immediate shortage and facilitate the volume ramp up, 138 locomotives (95 electrics and 43 diesels) were approved by the Board in August 2011. Minor adjustments were made to the locomotive fleet plan for GFB with the presentation of the business case of the 1064 locomotives in April 2013.
15. The history and status of the TFR Fleet Plan is summarised in the table below:

Loco Fleet History and Plan	Tons	Comment and Update
<b>Coal Fleet (26 ton axle)</b>		
112  (100)	97.5	<ul style="list-style-type: none"> <li>• Probable downward volume revision. Contracts currently being signed for 10 years for 80 mt as coal reserves, sources and Eskom demand are evaluated.</li> <li>• 112 targeted for expansion to 97.5 mt</li> <li>• Current fleet of 10E, 7E and 11E require near term replacement.</li> <li>• 100 (off the 112) switched to fleet replacement pending finality of and commitment to long term coal export expansion and requested per this submission</li> <li>• Feasibility studies investigating expansion of Coal Line to Waterberg as 26ton per axle heavy haul line. This is not currently included in the Locomotive Fleet plan.</li> </ul>
<b>GFB (22 ton axle)</b>		
50 EMD		<ul style="list-style-type: none"> <li>• 50 "like new" EMD diesels were delivered between December 2009 and March 2010 on open tender.</li> </ul>
100 GE (Class 43)		<ul style="list-style-type: none"> <li>• In 2008 these locomotives were identified as a "quick fix" with 81 to sustain the aging fleet and 19 for volume expansion.</li> <li>• GE won the tender, which was confined to three companies, and the locomotives were delivered between May 2011 and January 2013.</li> </ul>
776	155 mt	<ul style="list-style-type: none"> <li>• In April 2011 the Fleet Plan was presented to the "new" Transnet Board for 776 GFB locomotives for 155.8 mt.</li> </ul>
95 CSR and 43 GE		<ul style="list-style-type: none"> <li>• In June 2011 the Board approved 138 locomotives (95 electric and 43 diesels). The electrics were for open tender. A new confined contract was entered into with GE for the 43 diesels.</li> <li>• The 95 and 43 locomotives were determined and limited by the uncommitted funds in the then Five year Capital program</li> <li>• The diesels were delivered between January 2013 and June 2013.</li> <li>• The 95 CSR are planned for delivery March 2014 to March 2015.</li> </ul>
1064	170 mt	<ul style="list-style-type: none"> <li>• August 2011 the locomotive requirements for 176 mt were presented being 1202 locomotives (776+446).</li> <li>• With the 138 already approved the balance of the GFB fleet plan was 1064 locomotives. (1202 -138)</li> <li>• In March 2012 the 1064 approval process commenced in tabling the business case at Transnet Freight Rail Investment Committee.</li> <li>• The 1064 procurement is expanded in the body of the document below.</li> </ul>
60		<ul style="list-style-type: none"> <li>• 60 Class 43 requested to fill the gap in the first year of the 1064 resulting from the delay in procurement.</li> </ul>

Loco Fleet History and Plan	Tons	Comment and Update
<b>Ore Export Line (30 ton axle)</b>		
44  32 76	44 mt  60 mt	<ul style="list-style-type: none"> <li>• 44 15E bought open tender (Toshiba / Mitsui) to replace / supplement existing 9E locomotives and Class 34 GE Diesels with an option for a further 18 locomotives.</li> <li>• The option to extend by 18 locomotives was not exercised.</li> <li>• A new confined contract was entered into with Mitsui for a total of 32 locomotives to take the Ore Export Line to 60 mt. This confinement was motivated on standardisation of the fleet.</li> <li>• ~ 110 Class 34 GE diesels returned to General Freight and replaced with 30 Class 43 GE.</li> <li>• Potential General Freight traffic may materialise from 2013/14 on the Ore Export line and 4 9E locomotives may be retained for this traffic.</li> </ul>
23 15E and 3 Diesels	80 mt	<ul style="list-style-type: none"> <li>• The volumes are not likely to materialise in the 7 year MDS program. The FEL feasibility study is on hold and there is currently no commitment to the increased volumes.</li> <li>• The locomotives are also put on hold.</li> <li>• The 15E production line has shut down. As and when required, the procurement options will be evaluated against standardisation, cost and interoperability.</li> <li>• Diesels, if required, will be provided from the GFB fleet</li> </ul>



16. The essential points relating to this proposal are:

- a) The 100 Electric locomotives are for the coal line and were always part of the TFR locomotive fleet plan. See Para 35 and following. They release locomotives that can be used on GFB for the year that the 1064 program is delayed.
- b) The 60 Class 43 diesel locomotives are not part of the 1064 locomotive program.
  - i. They are in addition to the approved Locomotive Fleet Plan but accord with the fleet strategy. With the year delay in the 1064 procurement, the 60 locomotives fill the gap of the first year. Post the 1064 procurement, the sustaining fleet requirements based on a 30 year life are approximately 80 locomotives per annum and the last year of the 1064 procurement moves into the sustaining phase.

17. The programmatic element of the 1064 procurement enables locomotive quantities per annum to be adjusted to circumstances and this flexibility has been built into the tender and will be carried forward in the ultimate contracts.

18. The rationale for the 100 Electric and 60 Class 43 Diesel not being part of the 1064 locomotive process are covered under the Procurement Strategy Para 58.a) and following.

19. The future acquisitions for the expansion of the Coal Export line to 97.5 mt and the Ore Export line to 80 mt will depend on market conditions and development of the full supply chain across all stakeholders.

#### **History and Status of the 1064 Procurement**

20. TFR's Corporate Plan sets out the *7 Year Market Demand Strategy (MDS) 2013/14- 2019/20* to virtually double General Freight volumes to 170 mt by 2019/20. This requires an integrated and synchronised approach across locomotives, wagons, infrastructure and personnel and these aspects were covered in the 1064 business case submission.

21. The history of the 1064 procurement is depicted in the exhibit below.

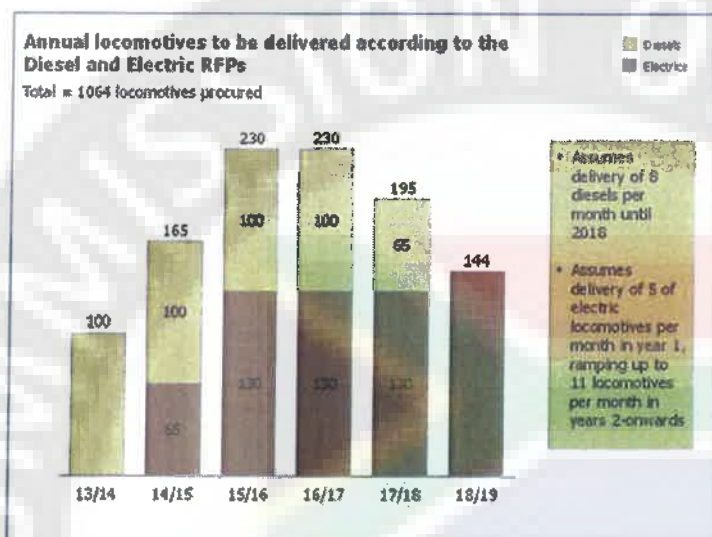
	2011/12	2012/13	2013/14	2014/15	2015/16	2016/17	2017/18	2018/19	2019/20	2020/21	Total
1064											
Current GFR Fleet Plan	1736	1746	1895	1890	1864	1832	1776	1885	1550		
March 2012			100	155	230	230	195	144			1064
Most likely	Considering current state a two year delay is probable				100	165	230	230	185	144	1064
95 CSR			10	85							

22. The approval process of the 1064 locomotives started in March 2011 when the business case was tabled at the Transnet Freight Rail Investment Forum.

23. Two approaches were used to shorten delivery times of the new locomotives as far as possible:

- a) An aggressive approach was taken with the maximum locomotives delivered per month cognisant of local conditions and
- b) Approval was obtained in July 2012 to go out on an RFP before the acquisition was finally approved or PFMA approval obtained.

24. Transnet adopted a cautious approach because of the value of the acquisition and appointed external consultants to evaluate the business case.
25. Board approval was obtained in April 2013 and PFMA approval in August 2013.
26. The tenders closed in April 2013 but negotiations with tenderers could not commence till PFMA approval had been obtained.
27. It is expected that adjudication will be finalised by February 2014 and contracts awarded by May 2014.
28. At the time of the tabling the 1064 business case, the 465 diesel and 599 electric delivery timelines were based on the RFP then in the market. The exhibit below details the locomotive delivery timelines that were modelled as per the RFPs and used as the base case assumption.

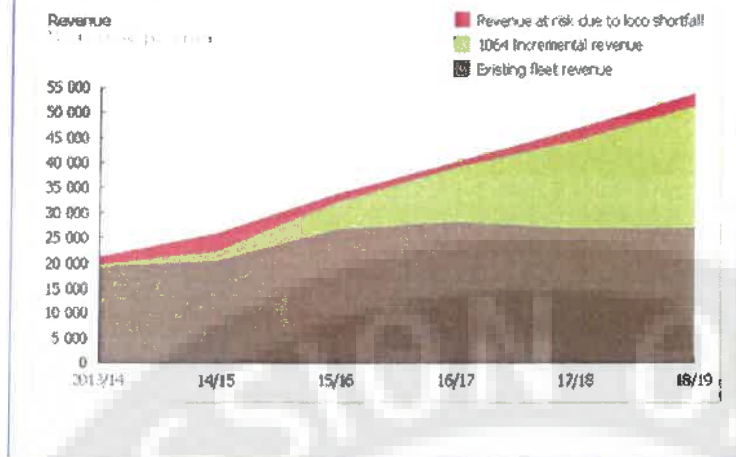


29. The 1064 program has slipped by at least a year against original expectations. The current RFP timelines are being reviewed by the Locomotive Steering Committee to ensure a compressed timetable to further mitigate volume risks to the MDC.

#### Impact of the 1064 Delay

30. Even with the 1064 business case being approved, there is a revenue shortfall which is exacerbated by the delay in locomotive delivery. This is depicted in the graph below extracted from the 1064 locomotive business case.

**The 1064 locomotives are instrumental in capturing MDS target revenues, but a revenue shortfall will persist due to procurement timelines lagging target demand**





31. The MDS shortfalls are tabled below for a one and two year delay.

a) One Year Delay:

Shortfall	MDS Shortfall Scenario - One Year Delay						
Locomotives	2013/14	2014/15	2015/16	2016/17	2017/18	2018/19	2019/20
No Delay	33	138	314	533	763	946	1040
Year Delay	0	57	202	405	638	828	972
Impact							
Locomotives #	33	81	112	129	125	118	68
Tons Mt	1.6	5.2	9.8	13.7	14.0	13.3	7.6
Revenue Rm	363	1286	2610	3639	4073	4188	2584
Capital Rm	-1725	-1248	-1641	276	381	20	5249
Mtce. Rm	36	91	132	159	162	160	96
Fuel and Elec. Rm	67	183	331	440	469	471	290

Shortfall Total	2013/14
One Year Delay	16/17
Tons Mt	30
Revenue Rm	7 900
Mtce. Rm	417
Fuel and Elec. Rm	1021

b) Two Year delay:

Shortfall	MDS Shortfall Scenario - Two Year Delay						
Locomotives	2013/14	2014/15	2015/16	2016/17	2017/18	2018/19	2019/20
No Delay	33	138	314	533	763	946	1040
Year Delay	0	0	57	177	302	415	465
Impact							
Locomotives #	33	138	257	331	358	309	212
Tons Mt	1.6	7.9	18.1	28.6	33.0	31.3	23.8
Revenue Rm	363	1955	4831	7593	9604	9899	8057
Capital Rm	-2183	-3910	-4014	-1807	1292	2003	6480
Mtce. Rm	36	155	302	409	465	418	301
Fuel and Elec. Rm	67	303	678	1004	1194	1153	903

Shortfall Total	2013/14
Two Year Delay	16/17
Tons Mt	56
Revenue Rm	14 743
Mtce. Rm	901
Fuel and Elec. Rm	2052

c) Notes to tables:

- i. The locomotives per year in the tables are mid-year numbers representing productive capacity and are lower than the total "delivered" during the course of the year.

- ii. The shortfall is totalled to 2016/17 on the assumption that other mitigating strategies will be put in place for the subsequent years.

## MOTIVATION

### MDS Risk Mitigation

32. The program and motivation below partially addresses the above MDS shortfall in the early years protecting tons and income per the table below.

Income Protected	2013/14	2014/15	2015/16	2016/17	Cumulative Total
Avg. Rand / Ton	225.4	244.7	255.4	264.0	
100 19E - Tons Protected	2.4	2.4	4.4	7.2	16.44 Tons
Income Protected Rm	R 541	R 587	R 1 134	R 1 901	R 4 163
60 Diesels Tons Protected		3.8	7.9	7.9	19.6 Tons
Income Protected Rm		R 930	R 2 018	R 2 086	R 5 033
<b>Total Tons</b>	<b>2.4</b>	<b>6.2</b>	<b>12.3</b>	<b>15.1</b>	<b>36.04 Tons</b>
<b>Income Protected Rm</b>	<b>R 541</b>	<b>R 1 517</b>	<b>R 3 152</b>	<b>R 3 987</b>	<b>R 9 197</b>

33. Note that this submission is not a full risk mitigation, Further the benefit in 2013/14 is from Project Shongololo which are the new operating procedures introduced on the Coal Export Line.
34. The prime motivators for this submission are to:
- Protect General Freight volumes through delivering diesel and electric locomotives earlier than is possible through the 1064 program.
  - Ensure delivery earlier than the 1064 program by:
    - Confining the procurement of the electric locomotives
    - Extending the current diesel locomotive contract.

### MDS Shortfall – 100 Dual Voltage Electric Locomotives:

35. The 100 Electric locomotives will be deployed on the Coal Export Line which will enable the release of 125 locomotives to the General Freight network protecting approximately 16.4 million tons (cumulative 13/14-16/17) of General Freight in the 7 Year MDS volume targets and thus allowing growth in the GFB market which would not have been possible because of the 1064 locomotive procurement delay.
36. The locomotive fleet plan presented to the Transnet Board in April 2011 proposed 112 new locomotives to meet an unconstrained coal export demand of 97 mt by 2015/16 with a proposed fleet of 308 electric locomotives. The "Capital investment for Export Coal 81 mt" predicated replacing the aged fleet with modern electric locomotives. The updated locomotive fleet plan of April 2013 accompanying the 1064 General Freight locomotive business case also predicated 112 new locomotives for the Coal Business.
37. Subsequent to the Fleet Plan, the operational model was revised to take full advantage of the dual voltage capability of the locomotive. The changeover to the new operational model commenced in July 2013 and will build up as drivers are trained on Radio Distributed Power operations on the current fleet and new the locomotives become available. This changes the future mix of the Coal Fleet. The new operational model is bringing about greater efficiencies and creating capacity and the order will be based on this technology.

38. The 112 locomotives were for expansion and replacement. Due to the volume shortfall in MDS it was decided to accelerate the acquisition of 100 electrics to enable the cascade of 125 locomotives to GFB and mitigate the MDS volume risk.
39. Cascading locomotives to General Freight will assist in mitigating the delay currently experienced in the 1064 program. In all cases the cascading will facilitate growth through to 2017/18 when the 1064 delivery begins to have significant impact. The class 7E and Class 10E series of the current coal fleet are facing imminent run outs, increasing maintenance costs and decreasing reliability and the cascade to General Freight is an interim measure.
40. The 100 Electric locomotives will sustain the Coal Line electric fleet for 81 million tons per annum capacity and standardize the coal fleet on Electric type locomotives with significant operational and cost advantages.
- a) To achieve this operational efficiency requires 200 wagon trains to bypass Ermelo Yard and couple parallel to the main line eliminating shunting and standing time in the yard.
41. The cumulative cascade program for the Class 10E and Class 7E locomotives depends on the acquisition of the 100 Electric locomotives which we envisage can be cascaded to GFB, as an interim measure, as follows;
- a) 40 in 2013/14  
b) 74 end 2015/16  
c) 120 end 2016/17
42. The first locomotives are cascaded in 2013/14. There are no or minimal cascades in 2014/15 as the locomotives are being delivered and commissioned. The effectiveness of the cascade is felt in 2015/16 and beyond.
43. Using the rule of thumb for General Freight that 100 locomotives generate approximately 6 mt per annum, the 125 released locomotives will protect approximately 7.2 mt per annum of general freight.
44. The exact allocation to the areas below will be determined at the time of cascading according to operational priorities.
- a) **Manganese exports through Ngqura:** Manganese exports from the Northern Cape through Ngqura are expected to grow according to the *7 Year Business Plan* to 12 mt (and to 16 mt thereafter). The Class 7E series released from the Coal Line to General Freight traffic will supplement this service till the full complement of class 20E locomotives have been delivered where after the Class 7E series will be retired.
- b) **Thabazimbi – Pyramid South:** This is an AC electrified section served by Class 7E series locomotives and the predicted volume growth is:
- | Year   | 2013/14 | 2014/15 | 2015/16 | 2016/17 | 2017/18 | 2018/19 | 2019/20 |
|--------|---------|---------|---------|---------|---------|---------|---------|
| M Tons | 8.868   | 10.347  | 15.135  | 17.056  | 18.446  | 22.897  | 22.912  |
- c) Cascading the Class 7E Series will facilitate volume growth through to 2015/16 as well as the potential life extending / technology changing modification on the cascaded Class 10E series.
- d) **Maputo Export:** This is a DC electrified section suitable for Class 18E locomotives only. The cascaded Class 10E will release Class 18E locomotives from other sections which will be transferred into this section. The tonnage increase is:



Year	2013/14	2014/15	2015/16	2016/17	2017/18	2018/19	2019/20
M Tons	6.421	8.353	12.469	13.499	16.446	21.168	21.598

- e) **General Freight on the Coal Line:** This traffic uses DC traction or Diesel locomotives to Ermelo and then AC electrification to Richards Bay. Currently Class 7E3 locomotives are designated for this traffic south of Ermelo. Releasing Class 11E locomotives from the export coal operation will enable the additional traffic and also substitute for the current Class 7E3 which will be cascaded.

Year	2013/14	2014/15	2015/16	2016/17	2017/18	2018/19	2019/20
M Tons	10.702	11.901	13.404	15.036	15.733	16.032	16.470

45. The TFR Business Plan volume projections for the Coal Export Line are:

	Actual	Actual	Budget	Projections					
	2011/12	2012/13	2013/14	2014/15	2015/16	2016/17	2017/18	2018/19	2019/20
Export Coal Mt	67.7	69.21	77.00	81.00	81.00	84.00	95.00	97.50	97.50

46. The 100 Electric locomotive business case articulates the benefits of the earlier than previously planned delivery of the locomotives to the Coal Export Line.
47. The market analysis and infrastructure investment for "Capital investment for Export Coal 81 mt" was recommended by Transnet Board on 16 February 2011 and approved by the Shareholder (Minister of Public Enterprises) on 20 June 2012.
48. Other aspects more fully covered in the 100 Electric Locomotive submission are:
- a) Reliability and Operational efficiency based on past experience of electric locomotives of similar design
  - b) Savings on operational expenditure and capitalised maintenance
  - c) Energy Savings

#### **MDS Shortfall – 60 Class 43 Diesel Locomotives**

49. TFR is in the process of acquiring 143 class 43 Diesel locomotives from GESAT which have been delivered over the past two years which are have proven to be a capable locomotive. Given the MDS volume shortfall, it is proposed that 60 class 43 locomotives be acquired to further mitigate the volume risk as those in the 1064 program are now likely to come on stream in 2015.
50. The efficiency utilization of the locomotives will be comparable to that currently achieved on the Phalaborwa – Richards Bay flow of 7 262 GTK per locomotive month. This flow powered by new class 43 Diesels already exceeds the national fleet efficiency targeted for 2018/19. This represents a 24% increase on the targeted 2013/14 efficiency.
51. The 60 locomotives have a potential mitigation of 3.8 – 7.9 mt at an average 8 149 GTK's per loco per month exceeding the current Phalaborwa – Richards Bay flow. The potential income protection is R5 033 m (cumulative 2014/15 - 2015/16). The exact allocation of the 60 locomotives will be confirmed at the time of deployment over the following flows:
- a) Botswana Coal to Bulk Connexion and Richards Bay.

- i. Potential 1.8mt – 3.8mt

- ii. Diesels required: 35 inclusive of technical allowance.
- iii. Potential GTK's per loco per month: 5 957
- b) Elitheni Coal from Sterkstroom to East London
  - i. Potential 1mt to 2.5mt
  - ii. Diesels required: 15 inclusive of technical allowance
  - iii. Potential GTK's per loco per month: 12 784
- c) Manganese from Postmasburg to Bloemfontein / Bloemcon
  - i. Potential 1 - 1.6mt mostly from new entrant miners.
  - ii. Diesels required: 10 inclusive of technical allowance.
  - iii. Potential GTK's per loco per month : 7 821

### PROJECT BENEFITS

- 52. Protection of GFB MDS income and targets amounting to R4 163 m for the 100 Electric locomotives and R5 033 m for the 60 Class 43 Diesels over the period 2013/14-2016/17 .
- 53. Coal Export volumes and income are protected though improved reliability.
- 54. Sustainability objectives as per the Transnet Sustainability framework are met threefold:
  - a) Sustainability from an **economic perspective** is met by offering a long term cost effective, low cost rail solution that addresses the needs of industry to remain globally competitive and allows emerging miners to enter the coal export market.
  - b) Sustainability from a **social perspective** is met through the optimisation of manufacturing facilities, job creation and proactive stakeholder engagement.
  - c) Sustainability from an **environmental perspective** in energy savings through (i) the improved efficiency of the new locomotives and (ii) the overall energy saving through the regenerative capability of the locomotives.
- 55. The programme will support the shift from road to rail as the cascaded locomotives take up the shortfall in the General Freight market.
- 56. Benefits specific to the 100 Electric locomotives based on past experience include:
  - a) Energy savings will be achieved with an 18% improvement in KVA requirements over the old technology Class 7E and Class 10E locomotives.
  - b) The regenerative capability of the new technology of modern locomotives introduces further energy savings of between 22% and 26%.
  - c) Quantifiable savings in maintenance of new locomotives.
  - d) Not quantified but direct and indirect savings with uninterrupted operations due to fewer failures.
- 57. Benefits specific to the 60 Class 34 Diesels include:
  - a) Fuels savings of 8% over the older diesel fleet.
  - b) Significantly reduced failures compared to the current diesel fleet improving availability and reliability.
  - c) Standardisation of maintenance regimes with current Class 43 fleet.
  - d) Virtual elimination of significant damage to rail infrastructure (skid-marks) which are prevented by the modern traction control system.

- e) The characteristics of the locomotive more closely match that of the electric fleet enabling optimum use of traction capability when worked in multiples with electric locomotives using RDP.

## PROCUREMENT STRATEGY

### Rationale for not being part of the 1064 process

58. The procurement process was carefully considered and was not taken into or part of the 1064 locomotive process. Aspects considered were:

- a) **Type:** The 100 electrics are 26 ton per axle locomotives for heavy haul use to be deployed on the coal line. The 599 electric locomotives in the 1064 tender are 22 ton per axle locomotives for GFB use.
- b) **Delivery:** The 60 diesels are similar to the 465 of the 1064 but the motivation below for extension is one of urgency because of the overall delay in the 1064 program. Including the diesels in the 1064 does not address the delay or urgency.

### Analysis and Implications of Procurement Options

59. The following options were considered and reasoned:

- a) Go out on tender
- b) Do Nothing
- c) Confine / Extend Contract
- d) Extend current 20E contract for 95 CSR Locomotives
- e) Leasing

60. **Go out on tender:** With this option the locomotives become available beyond the 1064 timeframe and hence this is not a viable option as it does not address the urgency. It is however the best option insofar as public perceptions, fairness and transparency are considered.

61. **Do Nothing:** This option puts the MDS volumes at risk that this proposal wishes to mitigate. The implications are:

Income Protected	2013/14	2014/15	2015/16	2016/17	Cumulative Total
Tons Lost	2.4	6.2	12.3	15.1	36.04 Tons
Income Lost	R 541	R 1 517	R 3 152	R 3 987	R 9 197 Rm

62. **Confine / Extend contract:** This addresses the urgency of the proposal but has potential negative public implications. For the urgency already outlined and the reasons below this is not part of the 1064 process and will not impact on that process.

- a) The diesel locomotives are known, running effectively, meet the technical requirements and prototyping and set up costs are not required
- b) Extension of the GE contract is the fastest most efficient way to procure the diesel locomotives.
- c) The CSR facilities are available for immediate production which will result in significant delivery acceleration based on the learnings of the 95 loco processes. CSR has capacity to produce 2000 locomotives per annum.



- d) CSR is a known current supplier who has excelled in the two most recent tenders for electric locomotives from a technical capability and capacity perspective, supplier development, commercial and transformational perspective.
  - e) Confinement of the contract to CSR meets the grounds for confinement per the most recently BADC approved PPM.
  - f) Both the extension and confinement are acceptable procurement mechanisms per the PPM in this instance.
63. **Extend current 20E contract for 95 CSR Locomotives:** The 20E currently on order is a 22 ton per axle GFB locomotive. Additionally, extension would not be an acceptable procurement mechanism per the PPM given the material amendment to contract which could be challenged.
64. **Leasing:** Aurizon in Australia have indicated that they have about 20 locomotives available for lease. However, the newest of these is 30 years old and the quantities are not likely significantly impact volumes. We will view the 20 locomotives and assess their suitability for our network. There is no viable external market for 1064mm dual voltage electric locomotives. South African circumstances are (historically) unique requiring bespoke electric designs. Even if leased the conditions would be that TFR take ownership after a period of time.
65. **Implications:** The 1064 tender is currently under adjudication. It is the largest procurement processes within Transnet and while it seeks (inter alia) to launch a South African locomotive industry, it will be closely scrutinised by the losing bidders seeking any loophole to press an advantage. The tender calls for programmatic procurement and it is possible to reduce the final quantities. The following implications were considered in adjusting the (diesel locomotive) quantities.
- a) The tenders have closed and asking respondents for revised submissions would delay the process further.
  - b) The perceptions that may be generated by "backtracking" on and reducing a visibly stated need and objective to "favour" a supplier, the urgency argument notwithstanding.
  - c) Proceeding with the proposed contract extension and announcing the reduction in diesel quantities at the time of award may be perceived as an underhanded manner of "favouring" a supplier.

#### **Procurement Recommendation**

66. For reasons of urgency, the confine / extend contract option is the recommended option.
67. This will procure the locomotives in the shortest possible time and, by so doing, best mitigates the potential shortfall in MDS volumes. The reasons of urgency have been set out as well as the complementary benefits of the recommended option.

#### **Confinement of 100 Electric Locomotives**

68. An extract from the latest approved Procurement Procedures Manual stipulating grounds for confinement which are relevant to this submission, reads:

**"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. However, where a genuine urgency has been created by the lack of proper planning, urgency can still be relied upon as a ground for Confinement. 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."

69. The project is motivated on the basis of Para (a) where a genuine unforeseeable urgency has arisen.

- a) Item 13 et al covering the "History and Status of the TFR Fleet Plan" and the "History and Status of the 1064 Procurement" demonstrates the reasonable and timeous steps taken to address to the Board the run out of the current fleet and the locomotive requirements required to address the volume ramp up of GFB.
- b) Item 11 et al further indicates that the delay was not attributable to a lack of proper planning as the GFB locomotive requirements have remained consistent throughout.
- c) Considering (a) and (b), no individual or group of individuals is responsible for bad planning.

70. Complementing the urgency is ground (d):

- a) Locomotives are highly specialised with limited suppliers worldwide.
- b) The locomotives would be largely identical with those already supplied and to be supplied and
- c) Transnet would incur wasted time and money in approaching the market (b) and (c) are relevant due to the fact that:
  - i. CSR has been adjudicated as the best bidder during the 95 electric loco process as well as joint on the 1064 process. Both these tenders include the Board approved procurement methodology of maximising supplier development whilst ensuring highest standards of quality and best possible commercial offering. Transnet has just spent a large amount of time, human capital and money in the recent tenders and going through another tender process would not be efficient given the urgency.
  - ii. Production of the current MARS contract has been completed and was based on previous procurement methodology where supplier development was not a key focus area and the Mitsui consortium did not fare well in the two most recent tenders issued by Transnet. Therefore continuation with Mitsui via confinement would pose unnecessary risk to the organisation. Furthermore, reputation risk exists, although subjective and places the company under

unnecessary risk if it were to follow a confinement approach with Mitsui. This reputation risk involves speculation in the media around Mitsui's local partners and their political affiliations. Transnet would never entertain awards based on political prowess of any business partners to an OEM but the risk does need to be taken into account from a reputational perspective.

71. TE is currently maintaining and repairing the Class 19E Electric Series which means that they are accustomed to maintenance regimes are more modern electric dual voltage locomotives. Limited additional training will be required and optimum utilisation of the current maintenance facilities will be met. Simplified maintenance practises will result in shorter Mean Time to Repair. Common practices will be addressed through maintenance regimes of the 95 loco series, 599 elements that CSR is shortlisted for and this fleet.
72. From a social-economic perspective the following jobs will be retained in assembly facilities:
- a) Approximately 186 jobs will be retained at the TE assembly facility and further jobs will be retained in downstream enterprises
  - b) Approximately 400 jobs are estimated to be created over the period for electric assembly and further jobs will be retained in downstream enterprises
  - c) Based on SD offerings made in recent tenders Transnet believes it can achieve maximum SD possible with at least 65% for diesels and 70% for electrics.
73. Considering the volumes at risk and the urgent requirement for the coal line locomotives to cascade the current fleet to General Freight, it is proposed that the procurement be confined to CSR.

**Contract Extension with GESAT for 60 Class 43 Diesels**

74. The arguments for an extension to the GESAT contract are similar to those for confinement and are motivated on:
- a) the basis of urgency (a) as outlined above
  - b) and complemented by standardisation (c) and goods largely identical to those previously executed (d).
75. The project is motivated on the basis where a genuine unforeseeable urgency has arisen. The arguments above are also applicable to the 60 Class 43 Diesels.
76. The latest approved Procurement Procedures Manual, dated 01 October 2013, par 22.4.2, allows for a contract extension. In this instance the request is for a material contract amendment to a previously confined event. The reasoning for the original confinement of the additional 43 loco's is still applicable given that there is a genuine unforeseeable urgency which has arisen due to the delay in the 1064 tenders and such urgency is not be attributable to a lack of proper planning.
77. Complementing the urgency is that the goods are largely identical to those previously executed by that supplier and standardisation is a benefit for the specialized locomotives.
78. Addressing the urgency:
- a) In December 2009, Transnet concluded a contract with General Electric South Africa Technologies (GESAT) PTY Ltd for the Supply of 100 Diesel Locomotives through a limited tender process confined to three potential suppliers. In 2011, through a



confinement process, TFR concluded a contract with GESAT for an additional 43 Class 43 diesel locomotives. The completion date of the 43 Locomotives was end June 2013 in line with the Transnet planned schedule. The last few locomotives to roll out of assembly will be tested by 30 September 2013, where after they may be accepted.

- b) As the production line is currently operational and design is finalised, delivery lead times will be reduced by approximately 12 months and Transnet will save by not requiring set up costs of facilities and production runs.
- c) GESAT and TE have the ability to roll out between 8 to 10 locomotives per month.
- d) No prototyping or type testing is required.

79. Complementing the urgency (a) is the standardisation (c) and goods largely identical to those previously executed (d). Inter alia:

- a) Locomotives are highly specialised with limited suppliers worldwide.
- b) The locomotives would be identical with the 143 Class 43 Diesels already supplied or about to be commissioned.
- c) Transnet would incur wasted time and money in approaching the market as:
  - i. The specialised tender specifications take time to prepare; prospective tenderers need time to respond and there is the time to adjudicate. This process takes at least 12 months by which time the urgency has passed and the 1064 deliveries will start to kick in.
  - ii. Furthermore a new supplier would necessitate a new design, design review and prototyping and type testing. This is a further 12 months for diesels before production commences.
- d) Standardisation of locomotives has two elements. (i) Operational standardisation and (ii) Maintenance standardisation.
  - i. Operational standardisation requires locomotives of the same class to operate as a consist (i.e. two or more locomotives coupled together operating as a single unit). This is not negotiable but is implemented through de facto industry standards.  
After many years these standards have now changed and TFR is evaluating the impact of these changes.
  - ii. Maintenance standardisation addresses:
    - Reduced spares holdings and simplified and standardised inventory.
    - Standardised tools and diagnostic instruments serving a common fleet
    - Unified training and for maintenance staff.
    - Simplified maintenance practises resulting in shorter Mean Time to Repair.
  - iii. TE is currently maintaining and repairing the Class 43 Series which means that no additional training will be required and optimum utilisation of the current maintenance facilities.

80. In light of the foregoing concerning standardisation, specialisation and similar locomotives already supplied and further considering that:

- a) the Class 43 diesel is a modern locomotive that is performing well and has proven to be both efficient and reliable and



- b) the proposed 60 locomotives will identical to the current design and no prototyping or type testing is required conservatively saving 15 months or more and
- c) the limited quantities required:

It is submitted that it is not in the best interest of Transnet to solicit other offers for the 60 Class 43 diesel locomotives.

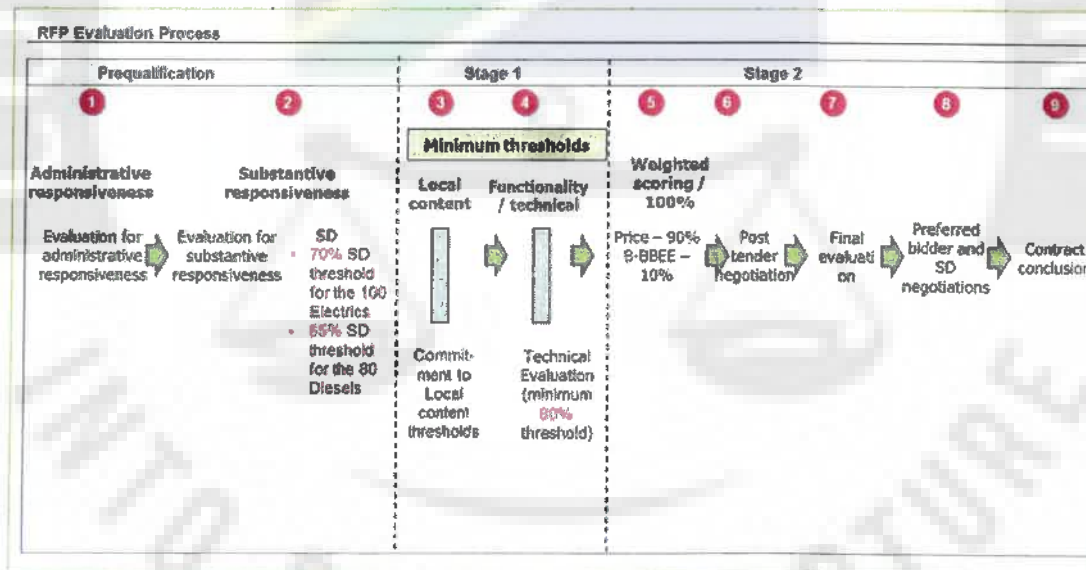
- 81. In both transactions, Transnet Engineering (TE) was appointed as GESAT's subcontractor for the local assembly of the locomotives and the contractual obligations have been met.
- 82. The time and cost to localise production to comply with local content and SD requirements has to be amortised over the anticipated production run. The smaller the run, the more expensive the overhead.
- 83. Given that a contract is already in place and that the additional 60 loco requirement will be largely on the same terms and conditions as the 43 loco confinement, this warrants extension.

#### Contracting strategy

- 84. Extend the current contract with General Electric South African Technologies (GESAT) for 60 Class 43 Diesel Locomotives.
- 85. Confine and award to China South Rail (CSR) for 100 Electric locomotives.
- 86. The reasons for the different confinement and extension strategies have been highlighted in the sections above.

#### Evaluation Methodology

- 87. The Request for Proposals (RFP's) for the confinement to Mars and extension to GESAT respectively will be issued and their respective proposals will be assessed as described below.



- 88. The Evaluation Methodology for an open tender comprises the following steps:

- 1) **Administrative responsiveness** – bidders will need to pass the administrative responsiveness to enable them to be evaluated further. This includes evaluating all returnable documents were submitted and the bid documents were duly signed by the bidders

- 2) **Substantive responsiveness** – bidders must ensure that all pre-qualification criteria, the pricing schedule is completed, their bid materially complies with the scope/specification and that all material terms and conditions in the bid documents have been met. SD pre-qualification criteria will be set at 65% for diesels and 70% for electrics based on recent learnings from the 1064 process.
  - 3) **Local Content** – bidders must comply to the minimum local content thresholds for Electric and Diesel locomotives as stipulated in the PPPFA
  - 4) **Technical evaluation** – bidders will need to pass the minimum technical thresholds of 80% for both Electric and Diesel locomotives to proceed to the final phase (stage 2) of evaluations.
  - 5) A **weighted scoring** approach for Price (90%) and B-BBEE – scorecard (10%) will be used determine final award
  - 6) **Post tender negotiations** – post tender negotiation requesting preferred bidders to provide their Best and Final Offers
  - 7) **Final evaluation** – preferred bidders to undergo final evaluation based on the 90/10 as stipulated by the PPM
  - 8) **Preferred bidder negotiations** – selection of the preferred bidder and negotiation of various aspects including final SD commitments and the B-BBEE improvement plan (FRC Future)
  - 9) **Conclude contract** – the parties sign a contract and addendums to formalize the agreement.
89. The above process is modified for the proposed confinement and extension in that:
- a) Administrative response (1) is simplified to essential documentation such as tax clearance certificate, BEE certificate etc.
  - b) Substantive response (2) will be required on to ensure that all material terms and conditions in the bid documents have been met. SD pre-qualification must be met
  - c) Local content threshold must be met
  - d) Technical evaluation (5) is simplified to ensure that all modifications / improvements made over the life of the locomotives (Class 43 and Electric's) for incorporation.
  - e) Weighted Scoring Approach (6) and
  - f) Final Evaluation (8) is not required due to confinement and extension to one party although evaluation against expected SD, BEE improvement and price ranges will be conducted to ensure the deals meet Transnet's expectations.,

**Local Content, Designated Components and Supplier Development (SD)**

90. Meeting Local Content (3) is a prerequisite to proceeding to SD threshold (4) evaluation.
91. The targets per PPPFA National Treasury Instruction Note (dated 16-07-2012) on 'Invitation and Evaluation of Bids Based on a Stipulated Minimum Threshold for Local Production and Content for the Rail Rolling Stock Sector' (Section 3 (3.1) are compulsory and are elaborated in following table:



Local Content - Section 3 (3.1)	
Category	Weighting
Local manufacturing: Threshold: 60% for Electric and 55% for Diesels)	100% of PPPFA
Total	100%

92. In addition, the progressive Local Content for Designated Components (Section 3 (3.2)) will also be applicable to both Electric and Diesel locomotives as per the table below though they may not materialize as the contracts will be fulfilled before three years and they are not programmatic.

Designated Component / Activity Heading Only - Section 3 (3.2)	% Local Content 3-5 Years	% Local Content 6 Years and above.
Assembly of Locomotives and EMU	100%	100%
Car Body	100%	100%
Bogie (including wheels)	100%	100%
Coupling Equipment	100%	100%
Suspension	100%	100%
Heat, Ventilation and Air Conditioning	60%	70%
Braking System	70%	80%
Alternators	90%	100%
Traction Motors	65%	80%
Electric Systems	80%	90%

1. The Supplier Development categories are set out in the table below. The pre-qualification targets are considered realistic and achievable without posing a risk to the project.

Supplier Development (SD)
Category
Investment in plant – bidders monetary commitment to investment in plant and equipment
Downstream procurement – bidders commitment to supporting 2 <sup>nd</sup> , 3 <sup>rd</sup> tier suppliers, etc.
Skills development – supplier's commitment to skills development (number of people and monetary)
Job creation / preservation – supplier's commitment to number of jobs maintained/created
Small business promotion – supplier's commitment to usage of small businesses (monetary)
ED/SD – bidders commitment to SD Initiatives and ED development

#### **Award Conditions – 100 Electric locomotives**

2. Approval to award the business to CSR is requested subject to SD compliance with the following:

- a) Local content meeting or exceeding 60% by value
- b) Compliance with **new** SD commitments with a minimum of 70% as measured in the SD Value Summary which forms part of the RFP
- c) Transnet will also request a price range of between R30.5m and R32m for the purposes of negotiation with the objective of coming in within the R34.34m per loco which will be used as a guide as is dependent on forex fluctuation.

#### **Award Conditions – 60 Class 43 Diesels**

3. Approval to award the business to GESAT is requested subject to SD compliance with the following:
  - a) Local content meeting or exceeding 55% by value
  - b) Compliance with **new** SD commitments with a minimum of 65% as measured in the SD Value Summary which forms part of the RFP
  - c) Transnet will also request a price range of between R22.5m and R24m for the purposes of negotiation with the objective of coming in within the R26m per loco which will be used as a guide as is dependent on forex fluctuation.

#### **FINANCIAL AND BUDGET IMPLICATIONS**

1. The financial motivation and budget implications for the 100 Electrics and 60 Class 43 Diesels are discussed in detail in the respective submissions.

#### **100 Electrics**

2. The 100 Electric Locomotives are summarized below and are based on previous experience with the Class 19E contract:
  - a) A base price per locomotive price of R 34.34 m (2013/14 - Yen 385 m @ Rand/Yen 0.09823)
  - b) Capital Investment Summary:

Year / Rm.	13/14	14/15	15/16	16/17	17/18	18/19	Contingency	Total
Project Plan Payment	R 343	R 1 737	R 1 439				R352	R 3 871
Delivery		56	44					100

- c) Adding the 100 class 19E sustaining locomotives to the original Coal 81 mt model changes the Net Present Value of the total Coal 81 Project from (NPV) R90.63m to (NPV) R98.49m over 10 years.
- d) The present value (PV) of the Total Cost of Ownership using the 1064 locomotive model is R58.6m per locomotive and R5 863m for the 100 locomotives.
- e) Approved infrastructure investments supporting the project totals R3 974 million.
- f) The cost is estimated and therefore a final price can only be given upon negotiation.

#### **60 Class 43 Diesels**

3. The 60 Class 43 Diesels are summarized below:
4. The 60 Class 43 locomotives are **over and above** the 465 diesels of the approved 1064 locomotives.

- a) The delays in the 1064 will result in the delivery of the 1064 locomotives extending beyond the current 7 year MDS capital plan. The diesels in particular will not meet the originally planned delivery.
- b) The fleet plan and the 1064 locomotive business case stress sustaining the fleet beyond the seven year period in the order of 60 to 80 locomotives per year.
- c) The 60 Class 43 diesels will be funded from the 1064 locomotive budget for the first year.
- d) The 1064 locomotive budget will be adjusted commencing the 2014/15 7 year cycle for the delayed delivery of the 1064 beyond the current 2013/14 7 year cycle. This adjustment is in line with the stated intent of sustaining the fleet through a continuous replenishment of new locomotives.
- e) A price per locomotive price of R 26m @ Rand / USD (R9.59/USD) (R27.67 m @ R10.4/USD for 2014/15).
- f) Capital Investment Summary:

Year / Rm	13/14	14/15	15/16	16/17	17/18	18/19	Contingency	Total
Project Plan Payment	R 156	R 1 504					R166	R 1 826
Delivery		60						60

- g) The acquisition of the 60 Class 43 Diesel preserves an NPV of R1 871 m based on the 1064 Locomotive Model.
- h) The PV of the Total Cost of Ownership using the 1064 Locomotive model is R63.7m per locomotive and R3 822m for the 60 additional diesels over their 30 year life.
- i) The cost is estimated and therefore a final price can only be given upon negotiation

#### Financial Impact to Group

5. The proposed procurement has limited impact on Group finances and the critical ratios are maintained.
6. For no delay the ratios are:

Ratios: Transnet Group - As is	Budget	Projections				
	2013/14	2014/15	2015/16	2016/17	2017/18	2018/19
- Operating margin %	24.9	29.1	31.5	32.5	35.4	36.3
- EBITDA %	42.9	46.7	49.1	49.7	51.8	52.6
- Return on average total assets (%)	8.0	10.0	11.3	12.4	14.2	14.5
- Gearing (%)	46.6	47.7	47.7	47.0	45.2	41.6
- Net debt to EBITDA (Times)	3.04	2.70	2.53	2.40	2.17	1.94
- Asset turnover (Times)	0.30	0.33	0.34	0.37	0.38	0.38
- Cash interest cover (Times)	3.3	3.6	4.0	4.1	4.5	4.8

## 7. For a one (1) year delay the ratios are:

Ratios: Transnet Group One (1) Year Delay	Budget	Projections				
	2013/14	2014/15	2015/16	2016/17	2017/18	2018/19
- Operating margin %	24.8	28.5	29.6	29.0	31.3	32.0
- EBITDA %	42.7	46.2	47.6	47.1	48.7	49.5
- Return on average total assets (%)	7.9	9.7	10.4	10.6	11.8	12.0
- Gearing (%)	46.2	47.3	47.8	48.7	48.7	47.1
- Net debt to EBITDA (Times)	3.01	2.71	2.67	2.75	2.64	2.49
- Asset turnover (Times)	0.30	0.33	0.33	0.35	0.36	0.36
- Cash interest cover (Times)	3.3	3.6	3.8	3.7	3.7	3.9

## 8. For a two (2) year delay the ratios are:

Ratios: Transnet Group Two (2) Year Delay	Budget	Projections				
	2013/14	2014/15	2015/16	2016/17	2017/18	2018/19
- Operating margin %	24.8	28.3	29.3	29.1	31.6	32.6
- EBITDA %	42.7	45.9	47.2	47.1	48.9	50.0
- Return on average total assets (%)	7.9	9.6	10.3	10.7	12.0	12.3
- Gearing (%)	46.0	46.6	46.8	47.4	47.7	46.3
- Net debt to EBITDA (Times)	2.99	2.67	2.61	2.64	2.55	2.41
- Asset turnover (Times)	0.30	0.33	0.34	0.35	0.36	0.36
- Cash interest cover (Times)	3.3	3.6	3.9	3.8	3.9	4.0

**SOCIO-ECONOMIC BENEFITS**

9. The transaction will be aligned with the Government of South Africa's socioeconomic policy framework, including CSDP, NGP, NDP, SSI, and IPAP2.
10. Meeting the MDS growth targets supports the National Development Program in the industrialisation of SA's mineral resources.
11. The program supports the sustainable development of a South African locomotive production industry.
12. Economic benefits include:
  - a) Using idle capacity available in South Africa
  - b) In terms of the National Treasury instruction note the local content for designated sector (rolling stock - locomotives) for electric locomotives is 60% and for diesel locomotives is 55%.
  - c) Ability to reinstate / retain local jobs as the skills pool already exists
  - d) Significant indirect and direct South African jobs will be preserved which include approximately 186 direct jobs at the TE assembly facility with further jobs retained in downstream enterprises

**PROJECT RISKS**

13. Both projects face several risks that could affect their overall economic viability:
14. **Locomotive Delivery:** This could arise if (i) the confinement is not approved (ii) unforeseen circumstances on the part of supplier including not complying with CSDP conditions.
15. **Lower volumes:** MDS volumes may not materialise per plan negating the need to cascade locomotives and / or the class 43 diesels not being fully or optimally utilised.



16. The coal line locomotives are nonetheless still nearing their end of life and these will require replacement in the short term to sustain coal exports at 81 mt. Long term coal contracts are currently being negotiated for 81 mt and there are sufficient coal reserves to sustain this tempo. The model and NPV is further based on 95% of the coal export volumes materialising. There is no risk to this project if volumes do not ramp up to 97.4 mt.
17. Exchange Rate Fluctuations:
- a) For the 100 Electric confined to CSR, the Yen / Rand Rate is used as a forecast given that the Class 19E deal was used as a base. Localisation is already set at 60%, thus mitigating exchange fluctuation risks.
  - b) For the 60 Class 43 confined to GESAT the base price is taken R10/USD. The rate is forecast to strengthen in the short term which includes the duration of the contract before weakening.
18. Tariffs not being realised:
- a) For the coal line current FOB prices for RBCT coal are around US\$90 per ton, well below the peak of over US\$150 per ton. At R9.50/USD and a tariff of R126 per ton, transport accounts for ~13% of the FOB price. Pressure on tariffs will remain till there is a long term sustainable uptick in the FOB price.
  - b) For General Freight increases linked to inflation are not seen as a risk while increases above inflation will be subject to scrutiny and downward pressure.
19. Tariff exposure to commodity downturns:
- a) In the short term this could impact the viability of emerging miners for export coal. This will affect only 3 mt as the rest are based on long term contracts being negotiated. The model is also based on 95% of the volumes realising.
  - b) Locomotives have a 30 year life-cycle which transcends economic cycles. In the short to medium term the global economic recovery is seen as slow but sustained. The economic environment for General Freight locomotives was fully set out in the 1064 business case.
20. **Over Capitalisation of the Coal Line:** This is not seen as a risk as the locomotives sustain current volumes of 81 mt for which long term contracts are being negotiated. The reserves in the Mpumalanga basin are also acknowledged to be able to sustain this tempo for the long term. There is thus little risk of stranded assets. The locomotives being replaced are at the end or very close to the end of their economic life and would require replacement in the very short term even if they were not cascaded to General Freight.
21. Project interdependencies:
- a) Crucial to the new operations and achieving 81mt on the Coal Export Line with the additional 100 Electric locomotives requires constructing the Ermelo bypass line. This line enables two 100 wagons trains from the mines to be coupled together enabling the train to proceed as a single 200 wagon Radio Distributed Power (RDP) train without going into Ermelo Yard.
  - b) An interdependency for the 100 Electric locomotives is cascading locomotives to general freight. The 60 Class 43 Diesels do not have other project interdependencies
22. Project risks will be mitigated during implementation by a **dedicated cross-functional project team** to manage the contract.

**RECOMMENDATION:**

23. It is recommended that the Transnet Board of Directors approve the following:

- a) Note the risk to TFR MDS volumes through insufficient traction power resulting from the delay in the procurement of the 1064 locomotives:
- b) To approve the investment in and procurement of 100 Electric locomotives required for the Coal Export Line in the amount of R3 871 m (excluding borrowing costs):
- c) To approve the confinement and award of the procurement for the 100 Electric locomotives.
- d) To approve the investment and change in the fleet plan to procure of 60 Class 43 diesel locomotives for General Freight in the amount of R1 826 m (excluding borrowing costs):
- e) To approve an extension of the current Class 43 diesel locomotives contract for 60 additional locomotives:
- f) The GCE be delegated the power to sign and conclude all relevant documents to give effect to the above resolutions, including the award and process approval.

**RECOMMENDED BY:**

Siyabonga Gama  
Chief Executive  
Transnet Freight Rail

Date: \_\_\_\_\_

**RECOMMENDED BY:**

Anoj Singh  
Group Chief Financial Officer  
Transnet SOC Ltd

Date: \_\_\_\_\_

**RECOMMENDED BY:**

Brian Molefe  
Group Chief Executive  
Transnet SOC Ltd

Date: \_\_\_\_\_



**ANNEXURE PV 34(a)**

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## MEMORANDUM

www.transnet.net

**To:** Brian Molefe, Group Chief Executive

**From:** Siyabonga Gama, Chief Executive, TFR

**SUBJECT: MANUFACTURE 100 CLASS 21E DUAL VOLTAGE ELECTRIC COAL LINE LOCOMOTIVES IN CHINA.**

### PURPOSE:

1. This purpose of this memorandum is

1.1 to request the Group Chief Executive (GCE) to request the Minister of Finance (the Minister) to exempt the acquisition of the 100 Class 21E Dual Voltage Electric Coal Line Locomotives (The locomotives) from the provisions of the PPPFA regulations (2011) and the Instruction Note for the Rolling Stock Sector issued by National Treasury (NT) dated 16 July 2014 (the Instruction Note).

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1.2 Pending the outcome of the request for exemption to the Minister, to approve that the memo requests that the recently approved 100 Class 21E locomotives be manufactured at the China South Rail (CSR) facilities in China and imported as complete units. This would be a change to the current program where 40 are manufactured at the CSR facilities and the remaining 60 are assembled by Transnet Engineering.

### BACKGROUND:

2.3. The Board submission of January 2014 proposed an accelerated procurement to mitigate General Freight MDS volumes at risk by confining 100 Class 21E locomotives to CSR (China South Rail) and extending the current class 43 contract with GESAT (General Electric South Africa) by 60 diesel locomotives. The accelerated acquisition would mitigate the MDS shortfall by at least a year with the effect realised in 2015/16. A copy of the approved Board submission is attached as "A".

3.4. The heavy haul 100 Class 21E locomotives will be deployed in the Coal Export Line and will release 125 locomotives that will be used on GFB pending delivery from the 1064 program.

4.5. The original proposal to the board on the 100 locomotives was for 56 operational locomotives to be delivered in 2014/15 and 44 in 2015/16

5-6. The currently contracted delivery schedule provides for 36 locomotives delivered in 2014/15 and 64 in 2015/16.

6-7. This delivery schedule is under further pressure~~further exacerbated~~ by the locomotives having to undergo type testing and approval. This impacts the first deliveries such that no locomotives will be operationally available in 2014/15.

7-8. The net effect is that there is no relief in 2014/15 from the currently contracted delivery of the 100 Class 21E locomotives.

8-9. The 100 Class 21E locomotives would have protected 2.4m tons in 2014/15 per the board submission and 4.4m tons in 2015/16.

## DISCUSSION

9-10. The discussion below makes reference~~refers~~ to three classes~~types~~ of locomotives that are currently being procured:

- i) The 95 Class 20E locomotives
- ii) The 100 Class 21E locomotives for the Coal Line
- iii) The 359 Class 22E locomotives General Purpose locomotives for General Freight.

10-11. TFR engaged CSR on its (TFR's) desired expedited delivery program for the 100 Class 21E locomotives. CSR responded by advancing the CSR manufactured locomotives by 3 months but the TE assembled locomotives were only advanced by one month. This is set out in the table in Annexure A.

11-12. To assist meeting TFR's requirements, CSR further proposed that the full 100 locomotives be manufactured at their facilities in China which would result in the complete delivery ex-factory in 2014/15.

## IMPLICATIONS

12-13. The implications cover:

- i) Effect on TE
- ii) Impact of the accelerated delivery
- iii) Localisation

13-14. **Effect on TE:** CSR ~~was~~~~were~~ one of successful bidders for the 1064 locomotive program. They are currently assembling the 95 Class 20E dual voltage electric locomotives at TE's Koedoespoort facilities. On completion of the 95 contract, the production line will switch to the 60 locally assembled Class 21E and thereafter to the 359 locomotives being their allocation of the 1064 locomotives.

14-15. The local assembly at TE of the 95 Class 20E, the 60 (of the 100) 21E and the 359 Class 22E are all planned as a sequential back-to-back operation on one line. Opening a second line for the CSR locomotives is not practical considering that it has to be equipped (jigged) and the staff and skills required will come out of a limited pool.

~~15-16.~~ The 95 Class 20E program is currently behind schedule. It is anticipated that recovery efforts notwithstanding, this delay will have a knock-on effect on the 60 locally assembled Class 21E locomotives. This in turn will have a knock-on effect on the 359 Class 22E locomotives as local assembly at TE is due to start in July 2015, with the first locally assembled Class 22E locomotives coming off the production line in December 2015.

~~16-17.~~ Removing the 60 Class 21E locomotives from the assembly line provides a buffer for TE and CSR to accommodate any residual delay in the 100 Class 20E program and to setup production for the 359 Class 22E locomotives where no delay can be tolerated.

~~17-18.~~ **Accelerated Delivery:**

Month	Oct -14	Nov -14	Dec -14	Jan -14	Feb -15	Mar -15	Apr -15	May -15
CSR	5	15	20	20	20	20		
SA Port		5	15	20	20	20	20	
Commission			20	20	20	20	20	
Operational Cumulative				20	40	60	80	100

~~18-19.~~ The Class 21E locomotives have to undergo obligatory type approval by the RSR (Rail Safety Regulator) and operational testing.

~~19-20.~~ The accelerated delivery provides Class 21E operational locomotives per the above table. These in turn will protect approximately 0.5mt in 2014/15.

~~20-21.~~ The accelerated delivery will protect the full 4.4mt in 2015/16 per board submission. This will not be possible with the currently contracted delivery which extends to August 2015 with still a month for commissioning thereafter.

~~21-22.~~ **Localisation:** ~~The duration of the 100 Class 21E locomotive contract is under a year. The Instruction Note on Rolling Stock stipulates a minimum threshold of 60% local content in respect of electric locomotives. Only those bidders who comply with this requirement will be further considered. The submission to the Board to confine the 100 locomotives to CSR contained the 60% minimum content stipulation.~~

~~22-23.~~ However, if all 100 locomotives are manufactured in China, the 60% threshold will not be met. ~~The 60% localisation target for electric locomotives per PPPFA National Treasury Instruction Note (dated 16-07-2012) on 'Invitation and Evaluation of Bids Based on a Stipulated Minimum Threshold for Local Production and Content for the Rail Rolling Stock Sector' (Section 3 (3.1)) would not be met.~~

~~24.~~ ~~The progressive Local Content for Designated Components (Section 3 (3.2)) applies to contracts of three years and longer. As the contract will be fulfilled in one year, the stipulations do not apply.~~

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23.—For the reasons outlined above, the GCE is requested to approach the Minister to exempt the acquisition of the 100 locomotives from CSR from the provisions of the PPPFA regulations and Instruction Note and to approve the manufacture of the 100 locomotives by CSR in China, pending the outcome of the request to the Minister.

**Commented [PVCJ1]:** Explain how local content has been exceeded on the 1064 deal which more than compensates for the loss of local content on the 100 loco transaction.



**RECOMMENDATION:****25. It is recommended that:**

1.1 the Group Chief Executive (GCE) request the Minister to exempt the acquisition of the 100 Class E Dual Voltage Electric Coal Line Locomotives from the provisions of the PPPFA regulations (2011) and the Instruction Note.

24-26. 1.2 Pending the outcome of the request for exemption to the Minister, the GCE to approve that the 100 Class 21E locomotives be manufactured at CSR's facilities in China and imported as complete units. It is recommended that approval be given to confirm with CSR that the 100 Class 21E locomotives be 100% imported ex-CSR works.

25-27. Other terms and conditions of the contract, including price, would remain unchanged.

**Recommended by:**

\_\_\_\_\_  
Siyabonga Gama  
Chief Executive, Transnet Freight Rail  
Date:

**Approved / Not approved:**

\_\_\_\_\_  
Brian Molefe  
Group Chief Executive Officer  
Date:



UNITED  
STATE CAPTURE



## Annexure A

CSR 中国南车		Proposals for Delivery of 100 Sets of 21E Coal Line Locomotives									
Delivery months	Contracted Delivery Schedule			TFR Expected Delivery Schedule based on 40 in China and 60 in TE			Accelerated Delivery Schedule 1 based on 40 in China and 60 in TE			Accelerated Delivery Schedule 2 based on 100 in China	
	Handled by CSR	Delivered by TE	Total delivered per month	Delivered by CSR	Delivered by TE	Total delivered per month	Delivered by CSR	Delivered by TE	Total delivered per month	Delivered by CSR	Total delivered per month
Sep-14				10		10					
Oct-14				15		15	2		2	5	5
Nov-14				15	5	20	15		15	15	15
Dec-14					10	10	15		15	20	20
Jan-15	2		2		10	10	5		8	20	20
Feb-15	15		15		10	10		4	4	20	20
Mar-15	16	4	19		10	10		12	12	20	20
Apr-15	8	12	20		10	10		12	12		
May-15		12	12		5	5		12	12		
Jun-15		12	12					12	12		
Jul-15		12	12					6	6		
Aug-15		8	8								
Total	40	60	100	40	60	100	40	60	100	100	100

南车电力机车项目公司  
CSR LOCOMOTIVE PROJECT CO., LTD.

Page 2 of 3

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**ANNEXURE PV 35**

## Summary of McKinsey Confinements

NO	Contract Description	Procurement method	Date of Confinement	Grounds for Confinement	Date contract concluded & contract period	Original Contract Value	Value and Period of Contract extensions
1.	For the provision of services related to the acquisition of 1064 locomotives tender (GSM /12/05/0447) 1064 Contract	Confinement	10 May 2012	Urgency Services are highly specialized and largely identical to work previously done	Service provider signed 21 February 2014 and Transnet Representatives signed 11 August 2014	R35.2m	First amendment: fee increase to R78.4(R43.1m increase) <sup>1</sup> *  Second amendment: "at risk" based fee of R166m. Total contract value not to exceed R265.5m.* <sup>2</sup>
2.	The award of contract to support MDS for Procurement and Capital Excellence and Productivity (GSM/12/10/0578) SWAT 1	Confinement <sup>3</sup>	22 November 2012	Urgency Services are highly specialized and largely identical to work previously done	Signed on 21/2/14 by service provider and on 11/8/14 Transnet representatives (Contract period 01 February 2013 to 31 March 2015).	The signed contract value was capped at R154.6m (excluding expenses and VAT).  The schedule of fees indicated R174.6m (including expenses, excl VAT)	Amendment to the duration of the contract from 31 October 2013 to 31 March 2015.

<sup>1</sup> The contract was ceded from McKinsey to Regiments.

<sup>2</sup> This information was extracted from copies of the contract and addendum documents

\*The contract was ceded from McKinsey to Regiments

<sup>3</sup> The TAC initially awarded the Swat 1 tender to McKinsey (See TAC resolution dated 26 July 2012). However, the GCE subsequently decided to split the award of contract between McKinsey and Deloitte. McKinsey then raised concerns about a possible conflict of intellectual property rights between itself and Deloitte, which led to the TAC approving the non-award of the tender (see TAC resolution dated 12 October 2012). The confinement to McKinsey was subsequently approved by the GCE on 22 November 2012. McKinsey undertook to subcontract a portion of the confined tender to Letsema Consulting, Regiments Capital and PD Naidoo.

### Summary of McKinsey Confinements

3.	The award of contract for Capital Optimization and Implementation Support to a consortium of McKinsey and Regiments (GSM 14/04/1052) Swat 2	18 October 2013	Standardization or compatibility with existing services are highly specialized and largely identical to work previously done.	10 March 2015 (9 April 2014 – 8 April 2016)	R225m fixed fee + contingent fee (R33m + R192m)	Reduction from R245m to R225m. Increase the scope and value for implementation and embedding support from R72m to R150m – R200m. Decrease capital optimization support from R173m to R25m – R75m. Amendment of split of work between McKinsey and Regiments.*4
4.	The award of contract for professional services to increase the coal line with a breakthrough of 2 million tons per week (GSM/14/04/1037) Coal contract)	March/ April 2014? <sup>5</sup>	Urgency (EBIDTA at risk) Services are highly specialized and largely identical to work previously done.	10 March 2015 (9 April 2014 – 30 September 2015)	R216.7m (R73.5m fixed fee + contingent fee R143.2m)	Confinement value increase from R130m to R216,7m = R86,7m (fixed fee increase from R20m to R43,5m) + contingent fee increase from R110m to R143,2m. Contract extended to September 2015. Amending split between McKinsey and Regiments.*6
5.	The award of contract for renegotiating the Kumba Iron Ore Contract (GSM /14/04/1038) Iron ore contract	1 April 2014	Urgency (EBIDTA at risk) Services are highly specialized and largely identical to work done before	1 April 2015 (9 April 2014 – 8 April 2015). <sup>7</sup>	R239m (R34m fixed fee + R205m contingent fee). <sup>8</sup>	Value amendment was as follows: Fixed fee increased to R37,4m Contingent fee increased to R210,6m Total contract increased to R248m.

## Summary of McKinsey Confinements

6.	Manganese Execution Support (GSM/14/04/1039) Manganese contract	Confinement	3 April 2014	Urgency (EBIDTA at risk) Services are highly specialized and largely identical to work done before Confidentiality	10 March 2015 (9 April 2014 – 8 October 2016)	R179.9m	Initial memorandum approved value was R150m and the amendment memorandum value approved was R30m.* <sup>9</sup>  Amending split between McKinsey and Regiments.
7.	The award of contract for NMPP Acceleration – de-risking the way forward (GSM/14/04/1040) NMPP contract	Confinement	3 April 2014	Urgency (EBIDTA at risk) Services are highly specialized and largely identical to work previously done Confidentiality	10 March 2015 9 April 2014- 8 October 2015.	R190m+R256.2m	Initial memorandum approved value was R100m and the amendment memorandum value approved was R90m. There is also evidence of a further LOI issued to

<sup>4</sup> This information is extracted from the confinement amendment memorandum.

<sup>5</sup> The exact date on which the GCE approved the confinement was not indicated on the memo. However, the GCFO signed on 31 March 2014.

<sup>6</sup> This information has been extracted from the confinement amendment memorandum.

<sup>7</sup> The contract was concluded on 1 April 2015, a few days before its initial expiry date of 8 April 2015. It must be determined whether a valid LOI was in place for the 12 month period before the contract expired.

<sup>8</sup> This is an increase from what was stated in the original confinement memo, in which the fixed fee amount was set at R20m + contingent fee R193m. The fees payable to McKinsey were payable over a 3 year period, despite the fact that the calculation was to be made on revenues earned over the full term of the contract. See para 31 of the confinement memo for the iron ore contract.

<sup>9</sup> This information has been extracted from the confinement amendment memorandum.

### Summary of McKinsey Confinements

							McKinsey for NMPP II in the amount of R256.2m
8.	The award of contract for professional services to support Transnet in increasing General Freight Business with a Breakthrough to reach the planned volume targets for FY 2015/16 and 2016/17 (GSM/15/03/1255) GFB contract <sup>10</sup>	Confinement	24 March 2015	Urgency (Transnet not meeting its planned GFB targets) Services are highly specialized and largely identical to work previously done	30 November 2015 (19 May 2015 – 18 May 2017)	R375m (fixed fee + R135m contingency R240m)	Increased scope; revision of split of work and fees between Regiments and McKinsey; cession from Regiments to Trillian; extension of contract period from 30 September 2016 to 31 March 2018; further increase in scope; increase in value from R375m to R463.3m (R88.3m) <sup>11</sup>

<sup>10</sup> The GFB contract was awarded to Regiments Capital with McKinsey as the subcontractor.

<sup>11</sup> This information has been extracted from the confinement amendment memorandum.



## ANNEXURE PV 36



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**TRANSNET****MEMORANDUM:**[www.transnet.net](http://www.transnet.net)

**To:** Anoj Singh, Acting Group Chief Financial Officer  
Brian Molefe, Group Chief Executive  
**From:** Garry Pitz, Group Chief Supply Chain Officer

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**CONFINEMENT OF ADVISORY SERVICES RELATED TO THE ACQUISITION OF 1064 LOCOMOTIVES TENDER.**

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**PURPOSE OF SUBMISSION:**

1. To obtain approval to confine the abovementioned business to any one or a combination of the following: KPMG, PWC, Aurecon, Letsame, McKinsey, Webber Wentzel, David Potter, Ledwaba Mazwai and MAC Consulting.
2. Approve the procurement strategy that will be used to assess the above companies.
3. Delegate authority to the Acting CFO to award business to the above after completion of the adjudication process.

**BACKGROUND:**

4. Transnet Board approved the TFR locomotive fleet plan in February 2012. 1202 GFB locomotives were approved as part of the TFR fleet strategy. Of the 1202 GFB locomotives, a contract was concluded for 43 diesels and a tender was issued for 95 electrics in December 2011.
5. TFR now requires 1064 (599 electric and 465 diesel) GFB locomotives. The locomotives are required to support the execution of the Market Demand Strategy (MDS) and achieve the projected increase in the MDS GFB volumes from 87.7 million tonnes in FY12/13 to 170.2 million tonnes by FY 18/19.

**MOTIVATION:**

6. Transnet Freight Rail has prepared a business case for the acquisition of 1064 locomotives. The business case was circulated on 26 March 2012 to members of CAPIC.
7. The investment for the 1064 GFB Locomotives is included in the 2012/13 Corporate Plan and is required to fulfill the aspirations of the Market Demand Strategy ("MDS") of ramping up GFB from 80mtpa to 170 mtpa by 2018/19 as well as to meet the capital investment expenditure targets.

8. In order to meet the Corporate plan targets for capital and volumes, the first tender award needs to be made by November 2012.
9. In light of the magnitude of the investment of R38,1 billion and the potential risks that such an investment poses to Transnet, further work is required to strengthen the current business case and mitigate associated risks.
10. TFR has conducted an extensive amount of work to support the business however further verification and validation of this work need to be conducted by Group, which include but are not limited to include the following:
  - Validating market demand for targeted commodities;
  - Mitigating the foreign exchange risks inherent in the acquisition of assets from foreign suppliers;
  - Funding options and other considerations;
  - Enhancing and detailing the procurement and contracting strategy (e.g. programmatic procurement)
  - Articulating the control and assurance processes to be built into the procurement process including key gate reviews.
  - Enhancing and detailing the socio-economic benefits (CSDP, Broad based Black Economic Empowerment, industrialization and localisation, environmental issues etc.);
  - Obtaining Independent audit/review of financial, operational and technical assumptions (e.g. number of locomotives required and specifications).
  - Conducting comprehensive risk assessments (e.g. risk of double dip recession) and mitigating plans.
  - Assist with final contract drafting.
11. A full list of the various issues/risks is available on request based on the review conducted by Group Finance.
12. Due to time constraints and the need to address the critical issues listed above, it is recommended that a parallel process be followed as outlined below:
  - Enhancement of the Capital business case and financial risk mitigation;
  - RFP will be issued subject to BOD and PFMA approval and will be made clear that it could be cancelled should these approvals not be obtained;
  - Issuing of the RFP to procure 1064 locomotives by May 2012 and closing in July 2012;
  - Obtaining PFMA approval from DPE and National Treasury;
  - Obtaining PPPFA exemption from National Treasury if no tender respondents meet the local content thresholds.
  - Evaluation of the RFP between August 2012 and September 2012 – award by December 2012.
13. The BADC and BOD approved the above process and as a consequence, we require the abovementioned consultants to execute the work as stated in paragraph 10 above.
14. KPMG, PWC, Aurecon, Letsema, McKinsey has been selected based on prior Transnet SOC Ltd experience and extensive working knowledge and experience in project finance.

Webber Wentzel, David Potter, Ledwaba Mazwai and MAC Consulting have been selected as they were engaged by PRASA in the recent procurement of locomotives and coaches.

15. From a Supplier Development perspective, as a criteria, 30% of the awarded work will be subcontracted to BBBEE companies with a high level of black (including female) ownership, management control and employment equity.

#### **GROUND FOR CONFINEMENT:**

16. Appended below, for your easy reference, is an extract from the latest directive, dated 5 July 2011, stipulating the grounds for confinement. Group ISOM is of the view that this matter complies with grounds (a) and (d), and the request for confinement is therefore fully supported –

- a) where a genuine unforeseeable urgency has arisen which is not attributable to bad planning;
- b) the goods/services are only obtainable from one supplier/limited number of suppliers. For instance, patented / proprietary goods or OEM spares and components. Operating Divisions are however required to satisfy themselves that there are no new entrants on the market who could also be tested;
- c) for reasons of standardisation or compatibility with existing products 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 "standardization" 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 tender 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 i.e. 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.

17. Specific emphasis is placed on grounds (a) due to the urgency of the tender being awarded by December 2012, as approved by the SADC and BOD.

#### **PROCUREMENT STRATEGY – EVALUATION METHODOLOGY**

18. Salient features of the evaluation is as follows:
- The evaluation will follow a staged process with minimum thresholds:
    - Stage 1 – Technical Evaluation (70% threshold)
    - Stage 2 – Commercial including price (60%) and BBBEE (40%)

The successful bidder will be required to partner with a black firm and subcontract a minimum of 30% of the business awarded.

**FINANCIAL IMPLICATIONS:**

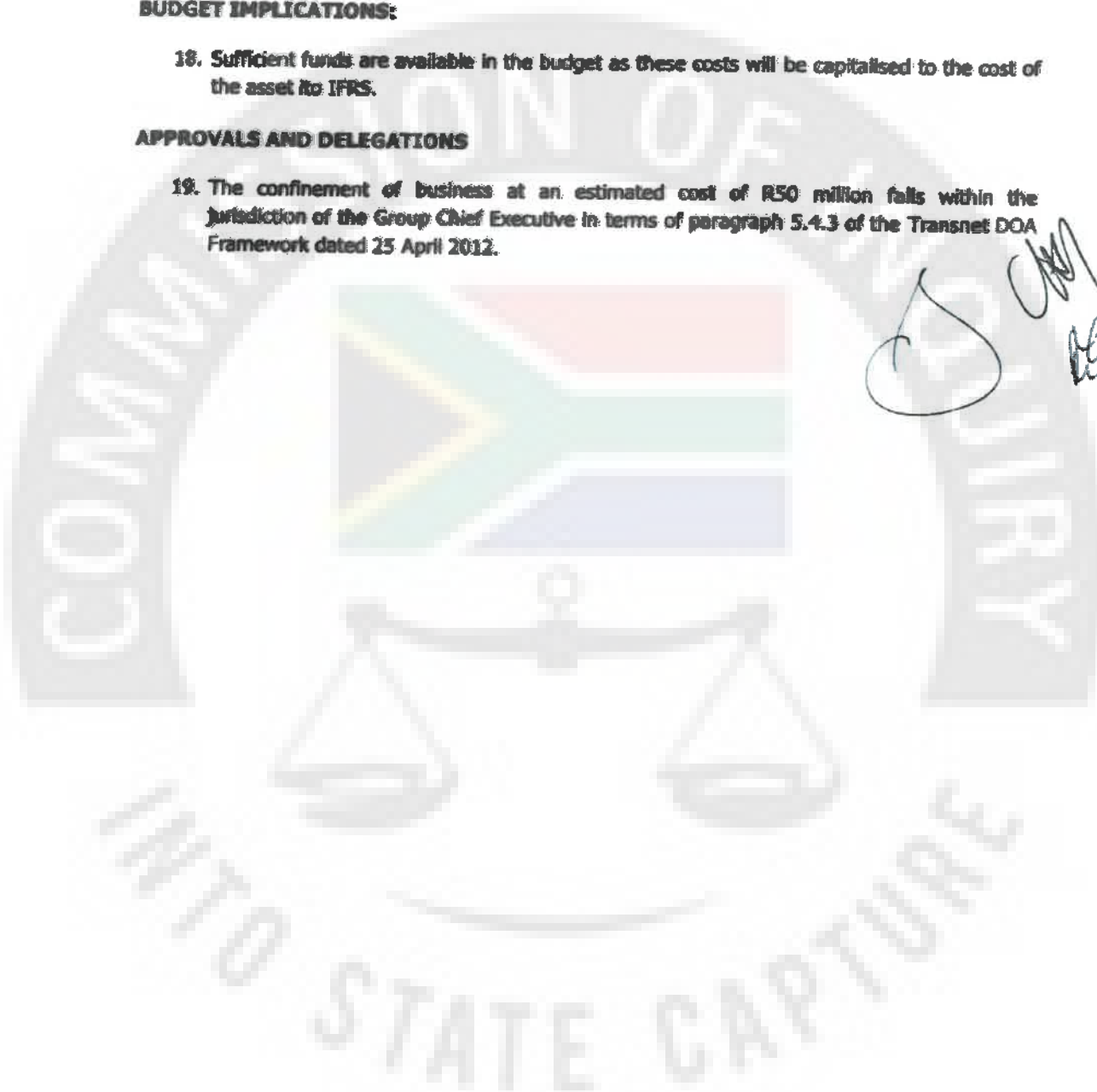
17. The estimated value for the advisory services required is R50 million collectively for all services required as requested in paragraph 1 of this memo.

**BUDGET IMPLICATIONS:**

18. Sufficient funds are available in the budget as these costs will be capitalised to the cost of the asset to IFRS.

**APPROVALS AND DELEGATIONS**

19. The confinement of business at an estimated cost of R50 million falls within the jurisdiction of the Group Chief Executive in terms of paragraph 5.4.3 of the Transnet DOA Framework dated 25 April 2012.

Handwritten signatures and initials in black ink, including a large stylized 'S' and several smaller initials.

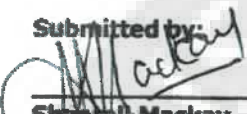


**RECOMMENDATION:**

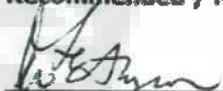
22. It is recommended that the Group Chief Executive approves the following:

- a. confinement of business to the estimated valued of R50 million, for the advisory services required in the go to market strategy for the acquisition of 1064 Locomotives. The award of the business will be considered by the TCC TAC in the normal manner.
- b. the procurement strategy that will be used to assess the above companies
- c. Delegate authority to the Acting CFO to award business after completion of the adjudication process.


Submitted by:

  
**Shantell Mackay**  
 Manager, Procurement  
 Date: 7/05/2012

**Recommended / Not Recommended**

  
**Wynand Esterhuizen**  
 Manager (Policy, Standards & Governance)  
 Date: 7/05/2012


**Recommended / Not Recommended**

  
**Edward Thomas**  
 Executive Manager  
 Date: 7/5/12


**Recommended / Not Recommended**

  
**Anoj Singh**  
 Acting Group Chief Financial Officer  
 Date: 07/05/12

**Recommended / Not Recommended**

  
**Peter Volmink**  
 Executive Manager  
 (Governance), ISCM  
 Date: 7/5/2012

**Recommended / Not Recommended**

  
**Garry Pita**  
 Group Chief Supply Chain Officer  
 Date: 7/5/12

**Approved / Not Approved**

  
**Brian Molefe**  
 Group Chief Executive  
 Date: 10/05/2012



## ANNEXURE PV 37



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Swat I  
→ Started as per BFR  
→ Nbr awarded  
→ the actual

## MEMORANDUM

**To:** Brian Molefe  
Group Chief Executive

**From:** Anoj Singh  
Group Chief Financial Officer

**Date:** 18 October 2012

**SUBJECT: CONFINEMENT AND AWARD OF SERVICES, CAPABILITIES AND RESOURCES TO SUPPORT THE MARKET DEMAND STRATEGY FOR PROCUREMENT AND CAPITAL EXCELLENCE AND PRODUCTIVITY ("SWAT TEAMS")**

### PURPOSE

1. The purpose of this memorandum is:
  - 1.1. to obtain approval for the confinement and award of services, capabilities and resources to support the Market Demand Strategy for procurement and capital excellence and productivity to McKinsey & Company.
  - 1.2. to request approval for an increase in budget by R100 million due to the finalization of the scope and deliverables, to R200 million.

### BACKGROUND

2. Transnet SOC Ltd announced that it expects to sustain 588 000 indirect jobs across the economy through its Market Demand Strategy (MDS), which will see the company spend R300 billion on capital projects over a seven-year period.
3. The MDS is aimed at expanding South Africa's rail, port and pipelines infrastructure, resulting in a significant increase in freight volumes, especially in commodities such as iron ore, coal and manganese. It will also lead to a significant modal shift from road to rail.
4. The main objective of the strategy is for Transnet to invest in building capacity to meet validated market demand that will enable economic growth.
5. Following an open tender process, the GCE approved, the appointment of the McKinsey Consortium and the Deloitte Consortium to provide resources, services and capabilities to support MDS for procurement and capital, for a budget of R100 million, refer to Annexure A.

## DISCUSSION

6. Over the last couple of months, Transnet and McKinsey & Company spent a considerable amount of time on the scope of work, deliverables and allocation of responsibilities amongst the consortium members. This process resulted in the finalization of clearly defined and amplified scope and deliverables for the engagement to ensure better implementation and management of both internal and external resources.
7. In addition, the scope and deliverables are structured to ensure key skills transfer to Transnet at the end on the engagement.
8. During these post tender negotiations (PTN), McKinsey & Company claimed that there was a conflict of intellectual property between McKinsey & Company and Deloitte Consulting as they are two international competitors. The intellectual property issue arises from the fact that Deloitte's would be exposed to McKinsey's methodologies and practices which constitute McKinsey's proprietary information. However, Deloitte's sub-contractor, PD Naidoo and Associates has no intellectual property related issues and McKinsey is willing to work with them to ensure the skills transfer objectives are met. The Transnet Acquisition Council has therefore been requested to approve a non-award of the business as originally proposed (See Annexure C).
9. In order to ensure that Transnet receives the most comprehensive appointment of services, capabilities and resources to support the MDS for procurement and capital excellence and productivity, it is recommended that this project be confined and awarded to McKinsey & Company. McKinsey has undertaken to sub-contract a portion of the contract to Letsema Consulting, Regiments Capital and PD Naidoo, which are black empowered companies.
10. Preliminary deliverables are articulated in annexure B.
  - 10.1. The overall objective of the SWAT teams is to enable Transnet to deliver its capital project portfolio in an effective and efficient manner by ensuring that:
    - 10.1.1. Projects are aligned with the overall strategy and properly prioritized across the portfolio;
    - 10.1.2. Each project within the portfolio is the right one, addressing the right business need, in the most cost and resource-effective way;
    - 10.1.3. Reduce the quantum of the unfunded capital by scrubbing and optimizing the portfolio;
    - 10.1.4. Each project is executed in the most effective and efficient way through application of a revised organizational structure;
    - 10.1.5. Setting up the required structures and governance to ensure capital projects are appropriately supported;
    - 10.1.6. Capital procurement is not a bottleneck to project delivery by supporting a subset of high value procurement events; and

10.1.7. The right tools and systems are available in a sustainable way.

11. To achieve these objectives, a number of short and longer term initiatives will be launched to ensure Transnet delivers on MDS, and reduce the current capital by ~R40bn-R50bn in the first wave and leave Transnet with the ability to continue to drive improvements.

12. Short term initiatives

12.1. Set up a 'project factory' – a SA first to leverage limited resources and build a sustainable way of developing our capital project business cases. This will cover the biggest commodities and account for > 80% of the capex spends in the first wave (based on the capital spend of R412bn, which comprises the Corporate Plan 2012/13 Capital Spend (R300bn) plus Group Planning and Monitoring identified R112bn capital deficit). We expect this to deliver 12.5% (~R41bn) in capital savings. It will also be a kick start to building the institutional capacity (teams) that can take this process forward.

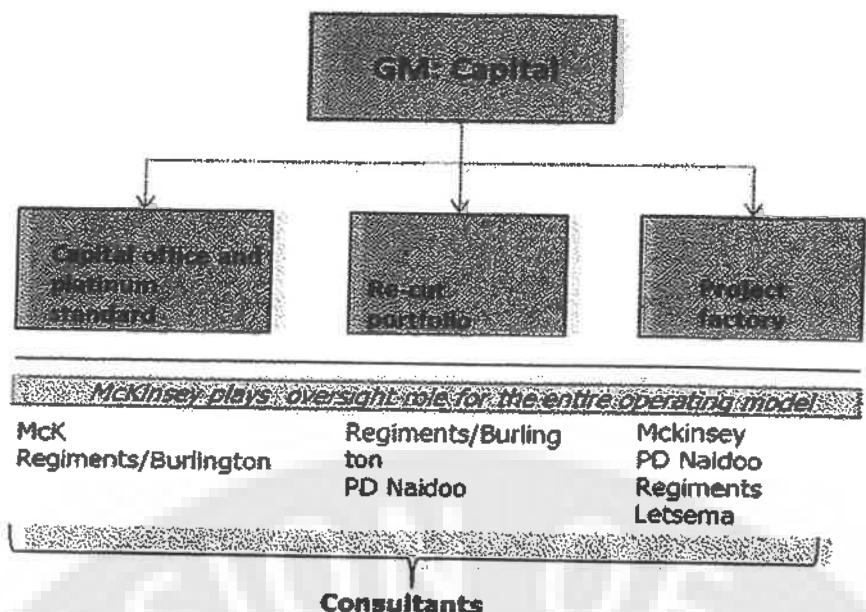
12.2. Re-cut the project portfolio – create projects which reflect the intended business outcomes (e.g. volumes, IRR, socio-economic etc.) and all of the capital and operating inputs required to achieve those outcomes. We expect this to deliver ~R10bn savings. As part of this process a dedicated portfolio management team will be established.

12.3. Accelerate capital procurement – ensuring that capital procurement is not a bottleneck to project delivery. The pipeline of 400 procurement events will need to be supported- the support will be targeted to a subset of these events.

13. Long term initiatives

13.1. Set up the capital organization and implement the capital platinum standard at Transnet – Setting up the required structures and governance to ensure capital projects are appropriately supported. In the long run this will increase our capacity by ~1200 people (to be determined).

14. An operating model, headed up by the GM: Capital (to be appointed), and McKinsey playing an oversight role for a period of nine months, has been proposed as follows:



#### GROUNDS FOR CONFINEMENT:

15. Appended below, for ease of reference, is an extract from paragraph 15.1.2 of the latest PPM, stipulating the grounds for confinement. We are of the view that this matter complies with grounds (a) and (d) and the request for confinement is therefore fully supported –

- a) Where a genuine unforeseeable urgency has arisen which is not attributable to bad planning;

*There is a definite urgency for this project to proceed as it is key to rapidly fulfilling the MDS strategy. Transnet has previously gone out on open tender for this work but due to factors listed above were not able to award. As this assignment is of a professional services nature (as opposed to the tendering for a simple product purchase, for example), a number of issues including detailed scope, intellectual property concerns, were only fully clarified, illuminated and identified during the open tender.*

- b) The goods/services are only obtainable from one supplier/limited number of suppliers. For instance, patented/proprietary goods or OEM spares and components. Operating Divisions are however required to satisfy themselves that there are no new entrants on the market who could also be tested;

- c) For reasons of standardization or compatibility with existing products 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 "standardization" will not be considered' or

- d) When 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 tender 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 prerequisites must be satisfied i.e. the goods or services must be highly specialized, almost identical to previous work done and approaching the market again would result in wasted money and time.

16. In addition, with regard to reason (d) above, it may be mentioned that McKinsey supported

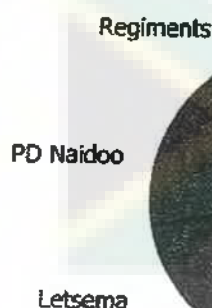


Transnet during the 2012/13 Corporate Plan approval process by refining the MDS, developing supporting documentation and communicating with stakeholders. They assisted with the scrubbing and prioritization of areas for consideration in the plans. They furthermore developed the MDS implementation framework and the principles. This framework and principles will now be executed in this procurement event. McKinsey also provide detailed support on procurement and Capital events which will be continued in this procurement event.

To issue another open tender will not address the intellectual property issues; On the other hand, a confinement will eliminate fruitless and wasteful expenditure of money both from a Transnet perspective and supplier perspective. In addition, if Transnet chooses another supplier at this stage, time would be required for the new supplier to adequately come to understand the scope and Transnet's business, thus extending the start and end date of the assignment.

#### FINANCIAL IMPLICATIONS

17. The estimated cost of the final scope for the resources, services and capabilities to support MDS for procurement and capital (SWAT teams) is R200 million, against the initially approved amount of R100 million.
18. Accordingly, an additional amount of R100 million is required to achieve the deliverables as set out above.
19. A preliminary view of which consultants will do work is provided in Annexure C. The % split of fees amongst the services providers is set out below:



#### BUDGET IMPLICATIONS

20. Sufficient funds are available in the 2012/13 budget as it is estimated that only a third to a half of the R200 million will be expended in the 2012/13 budget. The 2013/14 budget will need to be updated within the current budget cycle to account for the 2013/14 expenditure. It should be noted that there is a possibility that a portion of this R200 million may be eligible for capitalisation to specific assets rather than being expensed.
21. Any carry over into the 2013/14 year will be budgeted for in the next budgeting cycle.
22. R100 million was set-aside and previously approved by the GCE in the Memorandum: "Source of Funding for Strategic Project for 2012/13".



**APPROVALS AND DELEGATIONS:**

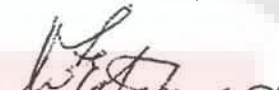
23. The confinement of business falls within the jurisdiction of the Group Chief Executive in terms of paragraph 5.4.3 of the Transnet DOA Framework dated 25 April 2012 (effective 1 May 2012).
24. An approval to confine and award is sought given the urgency of the matter and the fact that the confinement is made to only one supplier (See PPM 15.1.3(b))

**RECOMMENDATIONS**

25. It is recommended that the Group Chief Executive approves:
- 25.1. the confinement and award of services, capabilities and resources to support the market demand strategy for procurement and capital excellence and productivity to McKinsey & Company with the proviso that McKinsey & Company sub-contracts a portion of the contract to Regiments Capital, PD Naidoo and Associates and Letsema Consulting.
- 25.2. an increase in budget by R100 million due to the finalization of the scope and deliverables, to R200 million.

**Requested by:**

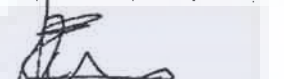

**Thabo Lebelo**  
General Manager: Group Financial Planning  
Date:

**Recommended/Not recommended:**


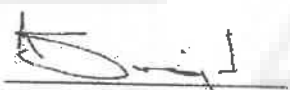
**Wynand Esterhuizen**  
Manager (Policy, Standards & Governance)  
Date: 19/10/2012

**Recommended/Not recommended:**


**Peter Volmink**  
Executive Manager (Governance), ISCM  
Date: 19 October 2012

**Recommended/Not recommended:**


**Edward Thomas**  
Acting Group Chief Supply Chain Officer  
Date: 19/10/2012

**Recommended/Not recommended:**


**Anoj Singh**  
Group Chief Financial Officer  
Date: 19/10/12

**Approved/Not approved:**


**Brian Molefe**  
Group Chief Executive  
Date: 22.11.12.

## ANNEXURE PV 38



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TRANSNET



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## MEMORANDUM

**To:** Brian Molefe  
Group Chief Executive

**From:** Anoj Singh  
Group Chief Financial Officer

**Date:** 7 October 2013

**SUBJECT: CAPITAL OPTIMISATION AND IMPLEMENTATION SUPPORT**

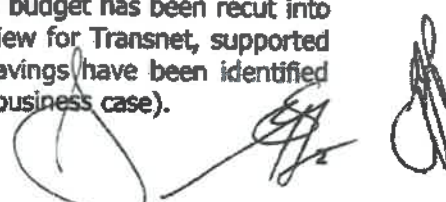
### PURPOSE

1. The purpose of this memo is to request the Group Chief Executive to approve a confinement and award in respect of the Capital Excellence programme to a consortium of Regiments & Company and McKinsey and Company ("Team") to:
  - a. Further value optimise the capital investment portfolio by a minimum of R100 billion for maximum fee of R173 million (excluding expenses and VAT) in excess of the ~R49bn optimisation expected from scrubbing and optimization by the Project Factory;
  - b. Implementation and embedding of the platinum standard developed by Capital Integration for a fixed fee of R72 million.

### BACKGROUND

2. Transnet's capital programme is one of the most ambitious initiatives in the world. By now, we all understand that South Africa's growth and the success of MDS are closely interlinked and depend on our ability to execute capital projects efficiently and effectively. The programme also provides opportunities to achieve the transformation objectives of job creation, skills development, localisation, supplier development and empowerment.
3. Transnet has recognised the importance of strengthening its capital delivery system (organisation structure, skills, capacity, systems, processes, and governance) and has previously appointed the consortium, led by McKinsey & Company, to assist Transnet to deliver its capital portfolio in an effective and efficient manner, through a Capital Excellence Programme. The programme consists of four Lighthouse Projects which have been launched to reduce the current capital spend by ~R49bn:
  - a. Set up a "Project Factory" – a world first to systematically scale limited resources and build a sustainable way of developing robust capital project business cases, optimized for socio-economic outcomes and improved execution readiness, thereby de-risking Transnet's project delivery.
  - b. The Project Factory is expected to cover at least eight of the biggest commodities, accounting for ~80% of the capital spend and volumes

- over the first 3 waves, with anticipated capital savings of ~R39bn;
- c. Re-cut the project portfolio – ensure that Transnet only creates capital projects that deliver the intended business outcomes (volumes) in line with Transnet's strategy, and that these projects accurately reflect all of the capital and operating inputs to achieve these outcomes. We expect this to deliver ~R10 billion in capital savings, as well as establishing the internal capabilities and methodologies in the portfolio management team to sustain this going forward.
  - d. Accelerate capital procurement – ensure that capital procurement is not a bottleneck to project delivery, with support targeted to procurement events that are critical for the large projects.
  - e. Set up a "Platinum Standard" capital organization - build the very foundation that will strengthen and sustain Transnet's capital investment levels beyond the seven year plan; including creating the structures, processes and governance to ensure capital projects are appropriately supported. In the long run this will increase our capacity by ~1200 people.
4. The projects as listed above are contained in the current LOI, dated 23 January 2013. The current fee split for this engagement (excluding expenses and VAT) for McKinsey and its subcontractors is as follows:
- a. McKinsey & Company: 58%
  - b. Regiments: 28%
  - c. Letsema: 14%
5. The Capital Excellence Programme has already picked up momentum:
- a. Project Factory - the concept, methodology, floor plan and skeleton organisation have been developed and pilot projects identified;
    - i. A rapid review of the Manganese business case has been commissioned and includes a focused validation of key assumptions in the business case as well as a review of financial models and monte carlo risk analysis.
    - ii. We have compiled the list of project sponsors and directors for the five mega programmes as approved by EXCO and presented at the Board of Directors strategy session. The processes to appoint the relevant teams are in progress.
    - iii. Transnet has been unable to put the required pre-requisites in place, so the Capital Excellence Programme has not ramped up as quickly as expected. For example:
      1. Getting leadership alignment on the Platinum Standard principles across Transnet has taken significantly longer than expected;
      2. The key area requiring significant resource commitment from Transnet, creation of appropriately resourced owner's teams, has been lacking to date and requires additional focus and momentum in the immediate few weeks;
      3. The Portfolio Manager has only been appointed effective 2<sup>nd</sup> October 2013, and the filling of the remaining structure is still underway;
  - b. Portfolio Recut – the R307 billion MDS capital budget has been recut into 30 programmes, creating the first portfolio view for Transnet, supported by a prioritisation tool. R17 billion capital savings have been identified (with an additional R10 billion from the locos business case).





- c. Platinum Standard – the Group Capital Integration team has been ramped up, with capability building for the 5 existing team members and 5-10 Graduates-In-Training. The programme owner's team blueprint and governance model has also been defined, along with the programme sponsor and programme director roles. The CAPIC mandate has been refined to include the steering of mega-projects, and a capital allocation process has been developed.

## DISCUSSION

6. The original contract was confined to the consortium. The contract fee payable, of R174.6 million (including expenses, excluding VAT) is dependent on the achievement of all the deliverables and the capital savings targets on the following basis:
  - a. Programme set-up: R78.9 million guaranteed fee (including expenses, excluding VAT) to build the base capabilities within Transnet and to lay the foundations for the scrubbing and optimization work;
  - b. At risk: R95.7 million (including expenses, excluding VAT), contingent on the realization of R49 billion capital savings from scrubbing and optimization.
7. The complexity and risk associated with the capital portfolio has increased since the contract was negotiated, thereby increasing the requirement for capital savings from R49 billion to ~R150 billion:
  - a. The MDS investment portfolio of R307.5 billion over the next seven years does not incorporate all projects to delivery 360 Mtpa, as identified by the Capital Planning team in compiling the Long Term Planning Framework. If all opportunities are considered (in the unlikely instance of unlimited capital) the investment plan would be in the region of ~R450 billion;
  - b. Transnet can only afford ~R230-280 billion due to volumes at risk, and factors such as increasing labour costs and regulatory pressure. The range is driven by the level of cost savings (e.g. procurement) and revenue enhancement (e.g. Africa) initiatives that can be realised;
  - c. Public Sector Partnerships (PSPs) currently being developed independently from the capital programme have critical inter-linkages with Transnet funded programmes, and must be closely integrated to ensure delivery of MDS volumes;
  - d. Given the changing market conditions, under-staffed owner's teams and discovery of additional risks, several mega-projects are further behind schedule than expected, and require additional support to ensure they deliver within the MDS horizon. Overruns, delays and estimation errors could be significant given the issues on the NMPP project and global trends in infrastructure projects;
  - e. Exchange rate risk resulting from the import component of the capital investment programme quantified at ~R30 billion;
  - f. The ability for Transnet to successfully execute the capital investment programme, on time, at cost, and within the required quality standards has been raised extensively by the credit rating agencies;
  - g. The Corporate Plan requires amending to reflect this improved understanding of the capital portfolio, and recent changes in demand.
8. One of the initiatives tabled at the Board Strategy Session was the Portfolio optimisation as well as the Project factory driven optimisation of mega projects

with total capital savings estimated at ~R100 billion.

9. The Platinum Standard has been developed, however, a clear implementation and embedding plan must still be developed and rolled out for Group as well as operating divisions. Furthermore, additional focus areas are required in the following areas to create a sustainable solution across Transnet for the embedding of the Platinum Standard:

- a. Resourcing strategies of TCP and Operating Divisions and filling of key roles identified through the process;
- b. Embedding the Capital Allocation principles for the future budgeting cycles to create a dynamic Capital Investment Plan;
- c. Development of a Financial model that will assist Transnet with the single view of Capital with links to volumes, demand and strategic objectives;
- d. Change management across Transnet of the modified methodologies and principles of the Capital Platinum Standard. The focus on delivering Capital Programmes to yield the strategic and business objectives of Transnet. This will require
  - i. Formulation of an implementation plan
  - ii. Training programs across Transnet incorporating all Operating Divisions and all relevant functions within the ODs
  - iii. Refresher training programs over a sustained period of time
- e. Development and implementation of a stakeholder engagement program to incorporate requirements of the DPE, PICC and other stakeholders
- f. Creation of a "Top Talent" program for Transnet with a focus on becoming a world-class Capital Organisation

10. Transnet does not have the capacity to achieve these additional capital savings and drive the implementation of the platinum standards, as the capability will only be created towards the end of the programme. It must be emphasised that IGC department was formed in January 2013 and to date only a further two management team members have been appointed.

- a. We propose engaging a team of consultants to ensure the embedding of a sustainable solution of the platinum standard. This will significantly reduce the reliance on consultant in the medium to long term by creating the capacity internally within Transnet
- b. Value optimise the capital investment portfolio by a further R100 billion for fee of maximum fee of R173 million (excluding expenses and VAT) that is contingent on the realization of the capital savings from scrubbing and optimization by the Project Factory in the short term, next 12 – 24 months.; Value optimisation is defined as follows
  - i. Savings identified in optimisation covering both technical and financial solutions to deliver the 360mt volumes;
  - ii. Reduction in value in the Capital Portfolio to deliver 350mt and bringing all mega programmes to FEL 3 stage;
  - iii. Removal and deferment of projects will not be considered;



11. The contingent fee will apply on the following scale linked to optimisation targets:

Further Optimisation target	Contingency fee payable
1 000 000 000	1 726 531
10 000 000 000	17 265 306
20 000 000 000	34 530 612
30 000 000 000	51 795 918
40 000 000 000	69 061 224
50 000 000 000	86 326 531
60 000 000 000	103 591 837
70 000 000 000	120 857 143
80 000 000 000	138 122 449
90 000 000 000	155 387 755
100 000 000 000	172 653 061

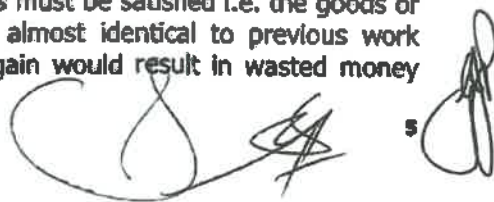
12. Implementation and embedding of the platinum standard developed by Capital Integration for a fixed fee of R 72 million.

13. A separate memo informing the GCE will be drafted once the optimisation is complete and before payment is made to the consultants.

#### **GROUND FOR CONFINEMENT**

14. For ease of reference, below is an extract from the latest approved Procurement Procedures Manual, stipulating the relevant grounds for confinement par (c) and (d) for this case, which we believe remain relevant:

- Where a genuine unforeseeable urgency has arisen which is not attributable to bad planning;
- The goods/services are only obtainable from one supplier/limited number of suppliers. For instance, patented/proprietary goods or OEM spares and components. Operating Divisions are however required to satisfy themselves that there are no new entrants on the market who could also be tested;
- For reasons of standardization or compatibility with existing products 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 "standardization" will not be considered' or
- When 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 organisation to solicit other tender 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 prerequisites must be satisfied i.e. the goods or services must be highly specialized, almost identical to previous work done and approaching the market again would result in wasted money and time.



15. Specific emphasis is placed on grounds (c) and (d) due to the potential business risks associated with approaching the market on an open tender process and are illustrated in the following table:

c. Standardization or compatibility with existing products, deviation will cause major operational disruption	This component of Ground C relates to the physical operations of capital execution. Following an open tender process and the potential appointment of another provider will result in major operational disruption of the portfolio recut, project factory and capital organisation work which has been rolled out across all ODs resulting in work done since January 2013 needing to be redone. This has all been done within a standardised process and the additional work is compatible with existing products being provided by the Consortium.
d. Goods and services being procured is highly specialised and largely identical	This component of Ground D relates to the specialised work conducted in the re-cutting of the capital investment portfolio and the optimisation of programmes in the project factory. The tools and methodologies have been developed and will be applied across the Transnet investment portfolio and then the same to be applied to the portion of investment that's not in the current 7 year plan but part of the long term planning framework.
d. Approaching the market would result in wasted money and time	Due to the specialised nature of the work a new service provider will be required to start from scratch and basically move the initiative back to January 2013 and as a result will require similar amount of hours to reach a level of where CI has currently progressed to. This will result in funding the same work already conducted by the original service provider. Additionally the amendment to contract does not guarantee any additional fees unless savings are achieved.

#### **FINANCIAL IMPLICATIONS, B-BBEE AND SUPPLIER DEVELOPMENT**

16. Similar to the optimization and scrubbing target of R49 billion, only once the FEL2/3 stages gate review and/or governance processes are passed will the consortium team qualify for the contingency fee of R173 million including:
- Robust gate reviews;
  - Review and approval by CAPIC in line with the new CAPIC mandate.
  - Achieving the value optimisation targets as defined as
    - Savings identified in optimisation covering both technical and financial solutions to deliver the 350mt volumes
    - Reduction in value in the Capital Portfolio to deliver 350mt and bringing all mega programmes to FEL 3 stage
  - Removal and deferment of projects will not be considered

17. The total fee of R245 million – at risk of R173 million and guaranteed fixed fee of R72 million will be shared with the Team as agreed by the consortium in conjunction with the Transnet sponsoring executive, with a minimum of a 70%

**CAPITAL OPTIMISATION AND IMPLEMENTATION SUPPORT**

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share going to Regiments and 30% to McKinsey and Company .

#### **BUDGET IMPLICATIONS**

18. The at risk of R173 million has not been included in the budget, but due to the contingent nature of the payment, if additional fees are paid, a significant saving would have been attained on the capital investment plan of 100 times the additional fees to be paid.
19. The guaranteed fee of R73 million has not been included in the 2013/14 budget as the work will be executed over the 2014/15 financial year, and will be budgeted accordingly in the 2014/15 Corporate Plan.

#### **APPROVALS AND DELEGATIONS**

20. The GCE's delegation for confinements is R250 million per paragraph 5.4.3 of the Delegation of Authority Framework (DOA), effective 1 June 2013. Therefore, as per the PPM and the DOA, this request for approval is being sought from the GCE.

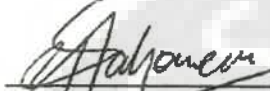
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**RECOMMENDATION**


21. It is recommended the Group Chief Executive approve a confinement and award in respect of the Capital Excellence programme to a consortium of Regiments & Company and McKinsey and Company ("Team") to:

- a. Further value optimise the capital Investment portfolio by a minimum of R100 billion for maximum fee of R173 million (excluding expenses and VAT) in excess of the ~R49bn optimisation expected from scrubbing and optimization by the Project Factory;
- b. Implementation and embedding of the platinum standard developed by Capital Integration for a fixed fee of R72 million.

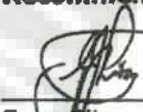
**Prepared by**

  
 Mohammed Mahomed  
 GM: Capital Integration  
 Date: 11.10.13.


**Recommended by**

  
 Peter Volmink  
 EM: Governance(ISCN)  
 Date: 14/10/13


**Recommended by**

 → SD plan to be negotiated  
 Garry Pita  
 Group Chief Supply Chain Officer  
 Date: 14/10/13

**Recommended by**

  
 Anoj Singh  
 Group Chief Financial Officer  
 Date: 14/10/13.

**Approved/Not approved by**

  
 Brian Molefe  
 Group Chief Executive  
 Date: 18.10.13



# Presentation to BOD Workshop- Overview of 14 initiatives and related benefits expectation

Initiatives	Higher impact lever		Lower impact lever		Revenue Rbn p.a	Cost Rbn p.a	EBITDA <sup>1</sup> Rbn p.a	Capital Cum. Rbn 2014-20
	Downside protection lever							
Capital	1	Portfolio optimisation, efficiencies and cutting the tail						60-70
	2	Project factory driven optimisation of mega projects			3.0-4.4 <sup>2</sup>			20-30
	3	Acceleration of Manganese and Coal programmes			1.1-3.7 <sup>4</sup>		1.0-1.5	4.0-5.0
	4	Loco 2 programme – diesel acceleration					0.4-1.2	7.0-9.0
Revenue	5	Kumba tariff renegotiation			0.8-1.7		0.8-1.7	
	6	Drive incremental volume through operational efficiency and targeted capital spend			1.2-1.7			
Alternate income-generation	7	Africa strategy (TE and overborder volumes)			2.3-5.0		0.3-1.1	
	8	Property portfolio revenue optimisation			0.3-0.7		0.3-0.7	
Operating cost-productivity	9	Procurement				0.8-1.5	0.8-1.5	
	10	Maintenance based on fleet refresh				0.5-1.0	0.5-1.0	
	11	IT cost streamlining				0.1-0.2	0.1-0.2	
	12	Discretionary spend reduction				0.5-1.0	0.5-1.0	
Total (Rbn)					8-17	2-4	5-11	90-114
Enabling initiatives	13	Refined business planning process for 2014/15						
	14	Ratings and liquidity management				0.2-1.5 <sup>3</sup>		

1 Assumes FY12/13 EBITDA margins for revenue initiatives, 100% EBITDA margins for cost initiatives and enabling initiatives

2 Once off annual revenue impact in next 6 years

3 Based on 1-2 notch downgrade prevention

4 Revenue downside avoidance

## ANNEXURE PV 39





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TRANSNET

**MEMORANDUM**[www.transnet.net](http://www.transnet.net)

**TO : Brian Molefe**  
**Group Chief Executive**

**FROM : Anoj Singh**  
**Group Chief Financial Officer**

**SUBJECT : COAL – BREAKTHROUGH OF 2 MT**

**PURPOSE OF SUBMISSION**

1. The purpose of the submission is to request approval of the Group Chief Executive (GCE) to approve:
  - 1.1 The resourcing strategy and remuneration model for the Coal Line – breakthrough of 2 mt initiative to mitigate the EBITDA at risk.
  - 1.2 Confine and award services for support to the internal team to McKinsey and Company and its BBBEE Consortium partners.

**BACKGROUND**

2. The 2014/15 EBITDA at risk was presented at the March Group Exco (refer to Annexure A). At that meeting the Exco accepted the risks and requested the GCFO to identify mitigating strategies to address the risks presented in order to achieve the financial performance and seven year MDS targets contained in the Corporate Plan.
3. One of the initiatives to mitigate the risk, contained in Annexure A, is increasing the Coal line – breakthrough of 2 mt initiative.
4. The export coal business has been facing numerous challenges that resulted in volume targets not being achieved (refer to Annexure B – weekly volumes).
5. The performance has been hampered by tippler performance and tippler unreliability, as well as customer infrastructure reliability.
6. Low demand from Coal customers impacted Export Maputo/TCM and West coal flows.
7. Resource constraints e.g. shortages of wagon sets resulted TFR being unable to capitalise on increased demand.
8. The implementation of Project Shongololo has not yet yielded the required reduction in cycle times, improvements in resource utilisation, efficiency improvements and resultant volume growth.
9. In 2014/15, Transnet aspires to transport 2 Mt weekly across the overall coal system, including the export coal line and other coal (Eskom, Maputo, Durban), up from current performance.
10. Significant investments have recently been made to increase capacity, including 110 new 19E locomotives, and extensive track refurbishment. Additional structural capacity increases are limited in the near term by the Overvaal tunnel, and limited substation capacity in certain sections.
11. Electricity constraints on the TFR Coal network impact ability to achieve projected volumes.
  - 11.1. The shortage of Eskom electrical capacity limits the throughput on the Coal Line to 75 Mtpa when operating trains with electric locomotives.

- 11.2. According to the current schedule, the electrical capacity between Ermelo and RBCT will be resolved in 2017/2018.
- 11.3. No timelines for the upgrade of electrical capacity between the mines and Ermelo has been received.
- 11.4. In order to increase capacity beyond 75 Mtpa while the Eskom electrical constraint exists, the trains must be operated with a mixture of electric and diesel locomotives.
- 11.5. The Class 43D locomotives do not have the necessary functionality.
- 12. Logistical complexity is driven by the need to:
  - 12.1. Accommodate GFB traffic on the same lines.
  - 12.2. Manage coal collection from 32 separate mines across the Mpumalanga coal basin and aggregate it at Ermelo.
  - 12.3. Manage export distribution via rail-port interfaces at three port terminals not owned by Transnet (Maputo, Durban West, RBCT).
- 13. Based on the achievement of weekly volumes it is estimated that Export coal volumes are likely not to exceed 72 mtpa compared to a budget of 75 mtpa contained in the 2014/15 Corporate plan.
- 14. This will thus result in 3 mtpa at risk and a concomitant EBITDA at risk of R400 million for 2014/15.

## DISCUSSION

- 15. A significant portion of the incremental value likely lies in maximising the export coal line making it the ideal starting point for the breakthrough effort. The programme can be scaled across the rest of the coal system as a second step using the same principles and tools.
- 16. 13 specific technical levers combined with 5 management levers could potentially deliver up to a 20% increase in tempo on the export coal line alone.
- 17. Technical levers
  - 17.1. Improve/Redesign SOC
  - 17.2. Increase wagon fleet size/availability
  - 17.3. Implement 100% book offs
  - 17.4. Top up all trains
  - 17.5. Improve ERM yard processes
  - 17.6. Reduce loco losses
  - 17.7. Reduce TAT in 2279 and RBCT
  - 17.8. Reduce Infrastructure losses
  - 17.9. Reduce mine cancellations
  - 17.10. Reduce derailments
  - 17.11. Improve TAT at mines
  - 17.12. Optimise Overvaal tunnel spacing
  - 17.13. Optimise dual voltage locomotive usage
- 18. Management levers
  - 18.1. 6 hourly call to aligned to end operations
  - 18.2. Control tower and performance dashboards to create transparency from structural capacity to planning to execution
  - 18.3. Train allocation based on mine equivalent ton system (service zones)
  - 18.4. Targeted incentives for front line (non-cash)
  - 18.5. Fill vacancies and roles in critical areas
- 19. To drive impact immediately, we would quickly develop a baseline, followed by rapid application of performance interventions.
- 20. Rapid baselining
  - 20.1. Analyse maximum structural capacity available.

- 20.2. Identify cycle time leakage using the Wagon Performance Model and information from Sprint.
- 20.3. Confirm the specific levers most likely to have impact given current operating challenges.
- 20.4. Run a health check on vacancies, roles, shift coverage and processes.
- 21. Targeted Interventions
  - 21.1. Re-institute the six-hourly calls.
  - 21.2. Re-institute weekly and daily management dashboards.
  - 21.3. Put in partial or full time coverage in high opportunity spots for each of the 13 technical improvement levers.
- 22. Build capability for sustainability
  - 22.1. Based on the outcome of short term performance improvement using technical and management levers, we would:
  - 22.2. Fill gaps in the organisational structure
    - 22.2.1. Implement redesigned processes as needed.
    - 22.2.2. Re-implement tools e.g. wagon performance model.
    - 22.2.3. Run broad-based training for front line supervisors and personnel.
- 23. Based on the above an expected 77mt is expected to be achieved – in excess of the Corporate Plan targets.
- 24. This approach has been discussed and agreed with Mr Siyabonga Gama: TFR CE.

#### **GROUNDINGS FOR CONFINEMENT:**

- 25. McKinsey and Company have the Intellectual property, experience and knowledge to provide these services to Transnet. McKinsey and Company have a detailed knowledge of Transnet, its operating divisions and MDS.
  - 25.1. McKinsey understands the underlying economics of the global and local industry in detail as well as the strategic trends in the coal industry,
  - 25.2. McKinsey understands Transnet's underlying economics in detail and have been an advisor in breakthrough projects across a number of clients.
  - 25.3. McKinsey has in its global practice supported many clients and a tool kit of best practices that can be leveraged.
  - 25.4. Previous application of these techniques resulted in rapid performance improvements of 15-20%.
- 26. Appended below, for ease of reference, is an extract from the current Procurement Procedure Manual, par 15.1.2, which sets out the grounds for confinement.
  - a) Where a genuine unforeseeable urgency has arisen which is not attributable to bad planning;
  - b) The goods/services are only obtainable from one supplier/limited number of suppliers. For instance, patented/proprietary goods or OEM spares and components. Operating Divisions are however required to satisfy themselves that there are no new entrants on the market who could also be tested;
  - c) For reasons of standardization or compatibility with existing products 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 "standardization" will not be considered' or
  - d) When 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 organisation to solicit other tender 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 prerequisites must be satisfied i.e. the goods or services must be highly specialized, almost identical to

previous work done and approaching the market again would result in wasted money and time.

27. We are of the view that this matter complies with grounds (a) and (d) as set out below, and the request for confinement is therefore fully supported.

28. Specific emphasis is placed on ground (a) and (d) due to the potential business risks associated with approaching the market on an open tender process as well as the credentials listed above.

Ground for confinement per Par 15.1.2	Confinement considerations
a. Where a genuine unforeseeable urgency has arisen which is not attributable to bad planning;	<ul style="list-style-type: none"> <li>• The EBIDA at risk was only identified after the 2014/2015 Corporate plan had been completed; taking into account the impact of the locomotive deposits.</li> <li>• These risks were presented to Transnet Group EXCO in March 2014.</li> <li>• If the mitigation plans are not put in place immediately the 2014/2015 Corporate plan, capital plan and funding pre-requisites will not be met placing the entire MDS at risk.</li> <li>• Mitigating the impact of lower than plan throughput tempo requires an urgent and immediate mitigation action which has an opportunity to deliver the required results in the 2014/15 Corporate Plan.</li> </ul>
d. Goods and services being procured is highly specialised and largely identical to work previous performed	<ul style="list-style-type: none"> <li>• Managing and optimising the Coal line is a highly specialised skill.</li> <li>• This skill requires technical knowledge of Coal rail equipment and environment, as well as technical limitations of the Infrastructure.</li> <li>• This skill requires specialised management skill in managing operations within a coal rail environment.</li> <li>• McKinsey has a proprietary coal demand and supply models as well as key operating philosophies that Transnet can use.</li> <li>• This tool is available from only one supplier i.e McKinsey. We have satisfied ourselves that there is no new entrant who can perform the work through the following manner.</li> <li>• These philosophies and tools have been implemented and delivered increases in volume tempo at desired levels in the past</li> <li>• McKinsey has provided this type service in the past to Transnet Freight Rail.</li> </ul>
d. Approaching the market would result in wasted money and time	<ul style="list-style-type: none"> <li>• Any new service provider would have to develop its own methodologies and tools as well as obtain operational experience within a coal rail environment.</li> <li>• Due to the specialised nature of the work a new service provider will be required to understand the intricacies of Transnet's operations, capital</li> </ul>



	programme and overall MDS.
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29. Additionally, due to the confidential nature of the information, the engagement cannot be subject to an open tender process. In terms of para 15.1.4 (c) of the revised PPM, in instances where a confinement is confidential, the GCE may approve such confinement without it being routed via any other signatory.

#### **ENTERPRISE AND SUPPLIER DEVELOPMENT AND BBBEE**

30. The work will be carried out internally supported with a team of consultants (McKinsey & Company and its Consortium partners). The external consultants fees for the scope above will be based on a fixed fee of R20 million.
31. McKinsey and Company will engage a Consortium Partner who is Black owned and this Consortium partner will perform a percentage of the work under the guidance of McKinsey and Company.
32. The Consortium partner will share 40% of the fixed fee and 60% of the contingent fee/fee at risk (excluding VAT and expenses). The initial fixed fee of R20 million excluding expenses and VAT will be shared on a 40%/60% split with Consortium partners, who will be allocated 40% of the fees. The contingent/at-risk portion of R110 million excluding VAT and expenses will be shared a 40%/60% split with the Consortium partners, who will be allocated 60% of the fees at risk.
33. McKinsey and company will be required to provide a supplier development plan whereby they commit 70% of the contract value for the fixed fee and 70% of the contingent fee to enterprise and supplier development value, which will be set out in an agreed supplier development plan. Preferential procurement and use of empowered consortium partners will contribute to this value. This will subject to negotiation with the service providers.
34. The consortium partner will be required to provide a supplier development plan whereby they commit 20% of their contract value for the fixed fee and the contingent fee to enterprise and supplier development value, which will be set out in an agreed supplier development plan. This should be targeted at downstream supplier development to SMME's (EME's and QSE's), preferably black owned, Black women owned, youth owned and owned by people living with disabilities. This will subject to negotiation with the service providers.
35. McKinsey and Company and the consortium partner will be required to provide an acceptable BBBEE improvement plan.

#### **FINANCIAL IMPLICATIONS**

36. The fees for the service provider will be based on a combination of a fixed fee and contingent fee. The fixed fee is to cover their cost to deliver the planned Transnet net revenue/volumes and the contingent fee will remunerate them based on the increase in actual net revenue/volumes over and above Transnet expected and planned net revenue/volumes.
37. The additional net revenue/volumes over and above the planned net revenue/volumes will be clear revenue for Transnet and thus will have no additional costs except for the contingent fee
38. The total fee will be capped at R130 million rand excluding VAT and expenses and split as follows:
  - 38.1. The fixed fee will be R20 million excluding VAT and expenses.
  - 38.2. If the engagement is successful and the risks are mitigated, the service provider will be remunerated at 20% of incremental net revenue benefit generated by the

delivering net revenue/volumes above the agreed baseline, this portion of the fee will be capped at R110 million.

39. The baseline proposed is 72mt, which is based on the weekly tempo achieved in 2013/14.
40. The amount of R130 million can be treated maximum ceiling and will be negotiated to maximise benefit for Transnet after the conclusion of the rapid baselining.
41. At this level of delivery of 5mt (77 mt vs 72mt) additional tonnes, the total incremental revenue benefit to Transnet will be R520 million (R650 million in revenues less R130 million paid to the consortium partners).
42. The fixed fee and expenses will be in accordance with the National Treasury instruction note. The expenses will be on actual costs incurred aligned with the instruction note.
43. Transnet's interpretation of contingent fees paid to consultants is that contingent fees only become due once a predetermined event has occurred, such as Transnet earning additional net revenue or receiving net cost savings less the contingent fee that Transnet would not have had unless the consultant was engaged. Thus Transnet will always be in a net cash positive position.



**BUDGET IMPLICATIONS**

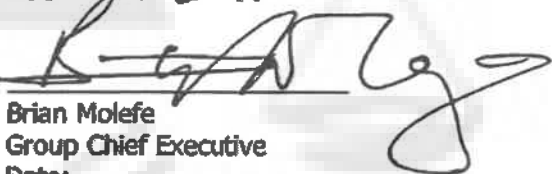
44. The amount of R20 million has been budgeted for in the 2014/15 Group Finance budget.
45. The additional at risk fees of R110 million has not been included in the budget but due to the contingent nature of the payment, however, if the fees are paid, significant incremental revenue of R520 million (R650 million in revenues less R130 million paid to consortium partners) will accrue to Transnet.
46. Typically work of this nature based on internationally accepted norms, where fees are at risk, are between 15%-25% of the net savings or additional net revenue achieved.

**RECOMMENDATION**

47. It is recommended that the of Group Chief Executive approve:
  - 47.1. The resourcing strategy and remuneration model for the Coal Line – breakthrough of 2 mt initiative to mitigate the EBITDA at risk.
  - 47.2. Confine and award services for support to the internal team to McKinsey and Company and its BBBEE Consortium partners.

**Compiled by**


Anoj Singh  
Group Chief Financial Officer  
Date: 31/03/14.

**Approved/ Not Approved**


Brian Molefe  
Group Chief Executive  
Date:

## ANNEXURE PV 40



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**TRANSNET****MEMORANDUM**[www.transnet.net](http://www.transnet.net)

**TO : Brian Molefe**  
**Group Chief Executive**

**FROM : Anoj Singh**  
**Group Chief Financial Officer**

**SUBJECT : RENEGOTIATING THE KUMBA CONTRACT**

**PURPOSE OF SUBMISSION**

1. The purpose of the submission is to request approval of the Group Chief Executive to:
  - 1.1 Approve the resourcing strategy and remuneration model for the Iron ore initiative to mitigate the EBITDA at risk by mobilising a team to:
    - 1.1.1 Assessing the current Kumba iron ore contract to determine a collaborative approach that will yield benefits for both Transnet and Kumba by quantifying different negotiation levers and the reasons for a revised tariff and impact for both parties (strategic, tactical)
    - 1.1.2 Identifying negotiation levers and craft a negotiation strategy
    - 1.1.3 Renegotiating the Kumba iron ore contract.
  - 1.2 Confine and award services for support to the internal team to McKinsey and Company and its BBBEE Consortium partners.

**BACKGROUND**

2. The 2014/15 EBITDA at risk was presented at the March Group Exco (refer to Annexure A). At that meeting the Exco accepted the risks and requested the GCFO to identify mitigating strategies to address the risks presented in order to achieve the financial performance and seven year MDS targets contained in the Corporate Plan.
3. One of the initiatives to mitigate the risks, in Annexure A, is assessing the options to renegotiate the Kumba iron ore contract.
4. Based on the achievement of weekly volumes it is estimated that Iron ore volumes are likely not to exceed 56 mtpa compared to a budget of 58 mtpa contained in the 2014/15 Corporate plan.
5. This will thus result in 2 mtpa at risk and a concomitant EBITDA at risk of R170 million for 2014/15.
6. The current Kumba iron ore contract has been signed for a 20 year period until the year 2027.
  - 6.1. Furthermore, the current price differential between the two customers (i.e., Kumba: 100 R/t; Assmang: 135 R/t) on a 1a contract (35.5mtpa) is significant. The rates on the 1a contract will be reviewed in 2015. The 1c contract has a current tariff of R118/t (9mtpa) and currently being reviewed in terms of the contract and is anticipated that no challenges will be experienced to achieve R128/t for this financial year.
  - 6.2. The current contract does not appropriately cater for allocating capacity to junior miners although Kumba has made available 3mtpa on an annualised basis recently. Transnet has not made and does not have loading facilities available and hence there is a dependency on Kumba.

- 6.3. Further, Kumba has first right of refusal for any new capacity (at the same tariff) made available to a limit of ~75% of total capacity. However, Kumba has indicated that they are willing to remove this onerous clause.
- 6.4. The current contract could potentially cause economic hardship for Transnet on the 1a Contract. Earlier commercial analysis indicates that the incremental EBITDA from equalising Assmang and Kumba pricing could be ~R1,0 billion. Further increases based on realising economic cost would further increase revenue.
7. A legal opinion was sought and delivered previously. However, a review of the opinion is required to thoroughly investigate the options for reopening the contract including:
  - 7.1. Economic hardship for Transnet,
  - 7.2. Whether the contracts signed preserved the interests of Transnet and its Shareholder,
  - 7.3. Investigate and lay out the implications of a legal challenge.
8. In addition, with effect from 2013/14 Kumba has experienced production problems at one of its mines and will not be in a position to deliver guaranteed tonnages in the short term. The take or pay penalty for under-delivery is not sufficient to compensate Transnet for the EBITDA lost related to lost tonnage.
9. A further concern is the life of mine for Sishen. At the results presentation of Kumba in July last year, it was stated that remaining life of mine is 18 years.
  - 9.1. Meeting the 2014/15 revenue targets are under significant pressure given the reasons articulated above

## DISCUSSION

10. Although the rates on the 1a contract will be reviewed in 2015, the following are the potential grounds for re-opening the 1a contract:
  - 10.1. Potential economic hardship for Transnet: under the 1a contract, the ore line infrastructure is valued at ~R300 million, less than the depreciated optimised replacement cost, which should be included in the lower bound for acceptable pricing. At this valuation, required infrastructure maintenance investments may not be affordable, potentially putting future revenue streams for both Transnet and Kumba at risk. This exercise will allow us to understand the risk.
  - 10.2. Capacity for junior miners: Currently, two incumbent miners (Kumba and Assmang) have a lock on iron ore capacity. Further, the capacity allocation approach, which grants Kumba the right of refusal of 75% of the total iron ore channel capacity is biased against new entrants. Although Kumba has indicated that they willing to remove that clause.
  - 10.3. Cabinet's condition that expansion agreement with Kumba must provide for ore supply to local beneficiation at development prices.
  - 10.4. Legality of terms: Given the arguments above, a review to establish the validity of all terms in the contract is advisable.
  - 10.5. Good faith: Without a formal review, it is unclear whether all parties acting on Transnet's behalf acted in good faith.
  - 10.6. The Ports Act gives TNPA the authority to require that the operator of the Iron Ore Terminal at Saldanha (TPT) ensure the allocation of terminal capacity is aligned with Transnet and government mandates, i.e. ensure an appropriate share of capacity is allocated to junior miners. This request for a review can be triggered by the port regulator of TNPA.
  - 10.7. Furthermore, the Ports Regulator has commented that the iron ore tariff is too low, however this cannot be rectified without renegotiating the contract (refer to Annexure for the latest tariff determination from the Ports Regulator.)
11. An annual additional cash flow of ~R250 million – ~R1,0 billion is possible based on a revised tariff for Kumba Sishen volume of ~35.5 mtpa on the 1(a) contract.

## RENEGOTIATING THE KUMBA CONTRACT

## SUGGESTED APPROACH

12. Determine a collaborative approach that will yield benefits for both Transnet and Kumba.
  - 12.1. Quantify different negotiation levers and the reasons for a revised tariff and impact for both parties (strategic, tactical)
  - 12.2. Assess the adequacy of the sustaining capital to sustain the iron ore line
  - 12.3. Make cost-benefit trade-off assessment for different scenarios.
13. Review the accuracy and assumptions included in the models that will be used by management to inform the renegotiation and make recommendation in this regard.
14. Outline the overall negotiation game plan and develop negotiation scenarios and potential responses
15. A steering Committee will be constituted to review the findings of the above and recommend the way forward in terms of redrafting of contracts.
16. The Steering Committee will comprise:
  - 16.1. Group Chief Financial Officer
  - 16.2. Group Executive: TFR
  - 16.3. Group Executive: TNPA
  - 16.4. Group Executive : TPT
  - 16.5. Group Executive: Group Commercial
  - 16.6. Group Executive : Legal
17. The fees will be based on a guaranteed and non-guaranteed portion. Approval to proceed to remunerate the consultant will be obtained from the GCE, based on the recommendation of the Steering Committee.
18. This approach has been discussed and agreed with Mr Divyesh Kalan from Group Commercial.

## GROUND FOR CONFINEMENT:

19. McKinsey and Company have the Intellectual property, experience and knowledge to provide these services to Transnet. McKinsey and Company have a detailed knowledge of Transnet, its operating divisions and MDS.
  - 19.1. McKinsey understands the underlying economics of the global and local iron ore industry in detail as well as the strategic trends in the iron ore industry, e.g., through its proprietary iron ore demand and supply model and dedicated practitioners in Minerals & Mining services line
  - 19.2. McKinsey understands Transnet's underlying economics and pricing methodology in detail and have been an advisor in establishing a pricing methodology across GFB
  - 19.3. McKinsey understands the operation on the iron ore line and hence potential operation negotiation levers
  - 19.4. Deep involvement in pricing for Transnet including a thorough understanding of applicability of Competition Act and other legislative frameworks
  - 19.5. McKinsey has in its global practice supported many major contract re-negotiations and a proven tool kit of negotiation best practices that can be leveraged
20. Appended below, for ease of reference, is an extract from the latest directive, stipulating the grounds for confinement.
  - a) Where a genuine unforeseeable urgency has arisen which is not attributable to bad planning;
  - b) The goods/services are only obtainable from one supplier/limited number of suppliers. For instance, patented/proprietary goods or OEM spares and components.



Operating Divisions are however required to satisfy themselves that there are no new entrants on the market who could also be tested;

- c) For reasons of standardization or compatibility with existing products 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 "standardization" will not be considered' or
- d) When 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 organisation to solicit other tender 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 prerequisites must be satisfied i.e. the goods or services must be highly specialized, almost identical to previous work done and approaching the market again would result in wasted money and time.

21. Specific emphasis is placed on ground (a) and (d) due to the potential business risks associated with approaching the market on an open tender process as well as the credentials listed above.

Ground for confinement per Par 15.1.2	Confinement considerations
a. Where a genuine unforeseeable urgency has arisen which is not attributable to bad planning;	<ul style="list-style-type: none"> <li>• The EBIDA at risk was only identified after the 2014/2015 Corporate plan had been completed; taking into account the impact of the locomotive deposits.</li> <li>• These risks were presented to Transnet Group EXCO in March 2014.</li> <li>• If the mitigation plans are not put in place immediately the 2014/2015 Corporate plan, capital plan and funding pre-requisites will not be met placing the entire MDS at risk.</li> <li>• Mitigating the impact of lower than plan throughput tempo requires an urgent and immediate mitigation action which has an opportunity to deliver the required results in the 2014/15 Corporate Plan.</li> </ul>
d. Goods and services being procured is highly specialised and largely identical to work previously done	<ul style="list-style-type: none"> <li>• This component of Ground D relates to the specialised work required to establish grounds and determine options to make an informed decisions to open the contract. The models used are highly complex and due to the work done on the capital SWAT process in re-cutting the portfolio extensive knowledge has been gained in understanding the sustaining capital requirements.</li> <li>• McKinsey has a proprietary iron ore demand and supply model that Transnet has used previously to determine its pricing methodology.</li> <li>• This tool is available from only one supplier i.e McKinsey.</li> <li>• McKinsey and Company have provided work relating to iron ore tariffs before.</li> </ul>
d. Approaching the market would	<ul style="list-style-type: none"> <li>• Due to the specialised nature of the work a new</li> </ul>



result in wasted money and time	service provider will be required to understand the intricacies of Transnet pricing strategy, capital programme and overall MDS.
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22. Additionally, due to the confidential nature of the information, the engagement cannot be subject to an open tender process. In terms of para 15.1.4 of the revised PPM (effective 1 October 2013), in instances where a confinement is confidential, the GCE may approve such confinement without it being routed via any other signatory.

#### **ENTERPRISE AND SUPPLIER DEVELOPMENT AND BBBEE**

23. The work will be carried out internally supported with a team of consultants (McKinsey & Company and its Consortium partners). The external consultants fees for the scope above will be based on a potential maximum fee of R20 million.
24. McKinsey and Company will engage a Consortium Partner who is Black owned and this Consortium partner will perform a percentage of the work under the guidance of McKinsey and Company.
25. The Consortium partner will share 60% of the potential maximum fee and 60% of the contingent fee/fee at risk (excluding VAT and expenses). The initial potential maximum fee of R20 million excluding expenses and VAT will be shared on a 40%/60% split with Consortium partners, who will be allocated 60% of the fees. The potential maximum contingent/at-risk portion of R193 million excluding VAT and expenses will be shared a 40%/60% split with the Consortium partners, who will be allocated 60% of the fees at risk.
26. McKinsey and company will be required to provide a supplier development plan whereby they commit 70% of the contract value for the potential maximum fee and 70% of the contingent fee to enterprise and supplier development value, which will be set out in an agreed supplier development plan. Preferential procurement and use of empowered consortium partners will contribute to this value. This will subject to negotiation with the service providers.
27. The consortium partner will be required to provide a supplier development plan whereby they commit 50% of their contract value for the fixed fee and the contingent fee to enterprise and supplier development value, which will be set out in an agreed supplier development plan. 30% of the contract value should be targeted at downstream supplier development to SMME's (EME's and QSE's), preferably black owned, Black women owned, youth owned and owned by people living with disabilities. This will subject to negotiation with the service providers.
28. McKinsey and Company and the consortium partner will be required to provide an acceptable BBBEE improvement plan.

#### **FINANCIAL IMPLICATIONS**

29. The work will be carried out internally supported with a team of consultants (McKinsey & Company and its Consortium partners). The external consultants fees for the scope above will be based on a fixed fee of R20 million. The Phase 1 fee is to cover their cost to deliver the planned Transnet net revenue/volumes and the contingent fee will remunerate them based on the increase in actual net revenue/volumes over and above Transnet expected and planned net revenue/volumes.
30. If the negotiation is successful and a revised tariff in excess of 115 R/t (total for all ODs) is agreed, the external consultants will be remunerated at 2% of the annualised additional net revenue capped a potential maximum of R193 million in total, even if a tariff in excess of 135 R/t is successfully negotiated. The annualised additional revenue is based on a 95% volume update

#### **RENEGOTIATING THE KUMBA CONTRACT**

31. The fees are payable over a three year period, despite the fact that the calculation is made on revenues earned over the full contract life. A sliding scale showing the potential range of payments is as follows:

New rate per ton, R	Additional annual revenue, R	2% over the remaining period of the 1(a) contract, R	R, NPV - Cumulative Fees payable over a 3 yr period
115.00	Entry position		
120.00	700 000 000	154 000 000	110 240 050
125.00	875 000 000	192 500 000	137 800 060
130.00	1 050 000 000	231 000 000	165 360 071
130.00	1 225 000 000	269 500 000	192 920 081

32. A separate memo informing the GCE of this will be drafted at the time if a revised tariff in excess of 115 R/t (total for all ODs) is successfully renegotiated resulting in a payment to be made to the consultants. The overall expected annual net revenue at R135 per ton over the duration of the contract is ~R13,5 billion.
33. The potential maximum fee and expenses will be in accordance with the National Treasury instruction note. The expenses will be on actual costs incurred aligned with the instruction note.
34. Transnet's interpretation of contingent fees paid to consultants is that contingent fees only become due once a predetermined event has occurred, such as Transnet earning additional net revenue or receiving net cost savings less the contingent fee that Transnet would not have had unless the consultant was engaged. The instruction note does not specifically exclude contingency fees. Thus Transnet will always be in a net cash positive position.

## BUDGET IMPLICATIONS

35. The amount of R20 million has been budgeted for in the 2014/15 Group Finance budget.
36. The additional fees of 2% of the annualised additional net revenue settled over a three year period capped a potential maximum of R193 million in total on a sliding scale has not been included in the budget but due to the contingent nature of the payment, however, if the fees are paid, on recommendation of the steering committee, significant additional revenue would have been attained.
37. The additional net revenue/volumes over and above the planned net revenue/volumes will be clear revenue for Transnet and thus will have no additional costs except for the contingent fee
38. Typically work of this nature based on internationally accepted norms, where 100% of fees are at risk, are between 2%-10% of the savings or additional net revenue achieved;

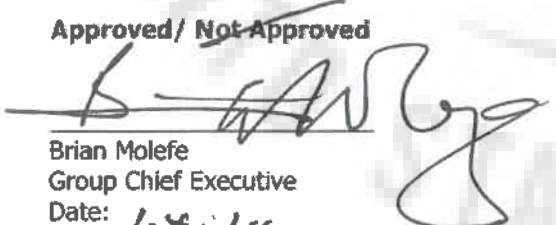
## RECOMMENDATION

39. It is recommended that the of Group Chief Executive approve:
  - 39.1. Approve the resourcing strategy and remuneration model for the Iron ore initiative to mitigate the EBITDA at risk by mobilising a team to:
    - 39.1.1. Assessing the current Kumba iron ore contract to determine a collaborative approach that will yield benefits for both Transnet and Kumba by quantifying different negotiation levers and the reasons for a revised tariff and impact for both parties (strategic, tactical)
    - 39.1.2. Identifying negotiation levers and craft a negotiation strategy
    - 39.1.3. Renegotiating the Kumba iron ore contact.
  - 39.2. Confine and award services for support to the internal team to McKinsey and Company and its BBBEE Consortium partners.

### Compiled by

  
 Anoj Singh  
 Group Chief Financial Officer  
 Date: 21/08/14

### Approved/ Not Approved

  
 Brian Molefe  
 Group Chief Executive  
 Date: 1.9.14.

## ANNEXURE PV 41



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## MEMORANDUM

www.transnet.net

**TO : Brian Molefe**  
**Group Chief Executive**

**FROM : Anoj Singh**  
**Group Chief Financial Officer**

**SUBJECT : MANGANESE EXECUTION SUPPORT**

### PURPOSE OF SUBMISSION

1. The purpose of the submission is to request approval of the Group Chief Executive to:
  - 1.1 Approve the resourcing strategy and remuneration model for the Manganese execution by accelerating and optimising thereby supporting the initiative to mitigate the EBITDA at risk by mobilising a team,
  - 1.2 Confining and awarding the services to support the internal team to McKinsey and Company and its BBBEE Consortium partners.

### BACKGROUND

2. Anticipated volume recovery envisaged for the month of February and March 2014 is not materialising as evident in weekly performance reports and this is likely to continue into the medium term (2014/15 financial year) and will negatively impact achievement of budgeted EBITDA for 2014/15.
3. Based on the achievement of weekly volumes it is estimated that GFB volumes are likely not to exceed 89 mtpa compared to a budget of 95 mtpa contained in the 2014/15 Corporate plan.
4. This will thus result in 6 mtpa at risk and a concomitant EBITDA at risk of R1,5 billion for 2014/15.
5. The 2014/15 EBITDA at risk was presented at the March Group Exco (refer to Annexure A). At that meeting the Exco accepted the risks and requested the GCFO to identify mitigating strategies to address the risks presented in order to achieve the financial performance and seven year MDS targets contained in the Corporate Plan.
6. One of the initiatives to mitigate the risk, in Annexure A, is the Manganese execution support.
7. Great progress has been made on Manganese so far to ensure that Transnet creates and captures value from this business opportunity.
8. However, this is the largest programme in recent Transnet (R27 billion ETC) history and the team is inexperienced in delivering a project of this magnitude.
9. Furthermore, the contractor market has become more commercially sophisticated and technically weak, resulting in massive risk to the owner – e.g., claims at Medupi.
10. Managing Manganese entails hundreds of interfaces and managing an EPCM/Transnet organisation of up to 400-500 people at its peak of construction.

A handwritten signature in blue ink, appearing to be a stylized 'S' or 'M' shape.



## DISCUSSION

11. We believe that it will be critical to support the Programme Director to ensure that Transnet starts the programme successfully - Failure as the first mega project execution under MDS is not an option.
12. The value proposition of this support is as following:
  - 12.1. **Set up owner's team & manage performance**
    - 12.1.1. Select suitable Owner/EPCM relationship model based on global benchmarks and local context to develop an effective Owner's team
    - 12.1.2. Assist with selection of staff for key roles in the structure
    - 12.1.3. Develop interaction models, define roles & responsibilities, set up and track personnel KPIs
  - 12.2. **Optimise procurement & contracting strategy for time and cost**
    - 12.2.1. Optimise lengthy approvals & governance for high spend contracts & improve CapEx material procurement/delivery processes
    - 12.2.2. Leverage global sourcing centres to identify and shortlist suppliers to improve on price and supplement short material supply
    - 12.2.3. Optimise for price by pressure-testing RFQs to eliminate redundant items and leveraging volumes
    - 12.2.4. Translate aligned set of best practices into a contracting strategy aligned with incentives, that drives behaviour to the project level
    - 12.2.5. Set up a contract management infrastructure that will include a "best practices claims and change management process"
  - 12.3. **Optimise execution and transition to operations**
    - 12.3.1. Pressure test pre-execution and execution schedules against international benchmarks and norms from 1000+ projects
    - 12.3.2. Identify and solve potential implementation roadblocks in the execution schedule
    - 12.3.3. Implement control tower and project performance management systems
    - 12.3.4. Set-up a world-class risk and issue management strategy and processes
    - 12.3.5. Set up operational transition planning
  - 12.4. **Bring transparency and visibility that will allow management decisions and risk management through**
    - 12.4.1. Best practice approaches, tools and people, proven in mega-project delivery from 100's of clients with 1,000's of projects; an understanding of how the largest companies on earth do projects
    - 12.4.2. Unparalleled view of what to do right from the start - Seen the "good" and the "bad"; helped clients recover "disaster" projects
13. The following project execution support in the short and medium term is therefore required:
14. **Pre execution support**
  - 14.1. Procurement
    - 14.1.1. Process development/optimization
    - 14.1.2. OD procurement optimisation
    - 14.1.3. Large packages procurement optimisation
    - 14.1.4. Tracking templates
    - 14.1.5. Prioritise major categories based on spend and critical path
    - 14.1.6. Pre-qualify alternative suppliers up to LOI
15. **Contracting**
  - 15.1.1. Optimize tender and due diligence process to evaluate and appoint EPCM and/or EPCs and subcontractors in order to accelerate selection/appointment
  - 15.1.2. Contract structuring to include unit costs and incentives for tracking



- 15.1.3. Setup of contract management infrastructure, e.g., team, tools, processes
- 15.1.4. Finalise customer volume commitments and contracting (MECA)
- 16. Organisation set up**
  - 16.1.1. Set-up and capacitate owners team
  - 16.1.2. Define roles and responsibilities
  - 16.1.3. Define KPIs and reporting
  - 16.1.4. Define internal and external interfaces supported by structured dialogues
  - 16.1.5. Identify stakeholders and execute plan
  - 16.1.6. Set-up capability building processes
  - 16.1.7. Key roles identification and assessment
- 17. This approach has been discussed and agreed with Mr Siyabonga Gama: TFR CE and Mr. Tau Morwe: TNPA CE.
- 18. There is a strong rationale for sole sourcing McKinsey and Company
  - 18.1. A service provider to support the Manganese execution is needed immediately.
  - 18.2. A new service provider would delay the project – appointing McKinsey will mitigate risks and eliminate delays.
  - 18.3. Proven track record at Transnet of reducing capital cost on large capital projects
  - 18.4. Proven track record in a number of international large scale rail and other infrastructure projects during execution
- 19. In addition, McKinsey's mega-project client service in last 3 years totals USD731 Bn of total project cost in 84 projects across industry sectors
  - 19.1. Their capital productivity practice has had 61 Fortune Global 500 clients in the last 3 years, and about 300 engagements last year in a broad range of industries and geographies
  - 19.2. Has >100 experienced senior capital productivity practitioners globally
  - 19.3. Has a proven track record of value creation (~ 30%\* on average)
  - 19.4. Offers an independent view of the project on business issues (vs. suppliers) based on fact-based analysis and broad experience
  - 19.5. Integrates the technical, market, and managerial aspects of the project into a consolidated business plan
  - 19.6. Systematically brings different concepts at plant, system and unit level, pushing for their objective assessment
  - 19.7. Incorporates experience from capital projects with comparable scale and complexity
  - 19.8. Acts as the trusted owner's representative with a top-management view, and can also work equally well at the project manager level
  - 19.9. Has the ability to join forces with external firms (e.g., technical consultants)
- 20. McKinsey understands the underlying economics of the global and local industry in detail as well as the strategic trends in the iron ore and manganese industry.
- 21. McKinsey also understands Transnet's underlying infrastructure program and has assisted in the development and roll out of the project factory and capital prioritisation tools.
- 22. In addition, Transnet has limited options to deliver manganese completely in-house:
  - 22.1. Under-resourced owners team. This remains an issue and capacity will have to be bridged until a fully functioning team is set up (in accordance with Platinum Standard)
  - 22.2. Lack of established standards and methodologies to run effective control tower and KPI tracking, counter claims management, and managing EPCM interfaces

**GROUND FOR CONFINEMENT:**

23. Appended below, for ease of reference, is an extract from the current Procurement Procedure Manual, par 15.1.2, which sets out the grounds for confinement.

Where a genuine unforeseeable urgency has arisen which is not attributable to bad planning;

- a) The goods/services are only obtainable from one supplier/limited number of suppliers. For instance, patented/proprietary goods or OEM spares and components. Operating Divisions are however required to satisfy themselves that there are no new entrants on the market who could also be tested;
- b) For reasons of standardization or compatibility with existing products 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 "standardization" will not be considered' or
- c) When 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 organisation to solicit other tender 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 prerequisites must be satisfied i.e. the goods or services must be highly specialized, almost identical to previous work done and approaching the market again would result in wasted money and time.

24. Specific emphasis is placed on ground (b) and (d) due to the potential business risks associated with approaching the market on an open tender process as well as the credentials listed above.

Ground for confinement per Par 15.1.2	Confinement considerations
a. Where a genuine unforeseeable urgency has arisen which is not attributable to bad planning;	<ul style="list-style-type: none"> <li>• The EBIDA at risk was only identified after the 2014/2015 Corporate plan had been completed; taking into account the impact of the locomotive deposits.</li> <li>• These risks were presented to Transnet Group EXCO in March 2014.</li> <li>• If the mitigation plans are not put in place immediately the 2014/2015 Corporate plan, capital plan and funding pre-requisites will not be met placing the entire MDS at risk.</li> <li>• Mitigating the impact of lower than plan throughput tempo requires an urgent and immediate mitigation action which has an opportunity to deliver the required results in the 2014/15 Corporate Plan.</li> </ul>
d. Goods and services being procured is highly specialised and largely identical to work done before	<ul style="list-style-type: none"> <li>• A service provider to support the Manganese execution is needed immediately.               <ul style="list-style-type: none"> <li>◦ Based on the current project plan, immediate ramp-up of the owners team is on the critical path, therefore no time for further delay that will result in volume and revenue loss</li> <li>◦ Being the first and the largest of Transnet's mega projects going through execution, it is critical that this project is flawlessly executed – sets an example –</li> </ul> </li> </ul>

	<p>and reduce risk of further impact on Transnet's capital portfolio affordability</p> <ul style="list-style-type: none"> <li>Based on the owners team requirement instituted by Platinum Standard (implementation led by McKinsey), Transnet's identified skills gap shortage of 1,200 specialised resources needed for capital delivery significantly need to be addressed – and therefore ramping up manganese owners team with special skills is of utmost importance.</li> <li>McKinsey has jointly worked with Transnet in creating and approving the business case and therefore understands all the value drivers and risks contained therein. The time required for a new provider will delay the execution</li> <li>McKinsey has extensive understanding of the Manganese programme and its interdependencies in the context of Transnet's broader capital portfolio, i.e., locomotives, Eskom and common user facility</li> <li>McKinsey has established working relationships with asset owners (TFR, TNPA) and detailed understanding of their schedule and volume requirements</li> <li>McKinsey has a proprietary iron ore and manganese demand and supply model that Transnet has used previously to determine its pricing methodology. This tool is available from only one supplier i.e., McKinsey.</li> </ul>
d. Approaching the market would result in wasted money and time	<ul style="list-style-type: none"> <li>Any new service provider would have to develop its own methodologies and tools as well as obtain operational experience within a capital execution environment.</li> <li>Due to the specialised nature of the work a new service provider will be required to understand the intricacies of Transnet's operations, capital programme and overall MDS.</li> </ul>

25. Additionally, due to the confidential nature of the Information, the engagement cannot be subject to an open tender process. In terms of para 15.1.4 (c) of the revised PPM, in instances where a confinement is confidential, the GCE may approve such confinement without it being routed via any other signatory.

#### **ENTERPRISE AND SUPPLIER DEVELOPMENT AND BBBEE**

26. The work will be carried out internally supported with a team of consultants (McKinsey & Company and its Consortium partners). The external consultants fees for the scope above will be based on a potential maximum fee of R100 million for the first phase and a potential maximum fee of R50 million for the second phase. The total potential fee will not exceed R150 million.

27. McKinsey and Company will engage a Consortium Partner who is Black owned and this Consortium partner will perform a percentage of the work under the guidance of McKinsey and Company.
28. The first phase fee of R100 million excluding expenses and VAT will be shared on a 40%/60% split with Consortium partners, who will be allocated 60% of the fees. The second phase portion of R50 million excluding VAT and expenses will be shared a 40%/60% split with the Consortium partners, who will be allocated 60% of the fees .
29. McKinsey and company will be required to provide a supplier development plan whereby they commit 70% of the contract value for the phase 1 fee and 70% of the phase 2 fee to enterprise and supplier development value, which will be set out in an agreed supplier development plan. Preferential procurement and use of empowered consortium partners will contribute to this value. This will subject to negotiation with the service providers
30. The consortium partner will be required to provide a supplier development plan whereby they commit 50% of their contract value for the fixed fee and the contingent fee to enterprise and supplier development value, which will be set out in an agreed supplier development plan. 30% of the contract value should be targeted at downstream supplier development to SMME's (EME's and QSE's), preferably black owned, Black women owned, youth owned and owned by people living with disabilities. This will subject to negotiation with the service providers
31. McKinsey and Company and the consortium partner will be required to provide an acceptable BBBEE improvement plan.

#### **FINANCIAL IMPLICATIONS**

32. The external service provider's fees for the scope above will be based on a maximum potential fee of R150 million for a period covering 2014/15 to the completion of the program.
33. This will comprise of R100 million excluding VAT in fees estimated for the first 12 months and R50 million excluding VAT in estimated fees for the next 18 months or until completion of the project.
34. The fees will be aligned to specific delivery and commissioning milestones.
35. The total fixed fees of R150 million will be shared on a split 40%/60% with the Consortium partners, who will be allocated 60% of the total fees.
36. This split of fees for McKinsey and consortium partners will be as follows:

<b>Period</b>	<b>McKinsey</b>	<b>Consortium partner</b>
First 12 months of support (till EPC contractor appointment) – larger team	R40m	R60m
Next 18 months or until the end of the project - smaller team	R20m	R30m
<b>Total</b>	<b>R60m</b>	<b>R90m</b>

37. The fee and expenses will be in accordance with the National Treasury instruction note. The expenses will be on actual costs incurred aligned with the instruction note.



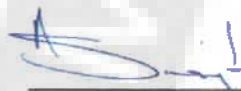
## BUDGET IMPLICATIONS

38. The amount of R50 million has been budgeted for in the 2014/15 Group Finance capex budget.
39. The additional fees of R100 million has not been budgeted, However, given the nature of the external support and FEL4 status of the project, the balance of the capex budget will be funded through the project budget and be secured through efficiencies delivered through the support.

## RECOMMENDATION

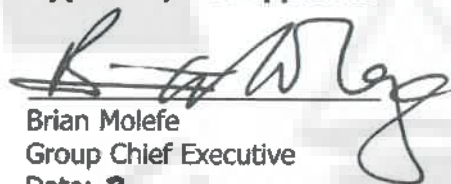
40. It is recommended that the of Group Chief Executive:
  - 40.1. Approve the resourcing strategy and remuneration model for the Manganese execution by accelerating and optimising thereby supporting the initiative to mitigate the EBITDA at risk by mobilising a team,
  - 40.2. Confining and awarding the services to support the internal team to McKinsey and Company and its BBBEE Consortium partners.

**Compiled by**



Anoj Singh  
Group Chief Financial Officer  
Date: 21/02/14

**Approved/ Not Approved**



Brian Molefe  
Group Chief Executive  
Date: 3.4.14

## ANNEXURE PV 42





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TRANSNET



## MEMORANDUM

www.transnet.net

**TO : Brian Molefe**  
**Group Chief Executive**

**FROM : Anoj Singh**  
**Group Chief Financial Officer**

**SUBJECT : NMPP ACCELERATION – DE-RISKING THE WAY FORWARD**

### PURPOSE OF SUBMISSION

1. The purpose of the submission is to request approval of the Group Chief Executive to:
  - 1.1. Approve the resourcing strategy and remuneration model for the NMPP Acceleration initiative to mitigate the EBITDA at risk;
  - 1.2. Confine and award services for support to the internal team to McKinsey and Company and its BBBEE Consortium partners.

### BACKGROUND

2. The NMPP is Transnet's largest programme in execution with an estimated cost of R22.4 billion. This NMPP trunk line, pump stations and terminals scope will increase volume from 4.4 billion litres to 8.7 billion litres through the construction of a 555km 24-inch diameter trunk line.

### DISCUSSION

3. The NMPP has experienced delays in project execution in the past. This has historically resulted in significant cost escalation and reputational risk exposure for Transnet.
4. Efforts to integrate with EPCM led to disruptions as late in 2012/2013, including de-scoping of AWP and change of Transnet Project Managers.
5. TIA have conducted an audit and the high level findings are as follows (refer Annexure B):
  - 5.1. Project Management and Project Controls in particular are fundamental and imperative to ensure that key risks are effectively mitigated, and reported accordingly.
  - 5.2. TM2 management detected the incorrect progress reporting by Group Five during mid- November 2013 and verbally instructed Group Five to review and rectify their reported progress figures.
  - 5.3. Ongoing poor performance and re-work by Group Five;
  - 5.4. Progress as per the Constructability schedule as at 31 October 2013 showed additional slippages to the MC date, compared to the PSR and NMPP OPCO reported dates;
  - 5.5. The October 2013 risk modelling reflected a most likely delay beyond the latest approved milestone dates;
  - 5.6. The TM2 Final Forecast Cost (FFC) at R2,977 billion exceeds the project budget of R2,777 billion. There is a risk that this FFC will be breached should there be further schedule slippage past mid-June 2014 and the overall ETC (R23.4bn) is at risk.

5.7. Completion of both TM1 and TM2 engineering and construction, and commissioning/ramp-up remain to be finalized – therefore the volumes and EBITDA contained in the 2014/15 Corporate Plan are at risk.

6. The RAB is also a risk as the regulator will not allow any non-prudent increase in the overall ETC. Nersa has appointed an independent consultancy to assist in its study to formulate an independent view on the prudence with which the NMPP was built.
7. GCIA conducted a site visit to the NMPP coastal accumulator terminal construction site (TM1) in Island View (Port of Durban, KZN) on 17 February 2014 and identified potential opportunities for improvement. The site visit included a briefing and progress update from the on-site owner's team, and a guided walk through the TM1 construction site footprint. The visit was supported by a project team and select Capital Productivity experts.
8. Furthermore significant reputational loss will be sustained by Transnet.
9. Accordingly, efforts to track construction costs, timelines and risks closer to actual activities, requires capacity to follow up effectively to reduce risk of further cost overrun / revenue loss – which Transnet does not have.

#### **SUGGESTED APPROACH**

10. To de-risk further schedule and cost escalations that will affect Transnet's reputation and capital affordability. This includes supporting Transnet's NMPP's owners team with a Control Tower combined with specialized intervention teams – to drive construction productivity, cost efficiency, and manage interfaces and risks during final phase of completion / commissioning & ramp-up
11. To bring transparency and visibility that will allow management decisions and risk management, notably through
  - 11.1. Re-baselining completion rates and cost estimates, including risks associated with completion of critical path items and potential claims
  - 11.2. Run control towers and collecting primary on site data for real time tracking of KPIs (e.g., schedule, on-site resources vs. resource plan, supervision levels, resource efficiency like scaffolding utilisation, critical issue tracking, visual tracking of progress and work area etc.)
  - 11.3. Deploy targeted intervention teams to manage contractor interfaces and protect value (e.g., claims, material management, commissioning management)
  - 11.4. To bring best practice approaches, tools and people – proven in distressed project situations globally and in South Africa (e.g., Cairn pipeline, SBG, Medupi claims management, Big Dig Boston, and in road, rail, port, oil & gas projects)
12. Performed revised baseline project costs and schedule;
  - o Review alignment with the public commitments;
  - o Mitigation of reputational risk;
13. Analysis of cashflow at risk;
14. Claims management process;
15. Quantitative risk assessment to incorporate:
  - o Revenue impact
  - o EBITDA impact
  - o Cost vs benefit analysis
  - o Monte Carlo analysis
16. Institute daily, weekly, monthly issue resolutions (technical AND management issues) with Project Team and Contractor teams onsite.



17. Recommended: senior visibility and engagement, i.e., monthly GCE and GCFO on-site progress review (via VC).
18. On-site intervention teams.
19. Specialised teams focusing 100% of their attention on critical path issues that drive cost and schedule.
20. Based on the above the Corporate Plan targets will be met.
21. This approach has been discussed and agreed with Mr Charl Moller: TCPCE.
22. McKinsey and Company have the Intellectual property, experience and knowledge to provide these services to Transnet. McKinsey and Company have a detailed knowledge of Transnet, its operating divisions and MDS.
  - 22.1. McKinsey understands the underlying economics of the global and local industry in detail as well as the strategic trends in the oil and gas industry.
  - 22.2. McKinsey understands Transnet's underlying infrastructure program in detail and have been an advisor to many clients to mitigate against similar risks experienced on the NMPP.
  - 22.3. McKinsey has in its global practice supported many oil and gas experts and a tool kit of best practices that can be leveraged and has a proven track record at Transnet of reducing capital cost on large capital projects.
  - 22.4. McKinsey has a proven track record of de-risking and improving outcomes of distressed projects in execution.
23. In addition, Transnet has limited options to do this with in-house capabilities.
  - 23.1. To do an independent review requires an independent party. Current NMPP owners team capabilities would be insufficient for a self-assessment and further distract resources from execution.
  - 23.2. Transnet has constrained availability of skills and know-how required to intervene in NMPP execution to mitigate further cost and schedule overruns.
  - 23.3. Lack of established standards and methodologies to run effective control tower and KPI tracking, counter claims management, and managing EPCM interfaces. Resulting in scope creep and unfinished.

#### **GROUND FOR CONFINEMENT:**

24. Appended below, for ease of reference, is an extract from the current Procurement Procedure Manual, par 15.1.2, which sets out the grounds for confinement.
  - a) Where a genuine unforeseeable urgency has arisen which is not attributable to bad planning;
  - b) The goods/services are only obtainable from one supplier/limited number of suppliers. For instance, patented/proprietary goods or OEM spares and components. Operating Divisions are however required to satisfy themselves that there are no new entrants on the market who could also be tested;
  - c) For reasons of standardization or compatibility with existing products 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 "standardization" will not be considered' or
  - d) When 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 organisation to solicit other tender 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 prerequisites must be satisfied i.e. the goods or services must be highly specialized, almost identical to previous work done and approaching the market again would result in wasted money and time.

25. We are of the view that this matter complies with grounds (a) and (d) as set out below, and the request for confinement is therefore fully supported.

26. Specific emphasis is placed on ground (a) and (d) due to the potential business risks associated with approaching the market on an open tender process as well as the credentials listed above. There is additional reputational damages that would be risked if Transnet went on an open tender process as this would indicate to the open market that there are further issues on the NMPP.

Ground for confinement per Par 15.1.2	• Confinement considerations
a. Where a genuine unforeseeable urgency has arisen which is not attributable to bad planning;	<ul style="list-style-type: none"> <li>• The EBIDA at risk was only identified after the 2014/2015 Corporate plan had been completed; taking into account the impact of the locomotive deposits.</li> <li>• These risks were presented to Transnet Group EXCO in March 2014.</li> <li>• If the mitigation plans are not put in place immediately the 2014/2015 Corporate plan, capital plan and funding pre-requisites will not be met placing the entire MDS at risk.</li> <li>• There is also a major risk that the capital expenditure will be disallowed in the tariffs to be charged.</li> <li>• Mitigating the impact of higher than expected capital expenditure and potential delays in the delivery of the NMPP requires an urgent and immediate mitigation action which has an opportunity to deliver the required results in the 2014/15 Corporate Plan.</li> </ul>
d. Goods and services being procured is highly specialised and largely identical to those provided previously	<ul style="list-style-type: none"> <li>• This component of Ground D relates to the specialised work to make informed decisions to de-risk the NMPP.</li> <li>• The models used are highly complex and due to the work done on the capital SWAT process in re-cutting the portfolio, extensive knowledge has been gained in understanding the expansionary capital requirements.</li> <li>• McKinsey has a deep understanding of the NMPP as well as the oil and gas industry.</li> <li>• McKinsey is leading the development and implementation of the platinum standard, including the operating model for projects in execution, includes NMPP review of lessons learned</li> <li>• McKinsey is rolling out the platinum standard, including training of 150 project directors and managers (including NMPP team members) in workshops across the organisation</li> <li>• McKinsey has strengthened risk mitigation framework for large capital projects which will be applied to NMPP</li> </ul>

	<ul style="list-style-type: none"> <li>McKinsey has gathered an intimate understanding of NMPP on-site issues, stakeholder concerns and reputational risks since de-scoping of AWP in 2012. Since that time, McKinsey has concluded             <ul style="list-style-type: none"> <li>Ongoing coaching of Sue Govender in 2012, including best practice contractor selection / due diligence process and risk assessment prior to post AWP de-scoping (not implemented)</li> <li>Facilitated conversations between NMPP and client teams in India (Caim)</li> <li>Lessons learned workshops with the NMPP owners team</li> <li>Site visit to TM1 and observations made by international experts</li> </ul> </li> <li>McKinsey has an intimate understanding of the NMPP programme in the context of Transnet's broader capital portfolio and overall affordability.</li> </ul>
d. Approaching the market would result in wasted money and time	<ul style="list-style-type: none"> <li>A service provider to support the NMPP project needs to be appointed immediately. Every week of delayed operations significantly increases tariff risks due to non-recognition of capital. In addition every week of delay also significantly increases the reputation and credibility of executing the overall capital portfolio (which compounds into a risk for MDS)</li> </ul>

27. Additionally, due to the confidential nature of the information, the engagement cannot be subject to an open tender process especially from a reputational risk perspective. In terms of para 15.1.4 (c) of the revised PPM, in instances where a confinement is confidential, the GCE may approve such confinement without it being routed via any other signatory.

#### **ENTERPRISE AND SUPPLIER DEVELOPMENT AND BBBEE**

28. The work will be carried out internally supported with a team of consultants (McKinsey & Company and its Consortium partners).
29. McKinsey and Company will engage a Consortium Partner who is Black owned and this Consortium partner will perform a percentage of the work under the guidance of McKinsey and Company.
30. The Consortium partner will share 40% of the phase 1 fee and 60% of the phase 2 fee (excluding VAT and expenses). The phase 1 fee of a potential maximum of R10 million excluding expenses and VAT will be shared on a 60%/40% split with Consortium partners, who will be allocated 40% of the fees. The phase 2 portion of a potential maximum R90 million excluding VAT and expenses will be shared a 60/40% split with the Consortium partners, who will be allocated 60% of the fees.
31. McKinsey and company will be required to provide a supplier development plan whereby they commit 70% of the contract value for the phase 1 fee and 70% of the phase 2 fee to enterprise and supplier development value, which will be set out in an



agreed supplier development plan. Preferential procurement and use of empowered consortium partners will contribute to this value. This will subject to negotiation with the service providers.

32. The consortium partner will be required to provide a supplier development plan whereby they commit 50% of their contract value for the total fee to enterprise and supplier development value, which will be set out in an agreed supplier development plan. 30% of the contract value should be targeted at downstream supplier development to SMME's (EME's and QSE's), preferably black owned, Black women owned, youth owned and owned by people living with disabilities. This will subject to negotiation with the service providers.
33. McKinsey and Company and the consortium partner will be required to provide an acceptable BBBEE improvement plan.

#### **FINANCIAL IMPLICATIONS**

34. The external service provider's fees for the scope above will be based on a potential maximum potential fee of R100 million.
35. A fee of R10m is payable for the phase 1 re-baselining exercise and will be shared on a 60/40% split with the Consortium partners, who will be allocated 40% of the fees.
36. At the end of a 5 week phase 1 re-baselining exercise a portion of the fees will be linked to specific deliverables agreed upon after the re-baseline sign-off.
37. The balance of the phase 2 fee will be based linked to delivery of mutually agreed outcomes between Transnet and the consortium based on the outcomes of the re-baselining exercise. This will be based on specific delivery milestones. This will not exceed R90 million and will be shared on a 60/40% split with the Consortium partners, who will be allocated 60% of the total fees.
38. The fee and expenses will be in accordance with the National Treasury instruction note. The expenses will be on actual costs incurred aligned with the instruction note.

#### **BUDGET IMPLICATIONS**

39. The amount of R10 million has been budgeted for in the 2014/15 Group Finance capex budget. This will cover the re-baselining exercise.
40. The additional fees of a maximum of R90 million has not been included in the capex budget. Given that the NMPP is capital project in build phase, these fees will be allocated to the project and capitalised. It is expected that the efficiencies introduced by the consultants, relative to finalised and revised baseline, will be sufficient to cover these fees.



**RECOMMENDATION**

41. It is recommended that the of Group Chief Executive:

- 41.1. Approve the resourcing strategy and remuneration model for the NMPP Acceleration initiative to mitigate the EBITDA at risk;
- 41.2. Confine and award services for support to the internal team to McKinsey and Company and its BBBEE Consortium partners.

**Compiled by**



Anoj Singh  
Group Chief Financial Officer  
Date: 21.05.14.

**Approved/ Not Approved**



Brian Molefe  
Group Chief Executive  
Date: 3. 4. 14.

## ANNEXURE PV 43



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TRANSNET

**MEMORANDUM**[www.transnet.net](http://www.transnet.net)

**TO : The Acquisitions and Disposals Committee**

**FROM : Mr. Brian Molefe, Group Chief Executive**

**SUBJECT : REQUEST FOR THE CONFINEMENT AND AWARD FOR THE PROVISION OF PROFESSIONAL SERVICES TO SUPPORT TRANSNET IN INCREASING GENERAL FREIGHT BUSINESS WITH A BREAKTHROUGH TO REACH THE PLANNED VOLUME TARGETS FOR THE FINANCIAL YEAR 2015/2016 AND 2016/2017**

**PURPOSE OF SUBMISSION:**

1. The purpose of the submission is to request the Acquisitions and Disposals Committee (ADC) to:
  - 1.1. Approve the confinement and award for the General Freight Business breakthrough to achieve the volume targets Initiative, which includes an Initiative for sales and commercial capabilities, processes and solutions, to Regiments Capital for R375 million.
  - 1.2. Delegate authority to the GCE to approve all documentation and contract amendments related to this transaction including process approval and award.

**BACKGROUND:**

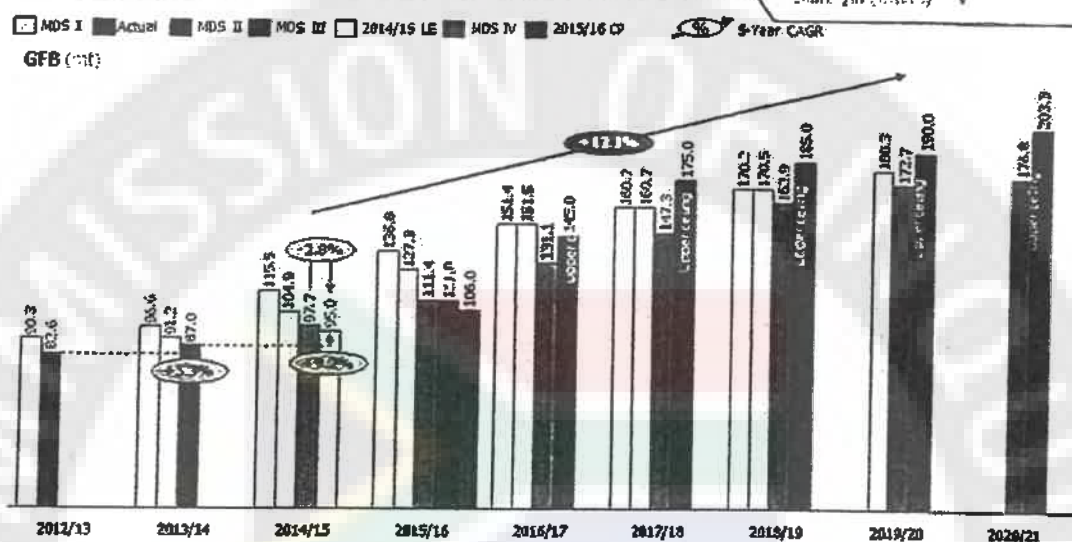
2. The latest OD submissions indicate that cash flows from operating activities will be significantly lower than the Corporate Plan due to market conditions, pressure on GFB volumes and cost increases. As a result, parameters for cash interest cover and gearing could be breached.
3. The GFB volume target for 2015/16 is 106Mt, however, to date GFB has not exceeded 87Mt per annum.
4. To mitigate this and to plan for the delivery of 1,064 new locomotives over the next 5-6 years, there will need to be a step change in GFB volumes.
5. This step change will entail, but not be limited to the following:
  - 5.1. Securing volumes and enabling execution capabilities on key flows,
  - 5.2. Capture additional revenue through pricing, mix optimisation and surcharge capture,
  - 5.3. Ensure sustainability through tools and capability building.

**DISCUSSION:**

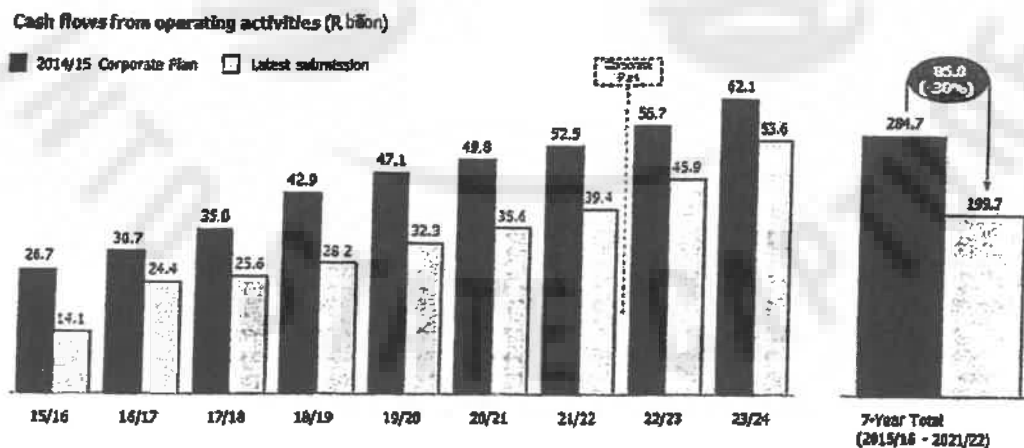
6. In the planning cycles since the inception of the MDS, a large emphasis has been placed on the growth of GFB volumes and the programmes to move freight from road to rail.

7. The delivery of volumes in the MDS program is critical to make the MDS investments affordable and to deliver cash flow into the organisation.
8. The GFB volume targets are not being met and the planned volumes are reducing with every planning cycle.

**Context: A step change will be required to meet 2015/16 target for GFB**



**Context: the latest OD submission (3<sup>rd</sup> iteration) sees drastically reduced cash flows from operating activities**



**Drivers of the decrease include:**

- Decrease in GFB volumes;
- Increase in TFR operating expenses (including additional infra opex)

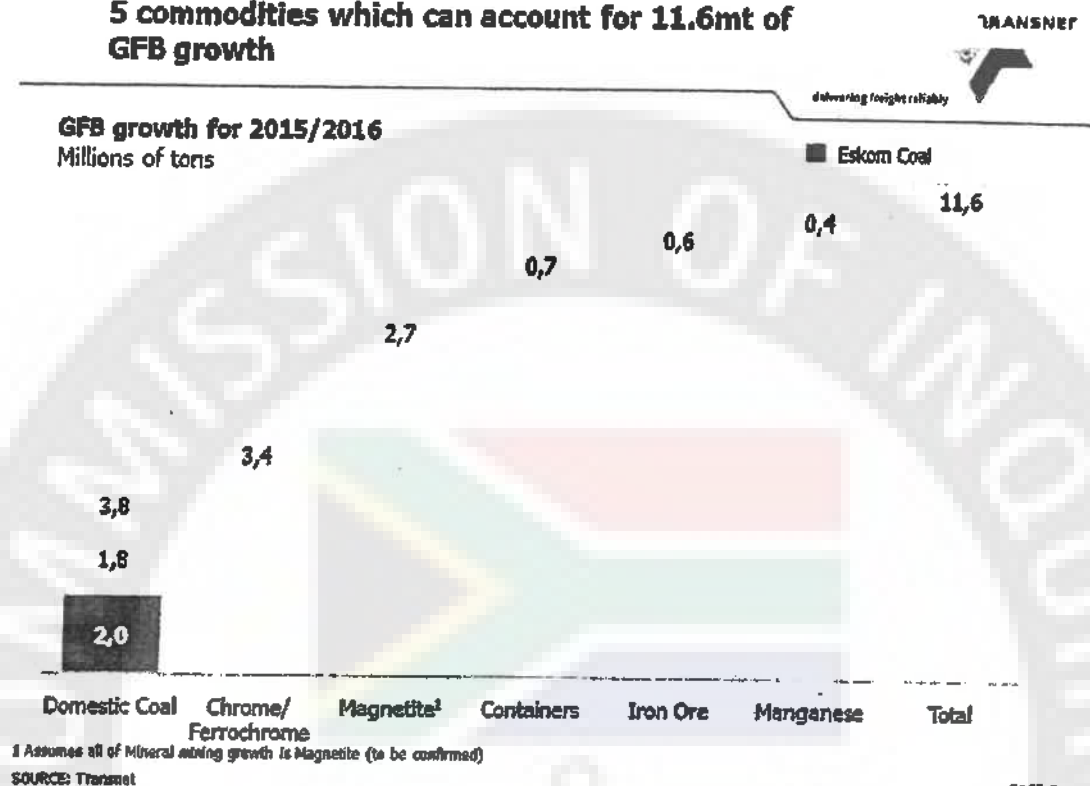
9. Transnet currently has a similar program underway on the coal line to deliver the breakthrough to achieve the planned coal volumes. Regiments Capital, a black owned business, was appointed as the sub-contractor to the coal programme through the supplier development program with the aim of the main contractor (Mckinsey) transferring skills and knowledge for Regiments to potentially lead future programmes for Transnet and other industry players. Regiments has gained the necessary experience to be able to perform this service as lead contractor (75%) for GFB, with Mckinsey being the sub-contractor (25%) so as to ensure continuity based on the lessons learnt on the coal programme.
10. The appointment of Regiments Capital as the main contractor for the GFB programs shows that Transnet's Supplier Development is delivering on the Transformation and Empowerment objectives.
11. Status of the coal program:
- 11.1. The historical performance of 69-72 Mt left a gap of 4-9 Mt to the target and stretch target for 2014/15, and the management team that was being formed at the time was not aligned on target and how to achieve it. There was a focus on daily push versus a systematic focus on driving scheduled operations as a means to driving growth by leveraging new tools and processes and filling in the many vacancies that were hampering operations.
- 11.2. To date the Coal line team has achieved significant successes and unprecedented volumes:
- Best December in the history of the Coal Line (6.9Mt vs. 6.1Mt in 2013)
  - Weekly average increased from 1.29Mt in 2013 to 1.44Mt in 2014 to 1.51Mt after project launch
  - YTD volumes of 67.93 Mt with an additional five week remaining to year end and an average tempo of 1.61 Mt for the last 3 weeks (excluding double line occupation)
- 11.3. This has been achieved through:
- Establishing a new philosophy around system balance
  - Team buy-in and ownership of the stretch target of 77Mt
  - Filling of critical vacancies
  - Reducing driver travel time
  - Reducing infra related cable theft and hook-ups
  - Introducing tools and technology to improve transparency and decision making, e.g. yard visibility, operational dashboards, cantilever tool
  - Joint working team consisting of representatives of TE and TFR to address key issues and improve communication
- 11.4. A further step up will be required to ensure delivery of the 2015/16 target of 79Mt. This would include:
- A commercial transformation of the sales function to ensure that demand does not become the constraint to future growth
  - Scaling up the technology solutions
  - Managing loco availability during the commissioning of the 21Es
  - Taking scheduling and planning to the next level in the SOC
- 11.5. Because there has been a systematic approach to growth and a focus on sustainability, much of what was learnt on the Coal line can be scaled to other flows such as domestic coal, chrome/ferrochrome, magnetite, containers, etc. in the GFB space.

12. The same principal needs to be applied on GFB.

13. A preliminary investigation has indicated that only on five commodities on GFB 11.6 Mt per annum that was not previously secured can be added to the GFB volumes.

### 5 commodities which can account for 11.6mt of GFB growth

GFB growth for 2015/2016  
Millions of tons



14. The volumes produced in the GFB program must create sustainable processes, systems, people capacity and mind-sets for Transnet. Thus this program should run over a two year period.

15. The Sales, marketing and commercial initiative will entail, but not be limited, to the following:

15.1. Set up sales nerve centres focusing on volumes making up 80% of growth in key business area's

15.1.1. Identification of specific GFB flows with short-term growth potential (e.g., flow volumes in traffic file exceed volumes in resource file, lost volumes to road, addressable volumes on road);

15.1.2. Identification of barriers to securing demand and incentives/service levels needed to capture demand;

15.2. Investigation and validation of new markets, including new markets identified by TFR e.g. FMCG market;

15.3. Targeted and structured programs and routines to capture the additional volumes by flow and customer, incl. rigorous performance tracking, sales execution support, short-term incentive schemes;

15.4. Identification of critical commercial capabilities and tools to capture growth;



- 15.5. Perspective of where take or pay contracts must be utilised and key contract elements that must be included;
  - 15.6. Targeted capability building programme to address gaps (e.g., concise key account plans, road-to-rail migration pitch);
  - 15.7. Piloting of sales enabling tools and roll out if value has been proven; and
  - 15.8. Any marketing thought leadership required.
16. The model that was applied to Coal programme will also be applied to the GFB programme:
- 16.1. Fixed pricing for the implementation of the processes and tools and the identification of commodities that can be leveraged to produce additional GFB volumes and the sales and commercial initiatives. There should be a fixed component for each of the two years but the first year will be more significant given the emphasis on creating sales, marketing and commercial capabilities.
  - 16.2. An 'at-risk' portion (outcomes based price) to the pricing which is linked to the delivery of the desired volumes. This will be based on volumes actually delivered per year.
17. The pricing and return for Transnet is discussed under Financial Implications.

#### **GROUND FOR CONFINEMENT:**

18. Appended below, for ease of reference, is an extract from the current Procurement Procedure Manual, par 15.1.2, which sets out the grounds for confinement.
- a) Where a genuine unforeseeable urgency has arisen which is not attributable to bad planning;
  - b) The goods/services are only obtainable from one supplier/limited number of suppliers. For instance, patented/proprietary goods or OEM spares and components. Operating Divisions are however required to satisfy themselves that there are no new entrants on the market who could also be tested;
  - c) For reasons of standardization or compatibility with existing products 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 "standardization" will not be considered' or
  - d) When 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 organisation to solicit other tender 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 prerequisites must be satisfied i.e. the goods or services must be highly specialized, almost identical to previous work done and approaching the market again would result in wasted money and time.

*C*

19. We are of the view that this matter complies with ground (a) and (d) as set out below, and the request for confinement is therefore fully supported.

Ground for confinement per Par 15.1.2	Confinement considerations
a. Where a genuine unforeseeable urgency has arisen which is not attributable to bad planning;	<ul style="list-style-type: none"> <li>• Genuine unforeseeable urgency has arisen as Transnet is not meeting its planned GFB targets due to economic circumstances.</li> </ul>
d. When 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 organisation to solicit other tender offers as it would result in wasted money and/or time for Transnet.	<ul style="list-style-type: none"> <li>• The work required is highly specialised and the supplier, working as subcontractor on the coal programme, has developed tools in the rail industry that is currently in use at Transnet. The coal programme is awarded to Mckinsey and Regiments Capital is the appointed SD subcontractor on a 60:40 split. As discussed in point 10 above the coal programme is proving to be successful.</li> <li>• It is not in the public interest as there would be additional cost and time wasted to develop the required tools and also to gain a deep understanding of Transnet Freight Rails infrastructure and operating model.</li> </ul>

#### ENTERPRISE AND SUPPLIER DEVELOPMENT AND BBBEE

20. Supplier development will continue to be a key factor and there will be a requirement for a BBBEE improvement plan as well as a SD plan with commitments of 30% to be negotiated with Regiments Capital, being the lead contractor. With Regiments being the lead contractor Transnet is delivering on its Supplier Development objectives of driving new entrants into markets to become suitably skilled to take on the lead for complex projects as well as delivering on its mandate to drive Transformation and Empowerment objectives.
21. Regiments Capital is a level two contributor with 68% black ownership, Mckinsey, who will be subcontracted by Regiments Capital is a level two contributor with 26% black ownership.

#### DELEGATIONS

22. The GCE has delegations to approve confinements up to R250 million.
23. The ADC's delegations to approve confinements is from R250 million to R1 billion.
24. This value of the confinement is R375 million and thus is in the delegation of the ADC.

#### FINANCIAL IMPLICATIONS

25. There is an expected increase in revenue for the first year of R2.9bn, which will flow into the second year plus there will be additional revenue unlocked in year two which is currently unknown as no analysis is available within that time span.

26. The GFB Fees are set-out below:
- 26.1. Fixed fee 2015/2016 – R50m
  - 26.2. Outcomes based fee 2015/2016 – R155m
  - 26.3. Probable fixed fee 2016/2017 – R20m
  - 26.4. Probable outcomes based fee 2016/2017 – R150m
27. The total expected fee for GFB for two years is estimated at R375m.
28. The outcomes based fee are based on the outcome and is thus not based on hourly tariffs.
29. The fixed fee is based on tariffs and these are in line with the National Treasury instruction note on professional fees.
30. The following table compares the fixed fee utilising the type of resource and the estimated time allocation to provide the service based on the service providers tariffs and the tariffs allowed in terms of the National Treasury Instruction note on professional fees.

**Fee comparison:  
Supplier vs. National Treasury  
tariffs**

**Price analysis**  
Rate/ hour (blended rate)  
2 680  
2 173

□ Supplier  
□ Treasury

Coal

SOURCE: DPSA "Hourly Fee Rates For Consultants - With effect from 1 April 2014", Rates for Model A incl. overheads  
: This blended rate per hour was achieved on the Coal program and the pricing for the GFB program will be based on the same principles

### BUDGET IMPLICATIONS

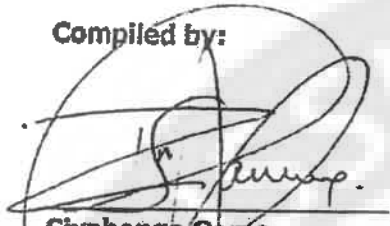
31. The fixed costs have been budgeted for and the outcomes based fee will be funded from the additional revenue received.

8

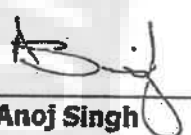

**RECOMMENDATION:****32. That the Acquisitions and Disposals Committee (ADC):**

- 32.1. Approves the confinement and award for the General Freight Business breakthrough to achieve the volume targets initiative, which includes an initiative for sales, marketing and commercial capabilities, processes and solutions, to Regiments Capital for R375 million.
- 32.2. Delegates authority to the GCE to approve all documentation and contract amendments related to this transaction including process approval and award.

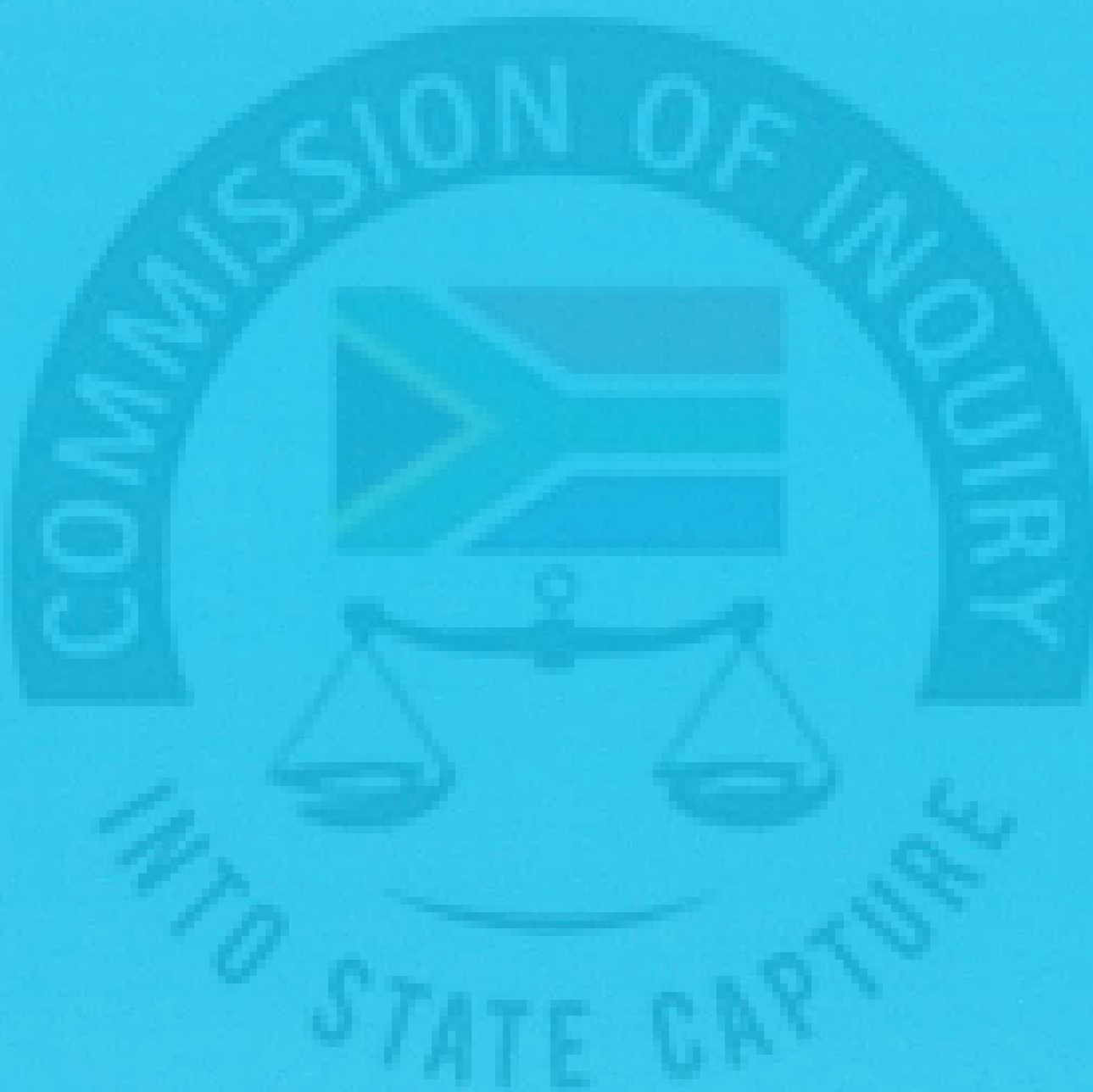
Compiled by:

  
**Siyabonga Gama**  
**Chief Executive Transnet Freight Rail**

Date: 2015.03.23

**Recommended / Not Recommended:**
  
**Anoj Singh**  
**Group Chief Financial Officer**  
 Date: 28.03.15
**Recommended / Not Recommended:**
  
**Brian Molefe**  
**Group Chief Executive**  
 Date: 24.3.15

## ANNEXURE PV 44





TRANSNET

**TRANSNET ACQUISITION COUNCIL****Meeting: 12/10/2012**

Agenda Item 2

RFP GSM/12/04/0445:

PROVISION OF SERVICES, CAPABILITIES AND RESOURCES TO  
SUPPORT THE MARKET DEMAND STRATEGY FOR PROCUREMENT  
AND CAPITAL EXCELLENCE AND PRODUCTIVITY  
NON-AWARD OF BUSINESS (CONSIDERATION)

R N/A

**RESOLUTION/MINUTE 201/2012TAC****THE TAC APPROVED THE NON-AWARD OF BUSINESS AS  
RECOMMENDED****Remarks:**

The reasons for the non-award of business were deliberated by the TAC and considered to be valid reasons.

The TAC, however, considered it prudent to highlight the following important issues:

- The aspect of the intellectual property disputes will presumably be addressed in the new RFP document.
- The revised scope for the services be confirmed before issuing of the new RFP.
- The revised budget be finalized before issuing of the new RFP.
- Consideration be given to refunding the R7 500.00 tender fee to the bidders who submitted proposals.
- That it be stated that Transnet reserves the right to do a split award of the business, at their sole discretion (standard disclaimer).

  
**SECRETARY****Date:** 15 October 2012  
**CHAIRPERSON****Date:** 15 October 2012

TRANSNET

**TRANSNET ACQUISITION COUNCIL****Meeting: 12/10/2012****Agenda Item 2****RFP GSM/12/04/0445:****PROVISION OF SERVICES, CAPABILITIES AND RESOURCES TO  
SUPPORT THE MARKET DEMAND STRATEGY FOR PROCUREMENT  
AND CAPITAL EXCELLENCE AND PRODUCTIVITY  
NON-AWARD OF BUSINESS (CONSIDERATION)****R N/A****Resolution/Minute /2012TAC****SECRETARY****Date:****CHAIRPERSON****Date:**

**Transnet Corporate Centre  
RFP Evaluation And Recommendation: Non-Award  
GSM/12/05/0445**



Date: 09 October 2012

**DISTRIBUTION**

Transnet Acquisition Council (TAC)

**RFP EVALUATION AND RECOMMENDATION REPORT  
FOR THE NON-AWARD OF BUSINESS**

**PROVISION OF SERVICES, CAPABILITIES AND  
RESOURCES TO SUPPORT THE MARKET DEMAND  
STRATEGY (MDS) FOR PROCUREMENT AND CAPITAL  
EXCELLENCE AND PRODUCTIVITY**

**RFP No. GSM 12/05/0445**

**Procurement:**

**Senior Buyer:** Luqmaan Noor Moosa  
**Commodity Manager:** Christopher Govender

**Transnet Corporate Centre**  
**RFP Evaluation And Recommendation: Non-Award**  
**GSM/12/05/0445**



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**GSM/12/05/0445**



**1. EXECUTIVE SUMMARY**

**1.1 Project Background:**

Transnet SOC Ltd announced that it expects to create up to 588 000 new job opportunities across the economy through its Market Demand Strategy (MDS), which will see the company spend R300 billion on capital projects over a seven-year period.

The MDS is aimed at expanding South Africa's rail, port and pipelines infrastructure, resulting in a significant increase in freight volumes, especially in commodities such as iron ore, coal and manganese. It will also lead to a significant modal shift from road to rail. The main objective of the strategy is for Transnet to invest in building capacity to meet validated market demand that will enable economic growth. The MDS is the centrepiece of government's growth strategy through investment in infrastructure and a key component of enabling the aspirations of the New Growth Path (NGP).

**Highlights of MDS:**

- R300 billion capital investment programme
  - R205 billion will be allocated to rail projects and R151 billion to general freight to support the growth in volumes to 170 million tons per annum (mtpa)
  - Expand export coal from 68mtpa to 97,5mtpa
  - Expand iron ore export from 53mtpa to 82,5mtpa
  - Container volumes handled through the ports to increase from 4,3 million to 7,6 million twenty-foot equivalent unit containers (TEUs)
  - Investment in the final phases of the New Multi-Product Pipeline
- Stronger financial position: Revenue growth of 16% per annum (p.a.) over the next seven years, driven by volume growth
  - EBITDA – Transnet's key measure of profitability – will more than triple to R68 billion by 2018/19
  - R213,6 billion of the required funding will be generated from operating cashflows
  - R86,5 billion of the required funding will be raised from debt capital markets
  - Gearing and cash interest cover will remain within target levels of 50% and greater than three times respectively

Significant productivity and efficiency improvements expected in rail and port operations.

Growth of the local industry through programmatic procurement – approximately 50% of the R78 billion set aside for locomotives will be spent on local suppliers.

Transnet's employee headcount will peak at 74 000 in 2018/19. The total number of jobs expected to be created via MDS will peak at 588 000 – this includes direct, indirect and economy-wide jobs.

Skills development: R7,7 billion spent on training by 2018/19 including R4,7 billion on bursaries and grants.



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MDS is not just about Transnet, but key to South Africa's growth objectives. This strategy aims to deliver a lasting economic, social and environmental value to society. A combination of partnerships with its stakeholders and the successful execution of MDS will enable economic growth for the country.

This is a huge challenge for the company, but Transnet has developed a comprehensive implementation plan to ensure a successful delivery of the strategy.

### 1.2 Project Details:

Resources, services and capabilities are required to work with Transnet to systematically scrub and optimise projects, ensuring complete and accurate information and ensure optimal use of resources.

Procurement resources, services and capabilities to address the requirements articulated above.

It is estimated that these requirements will be for an estimated period of 9 (nine) months.

### 1.3 Project Deliverables:

Procurement:

The projected spend is significantly more than in previous years and will require a step change in performance within the procurement function in order to deliver on these plans.

The procurement function has been identified as a critical area within the business to enable the additional requirements of MDS. In particular; the enablement of additional spend, on budget and on schedule, is paramount to the success of the strategy.

Additional resources, services and capabilities are therefore needed in particular areas of the procurement function in order to ensure successful delivery of transactions which may require intervention. These transactions will be determined on an on-going basis based on business needs.

Furthermore, successful support of these requirements will be in alignment with the overall operating model of the procurement organisation whilst ensuring adherence to The Public Sector's policies and procedures.

Support requirements will include but not limited to:

- The provision of resources with supply chain expertise and experience;
- Thorough knowledge of The Public Sector's supply chain policies and procedures;
- A thorough understanding and experience with Transnet's, other SOC's and the DPE's Supplier Development plans, policies and expectations;

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- Suitable knowledge of the Rail and Port related industries;
- Experience with supporting various stages of procurement transaction's (including Strategy development, RFP development, Bid evaluation, Negotiation, Award);
- Track history of performance improvements within operations and procurement;
- Experience with development of contracting strategies (e.g. programmatic procurement);
- Track history with the development of procurement control and assurance processes including key gate reviews;
- A thorough understanding and experience with the socio-economic issues (CSDP, Broad Based Black Economic Empowerment, industrialization and localisation, environmental issues etc.); and
- Thorough understanding of the Public Finance Management Act, Preferential Procurement Policy Framework Act, Industrial Policy Action Plan etc requirements.

**Capital:**

Support requirements will include but not limited to:

- Provision of resources with thorough knowledge of best practice capital projects policies and procedures (PLP – including gate review check lists, approval processes, systems and tools);
- Global expertise in accelerating timelines for business case approvals (benchmark timelines, quality requirements);
- Experience with linking business cases to strategic objectives, and ability to link individual projects to business outcomes;
- Proven experience of creating and optimising project business cases in Transnet specific asset classes, e.g. rail, port, pipeline (including validation of operating cost requirements, capital cost requirements, financing costs and overall affordability based on cash flows);
- Understanding of the South African context, e.g. how socio-economic benefits are linked to projects and proven ability to quantify these in business cases;
- Proven experience in optioneering, risk analyses and investment readiness assessments of a project to highlight execution risks, e.g. how to inform the contracting strategy, pre-requisites for procurement specifications and implementation plans;
- Proven methods for building capabilities in business case optimisation and approvals process acceleration
- Thorough understanding of the PFMA, SOC and DPE requirements as well as construction related pieces of legislation or regulatory frameworks such as CIDB.

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**1.4 Project Timeline:**

Project Start Date :01/08/2012  
 Project Completion Date :30/04/2013

**1.5 Tender Details and Tenders Received**

RFP Number :GSM 12/05/0445  
 RFP Issue Date :28/05/2012  
 RFP Closing Date :19/06/2012  
 RFP Validity Period :90 days (19 September 2012)  
 Extended RFP Validity Period :30 days (19 October 2012)  
 Procurement Procedure :Open RFP  
 Purchase price of RFP :R7500.00  
 Date of Advertisement :From 23/05/2012  
 Place where Advertised :The Star, Sowetan, The New Age, Mail & Guardian,  
 Business Day, Business Times  
 Method of RFP Evaluation :B-BBEE and Supplier Development Threshold – Stage 3  
 (60%)  
 Technical Threshold – Stage 4 (70%)  
**Final Evaluation:**  
 Technical – 30%  
 Price – 30%  
 B-BBEE  

- Scorecard – 10%
- Further Recognition Criteria (Current) – 20%

 Supplier Development Initiatives – 10%  
 Number of Bids Received :6  
 Number of Responsive Bids :6  
 Scheduled Award Date :26 July 2012  
 Revised Scheduled Award Date :Not Applicable  
 Reason for Revised Scheduled Date :Not Applicable

**Transnet Corporate Centre  
RFP Evaluation And Recommendation: Non-Award  
GSM/12/05/0445**



**1.6 Commercial Summary**

Transnet Corporate Centre on behalf of Transnet SOC Limited prepared and issued an open request for proposals (RFPs) for the "Provision of Services, Capabilities and Resources to Support the Market Demand Strategy (MDS) for Procurement and Capital Excellence and Productivity" by advertising in various newspapers from the 23<sup>rd</sup> May 2012. The RFP document was available to the public from 28<sup>th</sup> May 2012.

A total of 9 vendors purchased the RFP documents as listed below:

1. PricewaterhouseCoopers
2. Letsema Consulting
3. Deloitte Consulting
4. Davis Langdon (Pty) Ltd
5. SSI Engineers and Environmental
6. Accenture
7. McKinsey & Company
8. Volition Consulting Services
9. The Boston Consulting Group

Refer to **Annexure B** for further information on Vendors who purchased the RFP document.

A total of 6 vendors submitted their proposals on or before the closing day, as listed below:

1. PricewaterhouseCoopers/Isambulo Ami JV (Joint Venture)
2. Volition Consulting Services
3. Accenture
4. The Boston Consulting Group
5. Deloitte Consulting
6. McKinsey & Company

NB: JV = Joint Venture

Refer to **Annexure C** for the TAC register of tenders received.

**1.7 Standard Procurement Responsiveness**

Refer to **Annexure D** for the Checklist of Returnable Documents by the Vendors.

All bidders provided the documents required and none were eliminated.

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**2. RFP EVALUATION**

**2.1 Stage One – Administrative Responsiveness**

All bidders passed the test for administrative responsiveness and progressed to Stage Two for further evaluation.

**2.2 Stage Two – Substantive Responsiveness**

All bidders passed the test for substantive responsiveness and progressed to Stage Two for further evaluation.

**2.3 Stage Three – B-BBEE and SD Evaluation**

Stage Three Evaluation – B-BBEE and SD Evaluations	Weighting	Minimum Criteria
<b>B-BBEE:</b>		<b>60%</b>
- Scorecard	80%	
<b>Supplier Development:</b>		
- New Skills Development	10%	
- Technology and Skills Transfer	10%	
<b>Total</b>	<b>100%</b>	
<b>Note:</b> An overall minimum threshold of 60% for Stage Three evaluation criteria must be met or exceeded for Respondent's proposal to progress to Stage Four for further evaluation.		

The results of the Stage Three evaluations are as follows:

Bidder's Name	Stage 3 Score	Result
1. PricewaterhouseCoopers/Isambulo Ami JV (Joint Venture)	82.00%	Progress to Stage 4
2. Volition Consulting Services	62.80%	Progress to Stage 4
3. Accenture	70.00%	Progress to Stage 4
4. The Boston Consulting Group	46.40%	Disqualified
5. Deloitte Consulting	80.80%	Progress to Stage 4
6. McKinsey & Company	68.00%	Progress to Stage 4

Refer to Annexure E for detailed Stage Three B-BBEE and SD evaluation results.

Only five (5) bidders met the minimum threshold of 60% for Stage Three evaluations and proceeded to Stage Four for further evaluation.



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**2.4 Stage Four – Technical Evaluation**

Stage Four Evaluation – Technical Evaluations	Weighting	Minimum Criteria
<b>Procurement:</b>		
Provision of resources with supply chain expertise and experience	5%	
Thorough knowledge of The Public Sector's supply chain policies and procedures	5%	
Thorough understanding and experience with Transnet's other SOC's and the DPE's Supplier Development plans, policies and expectations	5%	
Suitable knowledge of the Rail and Port related industries	5%	
Experience supporting the various stages of procurement transactions (including Strategy development, RFP development, Bid evaluation, Negotiation, Award)	5%	
Track history of performance improvements within operations and procurement	7.5%	
Experience with development of contracting strategies (e.g. programmatic procurement)	7.5%	
Track history with the development of procurement control and assurance processes including key gate reviews	5%	
Thorough understanding and experience with the socio-economic issues (CSDP, Broad Based Black Economic Empowerment, Industrialization and localisation, Environmental issues etc.)	2.5%	
Thorough understanding of the PFMA, PPPFA, IPAP etc	2.5%	
<b>Capital:</b>		
Thorough knowledge of best practice capital projects policies and procedures (PLP – including gate review check lists, approval processes, systems and tools)	5%	
Global expertise in accelerating timelines for business case approvals (benchmark timelines, quality requirements)	5%	
Experience with linking business cases to strategic objectives and ability to link individual projects to business outcomes	5%	
Proven experience of creating and optimising project business cases in Transnet specific asset classes e.g. rail, port, pipeline (including validation of operating cost requirements, capital cost requirements, financing costs and overall affordability based on cash flows)	7.5%	
Understanding of the South African context e.g. how socio-economic benefits are linked to projects and proven ability to quantify these in business cases	7.5%	
Proven experience in optioneering, risk analyses and investment readiness assessments of a project to highlight execution risks e.g. how to inform the	5%	

**70%**

**Transnet Corporate Centre  
RFP Evaluation And Recommendation: Non-Award  
GSM/12/05/0445**



contracting strategy, pre-requisites for procurement specifications and implementation plans	
Proven methods for building capabilities in business case optimisation and approvals process acceleration	5%
Thorough understanding of the SOC and DPE requirements as well as construction pieces of legislation or regulatory frameworks such as CIDB	5%
Detailed CV's of proposed resources with relevant experience in line with requirements	5%
<b>Total</b>	<b>100%</b>
<b>Note:</b> An overall minimum threshold of 70% for Stage Four evaluation criteria must be met or exceeded for a Respondent's proposal to progress to Stage Five for final evaluation.	

The results of the Stage Four evaluations are as follows:

Bidder's Name	Stage 4 Score	Result
1. PricewaterhouseCoopers/Isambulo Ami JV (Joint Venture)	58.99%	Disqualified
2. Volition Consulting Services	50.05%	Disqualified
3. Accenture	57.10%	Disqualified
4. Deloitte Consulting	70.08%	Progress to Stage 5
5. McKinsey & Company	80.92%	Progress to Stage 5

Refer to Annexure F for detailed Stage Four evaluation results.

Only Two (2) bidders met the minimum threshold of 70% for Stage Four evaluations and proceeded to Stage Five for final evaluation.

## 2.5 Stage Five – Final Evaluation

Criteria	
Stage Five Evaluation - Final	Weighting
Technical	30%
Price	30%
B-BBEE Scorecard	10%
B-BBEE Further Recognition Criteria	20%
Supplier Development Initiatives	10%
<b>Total</b>	<b>100.00</b>

The results of the Stage Five evaluations are as follows:

**Transnet Corporate Centre**  
**RFP Evaluation And Recommendation: Non-Award**  
**GSM/12/05/0445**



**A. Technical Scores:**

	<b>Deloitte Consulting</b>	<b>McKinsey &amp; Company</b>
Stage Four Total (100%)	70.08	80.92
Final Weighted Technical Score 30%	21.02	24.28

Refer to Annexure F for detailed Technical evaluation calculations.

**B. Price Evaluations:**

<b>Name of Tenderer : Ranked lowest to highest Price</b>	<b>Financial Offer (P)</b>	<b>Comparative Offer (Pm)</b>	<b>Points for Financial Offer</b>	<b>% Premium payable</b>	<b>Premium payable in Rands</b>
			MAX (30)		
McKinsey & Company	R 4,021	<b>R 4,021</b>	<b>30.00</b>	<b>0.00</b>	<b>R 0</b>
Deloitte Consulting	R 4,417	<b>R 4,021</b>	<b>27.05</b>	<b>9.84</b>	<b>R 396</b>

Refer to Annexure G for the detailed Price submissions of each vendor.

**C. B-BBEE Preference Evaluations:**

	<b>Deloitte Consulting</b>	<b>McKinsey &amp; Company</b>
B-BBEE Scorecard Points (10)	9.15	8.00
FRC (Current) Points (20)	2.55	0.53
<b>Total Preference Points (30)</b>	<b>11.70</b>	<b>8.53</b>

Refer to Annexure H for the detailed calculations on the B-BBEE Preference evaluations.

**Transnet Corporate Centre**  
**RFP Evaluation And Recommendation: Non-Award**  
**GSM/12/05/0445**

**D. Supplier Development Evaluations:**

	<b>Deloitte Consulting</b>	<b>McKinsey &amp; Company</b>
Supplier Development Points (New Skills Development and Technology & Skills Transfer)	3.80	2.00
<b>Total Preference Points (10)</b>	<b>3.80</b>	<b>2.00</b>

Refer to **Annexure E** for the detailed calculations on the Supplier Development evaluations.

The consolidated Stage Five Evaluations are tabled below:

<b>Final</b>	<b>Stage Five Evaluation -</b>	<b>Weighting</b>	<b>Deloitte Consulting</b>	<b>McKinsey &amp; Company</b>
Technical		30%	21.02	24.28
Price		30%	27.05	30.00
B-BBEE Scorecard		10%	9.15	8.00
B-BBEE Further Recognition Criteria		20%	2.55	0.53
Supplier Development		10%	3.80	2.00
<b>Total</b>		<b>100.00</b>	<b>63.57</b>	<b>64.81</b>
<b>Ranking</b>			<b>2</b>	<b>1</b>

Refer to **Annexure I** for the consolidated score sheet.

**Transnet Corporate Centre**  
**RFP Evaluation And Recommendation: Non-Award**  
**GSM/12/05/0445**



**3. PROJECT BUDGET**

Refer to attached Memorandum approved by Anoj Singh, Transnet SOC: GCFO. See **Annexure A** attached hereto.

**4. RFP EVALUATION PROCESS**

Transnet's prescribed RFP process was followed with guidance and support provided by Thulani Mshwene and Johan van Niekerk from Transnet's Group Tendering and Policy department and Cindy Felix from Transnet Internal Audit (TIA).

Below is a sequence of steps followed during the evaluation criteria:

Stage Three (3) B-BBEE and Supplier Development Desktop Evaluation initially conducted on the 05<sup>th</sup> July 2012. The moderation session was conducted on the 05<sup>th</sup> July 2012.

Stage Four (4) Technical Desktop Evaluation initially conducted on the 05<sup>th</sup> July 2012 and ended on the 14<sup>th</sup> July 2012. The moderation session was conducted on the 16<sup>th</sup> July 2012.

Pricing evaluation was conducted on the 18<sup>th</sup> July 2012.

B-BBEE evaluation was conducted on the 18<sup>th</sup> July 2012

**5. RFP QUALITY ASSURANCE**

**5.1 Value Added Tax**

The RFP amounts exclude 14% Value Added Tax (VAT).

**5.2 Forex Contant**

All prices are quoted in South African currency. Forex has no impact on the amounts quoted.

**6. PRICING**

Pricing was requested on a rate per hour basis for a 9 month period.

The preferred bidder has quoted the following pricing during this RFP evaluation process, see **Annexure G** attached hereto.

**6.1 Bid Validity Period of the Recommended Supplier**

The preferred bidders quote is valid until 19 October 2012.



**Transnet Corporate Centre  
RFP Evaluation And Recommendation: Non-Award  
GSM/12/05/0445**



**7. INITIAL TAC RECOMMENDATION**

Based on the evaluation of the tenders, in accordance with the agreed RFP evaluation requirements and scoring as set out above, it is recommended that Transnet SOC Ltd awards the business and enters into negotiations with **McKinsey & Company** as the preferred vendor.

The TAC approved the award of business to McKinsey & Company on 30 July 2012.

Refer to **Annexure O** for the TAC resolution minute 183/2012.

**8. REVISED RECOMMENDATION**

During the post tender negotiations (PTN) the GCE raised a concern that Transnet has been awarding business excessively to McKinsey & Company and as a result this will expose Transnet to insurmountable risks should any unsavoury circumstances occur. A decision was then taken to award a portion of the business to Deloitte Consulting (Refer to **Annexure P** for the memo approved by the GCE and GCFO).

Over the last couple of weeks, Transnet and McKinsey & Company spent a considerable amount of time on the scope of work, deliverables and allocation of responsibilities amongst the consortium members. This process resulted in the finalization of clearly defined and amplified scope and deliverables for the engagement to ensure better implementation and management of both internal and external resources. In addition, the scope and deliverables are structured to ensure key skills transfer to Transnet at the end on the engagement. The revision of the scope has resulted in an expected project cost of R200m, from the initial R100m.

Thereafter, it was identified that there was a conflict of intellectual property between McKinsey & Company and Deloitte Consulting as they are two international competitors. However, Deloitte's sub-contractor, PD Naidoo and Associates has no intellectual property related issues and McKinsey is willing to work with them to ensure that the NGP objectives are met.

Due to the significant change in scope, fees and the intellectual property disputes, our procurement processes require that the previously approved tender process be non-awarded and a new tender be issued with the revised scope and budget.

**Transnet Corporate Centre**  
**RFP Evaluation And Recommendation: Non-Award**  
**GSM/12/05/0445**



It is recommended that TAC approves the non-award of this tender.

APPROVALS				
	NAME	DESIGNATION	DATE	SIGNATURE
Originator:	Luqmaan Noor Moosa	Senior Buyer	09/10/2012	
Supported by:	Christopher Govender	Commodity Manager	09/10/2012	
	Shantell Mackay	Chief Procurement Manager: Corporate Centre	09/10/2012	
	Yusuf Mahomed	Executive Manager: Special Projects	9/10/2012	
	Luis Gillman	Executive Manager: Group Financial Planning	9/10/2012	
Acquisition Council Approval:	Helen Walsh	Chair Person	15/10/2012	

## ANNEXURE PV 45



**Gugulethu Chauke Transnet Corporate JHB**

**From:** Peter Volmink Transnet Corporate JHB  
**Sent:** Monday, 15 April 2019 16:08  
**To:** Gugulethu Chauke Transnet Corporate JHB  
**Subject:** FW: GCFO requests for PO creation of McKinsey contracts\_for the record "PV 45"

**Importance:** High

**From:** Cindy Felix Transnet Corporate  
**Sent:** 11 July 2014 12:10 PM  
**To:** Suellen Du Plessis Transnet Corporate JHB <Suellen.DuPlessis@transnet.net>; Duran Balbathur Transnet Corporate JHB <Duran.Balbathur@transnet.net>  
**Subject:** FW: GCFO requests for PO creation of McKinsey contracts\_for the record  
**Importance:** High

Hi Sue and Duran,

Please be advised that Edward has informed us that there is no breach or deviation and that payment can be made per the instruction below.

Duran please upload this email onto SAP as proof of the instruction from Acting GCSCO to proceed with payment.

With kind regards  
 Cindy  
 Procurement Manager  
 Integrated Supply Chain Management  
 Transnet Corporate Centre,  
 8th Floor  
 Carlton Centre  
 Tel: +27 11 308 2360/1285  
 Email: [Cindy.Felix@transnet.net](mailto:Cindy.Felix@transnet.net)

**TRANSNET**



**From:** Cindy Felix Transnet Corporate  
**Sent:** 11 July 2014 12:08 PM  
**To:** Edward Thomas Transnet Corporate JHB  
**Cc:** Garry Pita Transnet Corporate JHB; Kevin Weir Transnet Corporate JHB; Yusuf Mahomed Transnet Corporate JHB; Richman Chivinge Transnet Corporate JHB; Mohammed Mahomedy Transnet Corporate JHB  
**Subject:** RE: GCFO requests for PO creation of McKinsey contracts\_for the record

Hi Eddie/Richman

Please ensure that Duran is notified of the PRs as soon as they are released.

Regards  
 Cindy  
 Procurement Manager  
 Integrated Supply Chain Management  
 Transnet Corporate Centre,  
 8th Floor  
 Carlton Centre  
 Tel: +27 11 308 2360/1285  
 Email: [Cindy.Felix@transnet.net](mailto:Cindy.Felix@transnet.net)

**TRANSNET**




---

**From:** Cindy Felix Transnet Corporate  
**Sent:** 11 July 2014 12:06 PM  
**To:** Edward Thomas Transnet Corporate JHB  
**Cc:** Garry Pita Transnet Corporate JHB; Kevin Weir Transnet Corporate JHB; Yusuf Mahomed Transnet Corporate JHB; Richman Chivinge Transnet Corporate JHB; Mohammed Mahomed Transnet Corporate JHB  
**Subject:** RE: GCFO requests for PO creation of McKinsey contracts\_for the record

Dear Edward,

Thanks for the confirmation regarding issuing payment and your advice regarding the process and we will upload accordingly.

With kind regards  
 Cindy  
 Procurement Manager  
 Integrated Supply Chain Management  
 Transnet Corporate Centre,  
 8th Floor  
 Carlton Centre  
 Tel: +27 11 308 2360/1285  
 Email: [Cindy.Felix@transnet.net](mailto:Cindy.Felix@transnet.net)

**TRANSNET**




---

**From:** Edward Thomas Transnet Corporate JHB  
**Sent:** 11 July 2014 11:37 AM  
**To:** Cindy Felix Transnet Corporate  
**Cc:** Garry Pita Transnet Corporate JHB; Kevin Weir Transnet Corporate JHB; Yusuf Mahomed Transnet Corporate JHB; Richman Chivinge Transnet Corporate JHB; Mohammed Mahomed Transnet Corporate JHB  
**Subject:** RE: GCFO requests for PO creation of McKinsey contracts\_for the record



Dear Cindy,

Firstly, a contractual obligation has been created, once the confinement process was approved, a letter was issued to McKinsey whereby Transnet requested them to commence work while the RFP was issued and they were to respond to the RFP, indicating that should Transnet not conclude the procurement event after the RFP process was completed Transnet commits to pay for any work delivered until that point. Thus a contract is in place, thus no condonation is required at all for any payment that is to be made.

Thus there are no risk regarding this payment and they can be validly made. The fact that Transnet will be negotiating price further through the RFP process will be taken into account in future payments to be made. The reduction in price negotiation leverage is noted and is mitigated through the limits imposed by the National Treasury instruction note for the fixed fee portion of the work and the at risk portion of the work is mitigated as it is linked to performance which has not yet occurred.

Based on the above, if business has agreed that work has been delivered and that Transnet has received value through the contractual obligations noted above, there is not risk regarding making these payments and making these payments is with the Transnet processes.

With regards to the issues on the RFP 1 and 2 noted below, can we please discuss these further so that we can get traction on these events.

Kind regards



**From:** Cindy Felix Transnet Corporate

**Sent:** 11 July 2014 10:58 AM

**To:** Edward Thomas Transnet Corporate JHB

**Cc:** Garry Pita Transnet Corporate JHB; Kevin Weir Transnet Corporate JHB; Yusuf Mahomed Transnet Corporate JHB; Richman Chivinge Transnet Corporate JHB; Mohammed Mahomedy Transnet Corporate JHB

**Subject:** GCFO requests for PO creation of McKinsey contracts\_for the record

**Importance:** High

Dear Edward,

I refer to your text message received this morning where you have instructed us to create purchase orders for payments to be made to McKinsey's where no contracts exist.

As the P2P Business Process Owner for TCC please be advised I require written permission via email from you as the Acting Group Chief Supply Chain Officer to request my team to create Purchases Orders as this is a deviation in the P2P process and effectively our supply chain policy and procurement procedures which is based on the regulatory statutes we are bound by as a state owned company.

It is my understanding that the payment requests is from business and is being approved as duly payable by the Group Chief Financial Officer – Anoj Singh as the respective delegated authority for Transnet and custodian of these transactions. We assume that the applicable risks in making such payments have been considered before release of the respective requisitions.

The tenders according to you affected include the following:

1. **GSM/14/04/1037: Coal Breakthrough of 2MT – no evaluation in progress business not responding and Business Owner wanted noted that does not agree to this request per email issued to Procurement. Transaction on hold.**
2. **GSM/14/04/1038: Renegotiating Kumba Iron ore Contract – no evaluation in progress business not responding and Business Owner wanted noted that does not agree to this request per email issued to Procurement. Transaction on hold.**
3. **GSM/14/04/1039: Manganese Execution Initiative – currently in evaluation stage**
4. **GSM/14/04/1040: NMPP De-Risking and Acceleration – currently in evaluation stage**
5. **GSM/14/04/1052: Capital Optimisation – only issued on 10 July as we only received ISCM sign-off this week**

Kindly be advised that we do not recommend that this be paid until such time these contracts are concluded as the scale of the risk is significant in relation to the payments being made to service providers who knowingly took on the risk of doing work without a proper tender process being completed. It has already been identified that the pricing structure of the bid proposals are excessive to what was originally budgeted by business.

The level of non-compliance is a moot point as it is evident that engagements have already occurred beyond the initial kick-off meetings and there is no retrospective remedy apart from condonation.

Furthermore the Group Chief Supply Chain Officer wanted us to negotiate the contracts to minimise the costs and risks to Transnet from a commercial perspective and now this opportunity is not being allowed if we make payment at this point.

Having said the above TCC Procurement can only assume that all risks have been taken into account and we abdicate any further responsibility with regards to payments made in this regard should the advice not be taken. If there are other tenders that we need to be aware of or payments to other service providers please provide details thereof for record purposes and the same advice applies.

Please note that as per audit requirements these payments will be logged in the deviation register.

With kind regards  
Cindy

Procurement Manager  
Integrated Supply Chain Management  
Transnet Corporate Centre,  
8th Floor  
Carlton Centre  
Tel: +27 11 308 2360/1285  
Email: [Cindy.Felix@transnet.net](mailto:Cindy.Felix@transnet.net)

TRANSNET



**ANNEXURE PV 45(a)**

PV45a

Anoj Singh, Group Chief Financial Officer

TRANSNET

**WITHOUT PREJUDICE OF RIGHTS**

McKinsey Incorporated  
88 Stella Street  
Sandown Mews East  
Sandton  
2196

Dear Sir/Madam

**Initial discussions on services required**

This letter serves to inform you that the Group Chief Executive of Transnet SOC Ltd has approved an assignment to McKinsey Incorporated and its consortium partners, subject to the successful conclusion of a Master Services Agreement.

As you are aware, Transnet is bound by regulatory policies, procedures and processes in respect of procurement. These processes require amongst others, a request for proposal to be issued for approved transactions, evaluation of the final bid proposals and subject to meeting Transnet's requirements in terms of the full scope of work as set out in the request for proposal, a final Master Service Agreement may be concluded.

The approvals received from the Group Chief Executive are for the following services:

The support of identifying additional capital savings as well as the implementation of the Platinum Standards which will include the following:

1.1 A consulting team to ensure the embedding of the sustainable solution of the Platinum Standard which will reduce the reliance on consultants in the medium to long-term and as required in terms of the National Treasury instruction note relating to consultancy reduction plans. The deliverables will include: -

- a) Filling of key positions per approved resourcing strategy;
- b) Embedding of portfolio recut and capital allocation principles;
- c) Rolling out capital rooms at Operating divisions;
- d) Rolled out approved financial model showing Transnet's single view of capital;
- e) GCIA implementation and embedding support;
- f) Change management of methodologies and principles of the Capital Platinum Standard;
- g) Implementation of an external stakeholder engagement plan; and
- h) Rollout of a Top Talent programme within GCIA.

Transnet SOC Ltd  
Registration Number  
1990/000900/30

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F +27 11 308 1269

Directors: ME Mkwand (Chairman) B Molefe\* (Group Chief Executive) MA Panecchi Y Farbas ND Gazendam NP Mncosane N Moko WR Njole SM Sharma TS Shosang  
\* Executive  
E Tshabalala DL Tshope A Singh\* (Group Chief Financial Officer)

www.transnet.net

Group Company Secretary: ANC Ooba

All embedding must be evidenced by new capabilities created in the operating divisions to fully apply the Capital Platinum Standard in their area, and a formal sign off from each operating division's CAPIC.

1.2 Value optimisation of the Capital Investment Portfolio by a further R 100 billion (in addition to SWAT 1 of R39 billion) defined as complying with all of the following:

- a) Savings identified in optimisation covering both technical and financial solutions with bankable FEL 3 final business case approved by Capital Investment Committee and signed off by owners' team;
- b) Reduction in value in the Capital Portfolio to deliver 350 Mt and bringing all mega programmes to the end of FEL3 stage; and
- c) Project optimisation must address strategic projects as listed per Annexure F of the Shareholder's compact.

***Please note that removal and deferment of projects will not be considered.***

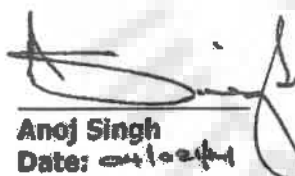
1.3 Implementation and embedding of the Platinum Standard.

While our teams expedite the issuing of the request for proposals for the above assignments, due to the urgency of the services required, I kindly request that you mobilise your team to have the initial discussions with our teams. In the unlikely event that we may not successfully conclude the above-mentioned assignments, Transnet SOC Ltd will reimburse all costs incurred by yourselves.

Please note that as service provider to Transnet providing consulting services the fees and expenses will be subject to the instruction note issued by National treasury relating to cost containment measures.

I am looking forward to working with your teams on these critical assignments.

Yours Sincerely,



**Anoj Singh**  
**Date: 09/10/2014**  
**Group Chief Financial Officer**



## ANNEXURE PV 45(b)



Anoj Singh, Group Chief Financial Officer

TRANSNET



## WITHOUT PREJUDICE OF RIGHTS

Mr. David Fine  
McKinsey Incorporated  
88 Stella Street  
Sandown Mews East  
Sandton  
2196

Dear Mr Fine

### Initial discussions on Consulting services required

This letter serves to inform you that the Group Chief Executive of Transnet SOC Ltd has approved a number of consulting assignments to a McKinsey led consortium, subject to the successful conclusion of a Master Services Agreement.

As you are aware, Transnet is bound by regulatory policies, procedures and processes in respect of procurement. These processes require amongst others, a request for proposal to be issued for approved transactions, evaluation of the final bid proposals and subject to meeting Transnet's requirements in terms of the full scope of work as set out in the request for proposal, a final Master Service Agreement may be concluded.

The approvals received from the Group Chief Executive are for the following consulting services:

1. Maximisation of the Coal Line – breakthrough of 2 mt per week initiative.
2. Manganese Execution Support to provide critical support that to the Programme Director.
3. NMPP Acceleration including de-risking of the schedule and cost escalations, risk management and resolution management.
4. Assessing the options to renegotiate the Kumba Iron Ore (1a) Contract.

While our teams expedite the issuing of the request for proposals for the above assignments, due to the urgency of the services required, I kindly request that you mobilise a McKinsey led consortium to have the initial discussions with our teams. In the unlikely event that we may not successfully conclude the above-mentioned assignments, Transnet SOC Ltd will reimburse all costs incurred by yourselves.

I am looking forward to working with your teams on these critical assignments.

Yours Sincerely,

Anoj Singh

Date: 01/01/14

Group Chief Financial Officer

Transnet SOC Ltd  
Registration Number  
1990/080900/30

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Johannesburg  
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Directors: ME Mkhwanazi (Chairman) B Molefe\* (Group Chief Executive) MA Panucchi Y Forbes MD Gazendam NP Moxatane N Mooda NR Njoku IM Sharma IB Shosane  
E Tshabalele DU Tshape A Singh\* (Group Chief Financial Officer)  
\*Executive

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Group Company Secretary: ANC Ceba

## ANNEXURE PV 46



Transnet SOC Ltd  
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TRANSNET



## MEMORANDUM

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**TO :** All Exco and Extended Exco members  
All CPOs  
All Acquisition Councils  
All iSCM Governance COE members

**FROM :** Gary Pita, Group Chief Supply Chain Officer- Group iSCM

**DATE :** 20 May 2014

**SUBJECT:** **PPM DIRECTIVE 04/2014: COMMUNICATION WITH SUPPLIER/S BEFORE OBTAINING INTERNAL APPROVAL TO EMBARK ON A CONFINEMENT PROCESS AS WELL AS THE EVALUATION AND ADJUDICATION OF SUCH BIDS**

---

### PURPOSE

1. The purpose of this Directive is to provide clear guidelines with regard to the roles and responsibilities of different stakeholders in the confinement process.

### BACKGROUND

2. The following practices with regards to Confinements have been brought to the attention of Group iSCM.
  - 2.1 Some Transnet employees (outside of Procurement) are communicating sensitive information with suppliers before receiving the permission to embark on the confinement process.
  - 2.2 Despite the fact that the Confinement process is considered to be a deviation from the norm of an open and fair competitive process there appears to be a growing tendency to use this procurement mechanism for acquiring goods and services from a single supplier only.
  - 2.3 Of greater concern, is the fact that there is a growing tendency to follow the "Confine and Award" process. The confine and award process effectively excludes the Acquisition Councils (ACs) from the final approval process.
  - 2.4 Cases have come to our attention where, after approval for "Confine and Award" was obtained from the GCE, the end-user himself entered into a

"Contract" with the service provider/supplier with no involvement of procurement and / or the AC.

## **GUIDANCE**

- 3 It is crucial that the following important factors should be noted by all employees, especially those outside of the procurement function, i.e. the so called end-users.
  - 3.1 With regards to paragraph 2.1 above, it should be noted that the end-user may not approach the market direct, but should provide procurement with a detailed demand requisition. Procurement will then kick-start the procurement process on the end-user's behalf. Refer to paragraph PPM 7.4.1 (b) in this regard.
  - 3.2 As will be noted from paragraph PPM 15.1.3 (b) the "confine and award" process may only be used in exceptional circumstances where one is dealing with a sole supplier situation or in cases of extreme urgency. Furthermore, as stated in paragraph PPM 15.1.3 (b) and 15.1.5 (a) such motivation for confinement (normal confinement or "confine and award") must be signed by the end-user, the OD CPO, the OD's main DAC and the OD's CEO before submission to Group. In the Group TCC environment this would be the end-user, the TCC Procurement Head, the Group CSCO and the CFO.
  - 3.3 With regards to paragraph 2.3 above, attention is directed to PPM 15.1.3 (b) which clearly stipulates the after approval to "confine and award" has been obtained, a proper RFX document must be compiled by procurement and sent out to the relevant service provider(s)/supplier(s). Such quotation must close at the relevant AC. After a proper evaluation of the RFX has been done in the normal manner (CFET etc. – see PPM 18.2.1 (a), (b), and (c)), the contract has to be signed by the person with the required DOA, if the final price is within the benchmark as initially approved by the person with DOA. Thereupon the AC must be informed of the award.

## **IMPLEMENTATION**

- 4 It is therefore of the utmost importance that the abovementioned procedures be strictly adhered to. In particular, non-procurement Staff (the end-users) should note that:
  - 4.1 They are not allowed to approach suppliers/service providers directly without involving the procurement department first. This applies to instances prior to approval to confine has been obtained, as well as thereafter.
  - 4.2 A formal RFX document must be compiled together with Procurement, formally issued to the confined market as approved, with such RFX closing at

the AC on a specific closing date and time. The end user may not approach the suppliers / service provider directly for a quote.


- 4.3 Only once a proper contract, duly signed by the person with the necessary DOA, has been put in place by Procurement, may the end-user communicate with the suppliers in his/her capacity (per the concluded contract) as a contract administrator.
- 4.4 It should furthermore be noted that any amendments to such contracts may not be effected without the Procurement Department and /or the AC and/or the original approver of the confinement. The procedure to be followed with regard to amendments to contracts is clearly defined in the PPM, and subsequent directives. Hence as from the date of this directive, transgressions in this regard will be viewed in a very serious light.

**COMPILED BY:**



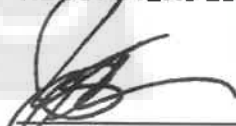
**Ndateni Ndou**  
Specialist: Policy & Governance, Group iSCM  
Date: 30/4/2014

**SUPPORTED BY:**



**Wynand Esterhuizen**  
Manager: Policy & Governance, Group iSCM  
Date: 30/4/2014

**RECOMMENDED:**



**Peter Volmink**  
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Atty



## ANNEXURE PV 47





**TRANSNET DELEGATION OF AUTHORITY  
FRAMEWORK  
(EFFECTIVE FROM 1 JUNE 2013)**

**APPROVED BY THE TRANSNET BOARD OF  
DIRECTORS ON 29 MAY 2013**

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## 1 Interpretation and Definitions

The following words and expressions bear the following meanings, unless the context indicates otherwise:-

- 1.1 **"Board"** means the Board of Directors of the Company and includes the Board when it acts in the capacity as the Divisional Board of the deemed Authority under the National Ports Act No. 12 of 2005;
- 1.2 **"Board Reserved Matters"** means matters reserved by the Board as set out in Annexure A1 of Written resolution 2011/P2;
- 1.3 **"CAPIC"** means the Capital Investment Committee, a committee of the Group Executive Committee which has been established to make decisions regarding capital expenditure;
- 1.4 **"CE"** means Chief Executive of an Operating Division;
- 1.5 **"Chairperson"** means the person who is appointed as the Chairperson of the Board as per the MOI;
- 1.6 **"Company"** means Transnet SOC Ltd including its Operating Divisions and Specialist Units, with registration number 1990/000900/30 and **"Transnet"** shall have a corresponding meaning;
- 1.7 **"Company Strategy"** means the strategy for the Company as approved from time to time by the Board;
- 1.8 **"Consultant"** means a person, or partners in a firm, or a company or a close corporation who can provide expert or specialised advisory skills, but excludes anyone who also carries out the physical work or provides the end product for Transnet based on his own professional or expert advice. Such consultancy service normally pertains to a specific project and therefore non-repetitive in nature and confined to design work, investigation, or advice on management, financial, business or technical matters;  
  
In short, a consultant does not supply the ultimate end product, but merely gives a recommendation, based on his expertise, of the best solution to a specific problem. That proposed solution, if acceptable to Transnet, still has to be acquired, built or erected by another party and may or may not be connected with the consultant. Excludes any professional services procurement package included in the approved asset procurement package plan for and approved physical asset project.
- 1.9 **"Delegation of Authority Framework"** means this document, recording the nature and extent of authorities required in order to implement certain actions by or on behalf of the company, including any sub-delegation of authority where permitted and **"Delegation"** shall have a corresponding meaning;
- 1.10 **"FRMF"** mean Financial Risk Management Framework
- 1.11 **"GCE"** means Transnet Chief Executive of the Company;
- 1.12 **"GCFO"** means Transnet Chief Financial Officer;
- 1.13 **"GCSCO"** means Transnet Chief Supply Chain Officer;
- 1.14 **"Group Executive Committee"** or **"Group Exco"** means the executive committee established to take responsibility for the day to day execution of strategy and running of the Company;
- 1.15 **"Group Executive or Group Executive nominee"** refers to the Group Executive responsible for the supporting business or his/her nominee;
- 1.16 **"International agreements"** means agreements entered into with entities incorporated in foreign jurisdictions or which are required to be construed in accordance with the laws of a foreign jurisdiction including the neighbouring countries;
- 1.17 **"Memorandum of Incorporation"** or **"MOI"** means the constitutive documents of the Company, as amended;
- 1.18 **"Neighbouring Countries"** means countries sharing a border with the Republic of South Africa;
- 1.19 **Operating Divisions** means the Operating Divisions of Transnet, namely, Transnet Freight Rail, Transnet Engineering, Transnet National Ports Authority, Transnet Port Terminals and Transnet Pipelines;

- 1.20 **"PFMA"** means the Public Financial Management Act 1 of 1999 (as amended), read together with its regulations' including **Treasury Regulations**;
- 1.21 **"Prescribed Officer"** means a person who, within a company, performs any function that has been designated by the Minister of Trade and Industry in terms of section 66(1), read with Regulation 38.
- 1.22 **"Shareholder"** means the Government of the Republic of South Africa represented by the Shareholder Minister.
- 1.23 **"Shareholder Minister"** means the Minister of Public Enterprises as defined in the MOI;
- 1.24 **"Shareholder's Compact"** means the shareholder's compact being an agreement entered into pursuant to section 52 of the PFMA between the Shareholder representative and the Board from time to time;
- 1.25 **"Specialist Unit"** mean all business units of Transnet which have been deemed 'supporting businesses' in terms of the Company Strategy, these include Transnet Property, Transnet Foundation, Transnet Capital Projects and Transnet Corporate Centre. Where a Specialist Unit CE is not a member of the Group Exco, the Group Exco member responsible for such Specialist Unit shall sub-delegate powers to the Specialist Unit's CE;
- 1.26 **"Subsidiary"** means subsidiary as defined in the Companies Act 71 of 2008 (as amended) and Subsidiaries shall have a corresponding meaning;
- 1.27 **"Transnet"** means the Company with its Subsidiaries and Operating Divisions as stated in clause 1.6 above.
- 1.28 **"Treasury Regulations"** means the regulations issued in terms of section 76 of the PFMA, amended from time to time;
- 1.29 **Transnet Total Asset Base:** refers to the total value of the assets in Transnet and is set at the asset value indicated in the integrated report for the year; and
- 1.30 **"VAT"** means Value Added Tax. All amounts indicated in the document are exclusive of VAT.

## 2 Scope

This Delegation of Authority Framework records the nature and extent of the authorities delegated by the GCE to certain employees and members of the Group Exco and other authorities delegated in order to implement certain actions by or on behalf of the Company. It includes, to the extent necessary and/or incidental thereto, the authority to discharge all of the duties, obligations and powers imposed upon the deemed Authority under the National Ports Act 12 of 2005.

## 3 Application

3.1 This Delegation of Authority Framework applies to all employees of the Company, including its Operating Divisions and Specialist Units. It does not apply to any of the Company's subsidiaries. The respective Boards of Directors of the Company will prepare the requisite delegations of authority for those subsidiaries.

3.2 The persons set out in clause 5 below are granted the power and /or authority to perform their functions and responsibilities subject to the limits of authority outlined in clause 5 below, provided that the exercise of such power and/or authority in terms of this delegation is not in conflict with the following:

- PFMA;
- Board Reserved Matters;
- Memorandum of Incorporation;
- Company Strategy;
- Shareholder's Compact;
- the Corporate Plan, Annual Budget and Borrowing Strategy and/or Funding Plan of the Company as approved by the Board from time to time;
- Enterprise Risk Management Framework; and
- Any approvals by the Board and the Minister of Finance for the delegation of the power to borrow money or issue a guarantee, indemnity or security, or enter into any other transaction that binds or may bind the Company to any future financial commitment in terms of section 66 of the PFMA.

3.3 This Delegation supersedes any prior Delegations of Authority Framework and takes effect upon the date determined by the Board of Directors.

3.4 Any proposal for amendments to this Delegation or to the authorities or the authorities delegated in this Delegation must be submitted in writing to the Transnet Company Secretary for consideration and approval by the Board of Directors.

## 4 Delegating Powers

4.1 A person authorised to exercise any of the authorities set out in clause 5 below ("original bearer of authority") may, in writing, sub-delegate to his/her subordinate ("designate") during his/her temporary absence or for an indefinite period, provided:

4.1.1 the authority is conferred by way of a certificate signed by the original bearer of authority, naming and identifying the designate, and the extent of the authority which is sub-delegated to the designate;

4.1.2 the sub-delegated authority shall only be exercised within the original bearer of authority's respective area of responsibility; and

4.1.3 the sub-delegated authority may be revoked at any time by the original bearer of authority.

4.2 Unless otherwise specifically indicated, approval of any of the matters listed in clause 5 below may be granted by a designate.

4.3 With respect to all matters and authorities specifically listed in clause 5 below, the delegated authority by the GCE to bind the Company is in regard to any business activity or transaction (or a series of related transactions) and is subject to the value in the aggregate of all payments or any consideration made or to be made for any such business activity or transaction(s) being complied with.

4.4 The original bearer of authority or designate must ensure that all the necessary procedures and/or approvals have been fulfilled prior to exercising any of the matters and authorities listed in clause 5 below.



## 5 Company Authorities

Limits of authority have been delegated by the Board of Directors to the Transnet Group Chief Executive. In the interest of good corporate governance, approval structures have been established in the Company. Requests for approval must follow the approved governing processes and structures for recommendation but the final approval vests with the delegated individual (for example CE, GCFO, GCE) as reflected in the specific delegations set out in this document.

In cases where business requirements necessitate that approval be obtained from the delegated authority without the review and recommendation by the relevant governance structures (CAPIC, Group Exco, etc.) this must be reported to the relevant governance structures immediately thereafter.

The authority to approve the Annual Corporate Plan and Budget of the Company vests with the Board of Directors, provided that it must be submitted to the Shareholder in terms of Section 52 of the PFMA.

### 5.1 Capital Expenditure

**NOTE 1:** Capital expenditure may only be authorised 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.

**NOTE 2:** Capital expenditure may only be authorised if the project has been approved and a warrant number has been issued by the relevant authority. All requests for capital expenditure exceeding the Divisional CE's limit must be submitted to the project administrator at Transnet Financial Planning.

#### 5.1.1 CAPEX in approved budget/Corporate Plan: To commence projects

Approval Authority →	OD Exco/CE excluding TFR	TFR Exco/CE	Transnet CAPIC/GCFO	Group Exco /GCE	Board Acquisitions and Disposals Committee	Board	Shareholder Minister
Operating Divisions	Up to but not exceeding R200m	Up to but not exceeding R400m	Up to but not exceeding R800m	Up to but not exceeding R1000m	Up to but not exceeding R2000m	Up to but not exceeding R3900m	Exceeding R3900m
Approval Authority →	Group Exco Member		Transnet CAPIC/GCFO	Group Exco /GCE	Board Acquisitions and Disposals Committee	Board	Shareholder Minister
Specialist Units	Up to but not exceeding R20m		Up to but not exceeding R800m	Up to but not exceeding R1000m	Up to but not exceeding R2000m	Up to but not exceeding R3900m	Exceeding R3900m

\*Refer to Materiality and Significance Framework. If the set limit (R3900m) is exceeded then the Board has to consider and recommend to Shareholder Minister for approval.

- Approval limits are per individual project, reported on a monthly basis to Group Financial Planning.
- Amounts indicated above exclude the capitalisation of borrowing costs.
- All ICT projects requiring Transnet approval must be signed off by the Head: Enterprise Information Management Services.
- Board Acquisitions and Disposals Committee refers to the Acquisitions and Disposal Committee of the Board. Group Exco/GCE to be the final approval gate for all capitalisation of maintenance projects (COPEX) irrespective of the value of the project provided that it has been included in the Corporate Plan.
- Front end loading (FEL) studies for level 1 and 2 may be approved in terms of the operating expenditure DoA, FEL 3 studies may be approved as standalone (excluding execution) per the above table. Please refer to the Accounting Policy for Conceptual, Pre-feasibility and Feasibility Studies when capitalising FEL studies.
- Approvals exceeding R2000m but less than R3900m in ETC are to be reported to the Shareholder Minister

### 5.1.2 Unforeseen CAPEX (not included in budget/Corporate Plan)

Approval Authority →	OD Exco/CE excluding TFR	TFR Exco/CE	Transnet CAPIC/GCFO	Group Exco/GCE	Board Acquisitions and Disposals Committee	Board	Shareholder Minister
Operating Divisions	Up to but not exceeding R50m	Up to but not exceeding R75m	Up to but not exceeding R400m	Up to but not exceeding R500m	Up to but not exceeding R1000m	Up to but not exceeding R3900m	Exceeding R3900m
Approval Authority →	Group Exco Member		Transnet CAPIC/GCFO	Group Exco/GCE	Board Acquisitions and Disposals Committee	Board	Shareholder Minister
Specialist Units	Up to but not exceeding R20m		Up to but not exceeding R400m	Up to but not exceeding R500m	Up to but not exceeding R1000m	Up to but not exceeding R3900m	Exceeding R3900m

\*Refer to Materiality and Significance Framework. If the set limit (currently R3900m) is exceeded then the Board has to consider and recommend to Shareholder Minister for approval.

- All unforeseen Capex approved by Operating Divisions/Specialist Units within their delegated authority, must be reported on a quarterly basis to Group Financial Planning.
- Amounts indicated above exclude the capitalisation of borrowing costs.
- All ICT projects requiring Transnet approval must be signed off by the Head: Enterprise Information Management Services
- Approval limits are **per project** at Operating Divisional level subject to an aggregate divisional limit of R200m per annum and R400m for TFR on condition that divisions remain within their annual approved capital budget (refer to 5.1.3.1).
- Divisional investment committees are to monitor the limits pertaining to the respective OD and to escalate submissions to Transnet if the respective OD limits are reached.
- If an unforeseen project will result in the divisional 7 year investment plan being increased then Group Exco needs to be approached for approval.

### 5.1.3 Increase in Estimated Total Cost (ETC) of Existing/Approved Projects

Approval Authority →	OD Exco/CE excluding TFR	TFR Exco/CE	Transnet CAPIC/GCFO	Group Exco/ GCE	Board Acquisitions and Disposals Committee	Board
Operating Divisions	ETC may be increased to a maximum of R200m, increases beyond this amount may only be approved at Transnet Level	ETC may be increased to a maximum of R400m, increases beyond this amount may only be approved at Transnet Level	Up to but not exceeding R800m	Up to but not exceeding R1000m	Up to but not exceeding R1400m	Exceeding R1400m
Approval Authority →	Group Exco Member		Transnet CAPIC/GCFO	Group Exco/ GCE	Board Acquisitions and Disposals Committee	Board
Specialist Units	ETC may be increased to a maximum of R20m, increases beyond this amount may only be approved at Transnet Level		Up to but not exceeding R800m	Up to but not exceeding R1000m	Up to but not exceeding R1400m	Exceeding R1400m

- Increase in ETC of projects already approved by the Shareholder Minister must be reported to the Shareholder Minister if the increase is in excess of 15%.

- All ICT projects requiring Transnet approval must be signed off by the Head: Information Management Services.
- All cost increases in excess of 25% of the approved budget for a project must be reported to Transnet CAPIC/GCFO.
- Amounts indicated above exclude the capitalisation of borrowing costs. Increases in ETC of a project solely due to the capitalisation of borrowing costs may be approved by the OD Exco/CE. Project costs and capitalisation of borrowing costs are to be managed separately and may not be expended on projects interchangeably.

5.1.3.1 Any increase in excess of the annual approved capital investment budget must be submitted to Transnet CAPIC/GCFO for approval.

#### 5.1.4 Asset Write-off/Scrapping: Movable Assets

Approval Authority →	OD Exco/CE excluding TFR	TFR Exco/CE	Transnet Capic/GCFO	Group Exco/GCE	Board Acquisitions and Disposals Committee	Board
Operating Divisions	Up to but not exceeding R10m	Up to but not exceeding R50m	Up to but not exceeding R100m	Up to but not exceeding R250m	Up to but not exceeding R700m	Exceeding R700m
Approval Authority →	Group Exco Member		Transnet Capic/GCFO	Group Exco/GCE	Board Acquisitions and Disposals Committee	Board
Specialist Units	Up to but not exceeding R5m		Up to but not exceeding R100m	Up to but not exceeding R250m	Up to but not exceeding R700m	Exceeding R700m

\*Refer to Materiality and Significance Framework. If the set limit (currently R3900m) is exceeded then the Board has to consider and recommend to Shareholder Minister for approval.

- The above amounts refer to net book value and are a cumulative annual limit. Write-offs above R10m and above R50m in the case of TFR must be reported to Transnet CAPIC/GCFO quarterly.
- Divisional investment committees are to monitor the limits pertaining to the respective OD and to escalate submissions to Transnet if the respective OD limits are reached.

#### 5.1.5 Asset write-off/Scrapping/Demolition of Immovable Assets (excluding land) e.g. buildings, structures

Approval Authority →	OD Exco/CE excluding TFR	TFR Exco/CE	Transnet Capic/GCFO	Group Exco/GCE	Board Acquisitions and Disposals Committee	Board*
Operating Divisions	Up to but not exceeding R10m	Up to but not exceeding R50m	Up to but not exceeding R150m	Up to but not exceeding R250m	Up to but not exceeding R300m	Exceeding R300m
Approval Authority →	Group Exco Member		Transnet Capic/GCFO	Group Exco/GCE	Board Acquisitions and Disposals Committee	Board*
Specialist Units	Up to but not exceeding R5m		Up to but not exceeding R100m	Up to but not exceeding R250m	Up to but not exceeding R300m	Exceeding R300m

\*Refer to Materiality and Significance Framework. If the set limit (currently R3900m) is exceeded then the Board to consider and recommend to Shareholder Minister for approval.

- The above amounts refer to an estimated market value at that point in time and are a cumulative annual limit.
- Divisional investment committees are to monitor the limits pertaining to the respective OD and to escalate submissions to Transnet if the respective OD limits are reached.
- Write-offs below R10m and below R50m in the case of TFR must be reported to Transnet CAPIC/GCFO quarterly.

### 5.1.6 Disposal of Movable Assets (excluding sale of scrap)

Approval Authority →	OD Exco/CE*	Transnet Capic/GCFO	Group Exco/GCE	Board Acquisitions and Disposals Committee	Board#
Operating Divisions	Up to but not exceeding R50m	Up to but not exceeding R100m	Up to but not exceeding R250m	Up to but not exceeding R700m	Exceeding R700m
Approval Authority →	Group Exco Member	Transnet Capic/GCFO	Group Exco/GCE	Board Acquisitions and Disposals Committee	Board#
Specialist Units	Up to but not exceeding R5m	Up to but not exceeding R100m	Up to but not exceeding R250m	Up to but not exceeding R700m	Exceeding R700m

\*The above amounts refer to an estimated market value and are subject to a cumulative annual limit of R200m. For sale of scrap please refer to 5.5.1.

- Divisional investment committees are to monitor the limits pertaining to their OD and to escalate submissions to Transnet once the respective OD limits are reached.
- #Refer to Materiality and Significance Framework. If the set limit (currently R3900m) is exceeded then the Board to consider and recommend to Shareholder Minister for approval.

### 5.1.7 Management's intervention in addressing non-compliance with regard to the approval of capital projects

Approval Authority →	OD CE	GCFO	GCE
Operating Divisions	Nil	Nil	Unlimited
Approval Authority →	Group Exco Member	GCFO	GCE
Specialist Units	Nil	Nil	Unlimited

- Together with the application for approval of non-compliance, the requestor must advise on the steps/corrective measures taken to avoid a repeat of the transgression within 30 days of the transgression being discovered.
- If the approval of non-compliance results in the annual divisional budget being exceeded, then the request must be submitted to Transnet CAPIC for approval (refer to 5.1.3.1).

### 5.1.8 Alienation/acquisition of Immovable property (land and servitudes)

Approval Authority →	OD Exco/CE excluding TFR	TFR Exco/CE	Transnet Capic/GCFO	Group Exco/GCE	Board Acquisitions and Disposals Committee	Board*
Operating Divisions	Up to but not exceeding R10m	Up to but not exceeding R50m	Up to but not exceeding R200m	Up to but not exceeding R350m	Up to but not exceeding R500m	Exceeding R500m
Approval Authority →	Group Exco Member		Transnet Capic/GCFO	Group Exco/GCE	Board Acquisitions and Disposals Committee	Board*
Specialist Units	Up to but not exceeding R1m		Up to but not exceeding R200m	Up to but not exceeding R350m	Up to but not exceeding R500m	Exceeding R500m

\*Refer to Materiality and Significance Framework. If the set limit (R3 900m) is exceeded then the Board to consider and recommend to Shareholder Minister for approval.

- Approval limits are per transaction and are with reference to market value
- All transactions entered into in terms of the above must be reported to Transnet CAPIC/GCFO
- Only immovable property on the non-core list, may be disposed of (refer to 5.1.8.1), such disposal may only be done through the Specialist Unit, Transnet Property.
- Amounts indicated above exclude the capitalisation of borrowing costs.



### 5.1.8.1 Newly Identified properties to be included on the non-core list (Book value of individual properties)

GE: Transnet Property	GCFO	GCE	Board Acquisitions and Disposals Committee	Board
Up to but not exceeding R50m	Up to but not exceeding R100m*	Up to but not exceeding R200m	Up to but not exceeding R300m	Exceeding R300m

\* These disposals must be reported to Transnet Capic/Group Exco/Board Acquisitions and Disposals Committee/Transnet Board.

## 5.2 Treasury

### Treasury Policies and Strategies

Approval Authority →	Group Treasurer	GCFO	GCE	Audit Committee	Board
Financial Risk Management Framework	Recommend	Recommend	Recommend	Recommend	Approve

**NOTE 1:** In respect of all transactions set out in paragraphs 5.2.1 to and including 5.2.10, the necessary legal advice must be obtained where applicable and persons executing such transactions must comply fully with the applicable Enterprise Risk Management Framework and any revised limits determined in terms of such framework and the provisions of the PFMA and, when in doubt, persons must consult the Treasury Compliance Officers and Transnet Finance or Transnet Legal Services.

**NOTE 2:** Only approved financial instruments as approved in terms of the applicable Treasury Financial Risk Management Framework approved by the Board and subject to such limits determined in accordance with such framework may be utilised in the Treasury operations.

### 5.2.1 InterTransnet Debt (Treasury inter Transnet debt write-off)

Approval Authority →	Deputy Treasurer: Back Office	Group Treasurer	GCFO	GCE
Operating Divisions	Up to but not exceeding R5m	Up to but not exceeding R10m	Up to but not exceeding R20m	Exceeding R20m
Specialist Units	Up to but not exceeding R2m	Up to but not exceeding R10m	Up to but not exceeding R20m	Exceeding R20m

All breaches of the above limits to be reported to the Audit Committee.

External debt write-off on financial instruments due to counter-party liquidation may only be approved by the GCE.

### 5.2.2 Maximum annual loss on all repo activities (Realised and unrealised)

Approval Authority →	Traders and Chief Trader	Deputy Treasurer: Front Office	Group Treasurer	GCFO	GCE
Group	Up to but not exceeding R1m	Up to but not exceeding R1.5m	Up to but not exceeding R2.5m	Up to but not exceeding R5m	Exceeding R5m

All breaches of the above limits to be reported to the Audit Committee

Note: The above limits are aggregate desk limits

### 5.2.3 Buy and sellback and sell and buyback transactions (Expressed in nominal terms)

Approval Authority →	Traders and Senior Traders	Chief Trader	Deputy Treasurer: Front Office	Group Treasurer	GCFO
Group	Up to but not exceeding R250m	Up to but not exceeding R500m	Up to but not exceeding R750m	Up to but not exceeding R1 000m	Exceeding R1 000m
Duration Limit	2 weeks	3 weeks	1 month	1 month	> 1 month

All breaches of the above limits (amount or tenure) to be reported to the Audit Committee.  
Approval limits are per transaction/event.

**5.2.4 Foreign Exchange Spot Transactions Operational payments, not related to hedging, early take ups or extensions (expressed in USD equivalent)**

Approval Authority →	Traders	Chief Trader	Deputy Treasurer: Front Office	Group Treasurer	GCFO
Group	Up to but not exceeding an aggregate equivalent of \$20m per day (desk total)	Up to but not exceeding an aggregate equivalent of \$40m per day (desk total)	Up to but not exceeding an aggregate equivalent of \$100m per day (desk total)	Up to but not exceeding an aggregate of \$250m per day (desk total)	Exceeding a daily equivalent of \$250m (desk total)

All breaches of the above limits to be reported to the Audit Committee.

**5.2.5 Foreign Exchange Hedging Transactions New hedges or re-alignment of existing hedges (expressed in USD equivalent)**

Approval Authority →	Deputy Treasurer Middle Office	Group Treasurer	GCFO
Group	Submissions not exceeding \$10m	Submissions not exceeding \$100m	Submissions exceeding \$100m
Tenure	Not exceeding 18 Months	Not exceeding 3 years	Exceeding 3 years

All breaches of the above limits (amount or tenure) to be reported to the Audit Committee.

**5.2.6 Foreign Exchange Hedging Transactions: Extensions, early take ups (expressed in USD equivalent)**

Approval Authority →	Traders	Chief Trader	Deputy Treasurer: Front Office	Group Treasurer
Group	Not exceeding an aggregate equivalent of \$20m per day (desk total)	Not exceeding an aggregate equivalent of \$50m per day (desk total)	Not exceeding an aggregate equivalent of \$100m per day (desk total)	Exceeding an aggregate of \$100m per day (desk total)

All breaches of the above limits to be reported to the Audit Committee.

Note: Where no specific limit is mentioned, the FRMF policy on foreign exchange rate risk will apply.

**5.2.7 Approval of FX hedges to be hedged by external suppliers on their balance sheet for goods/services to be delivered to Transnet in respect of Rand agreements involving foreign content**

Approval Authority →	Traders	Chief Trader	Deputy Treasurer: Front Office	Group Treasurer
Group	Not exceeding \$10m	Not exceeding \$25m	Not exceeding \$50m	Exceeding \$50m

All breaches of the above limits to be reported to the Audit Committee for noting.

The above limits are applicable per agreement.

Note: The Business Units must always obtain quotes on FX forward rates and liaise with the Treasury Trading desk that will verify the rates to ensure it is market related. The Business Units can only enter into the FX hedges with the supplier once the rates are accepted by the Treasury Trading desk via e mail. Once the above approvals are obtained, the Treasury Traders will provide sign off on the rate acceptance.



## 5.2.8 Interest Rate Risk Hedging

Approval Authority →	Notional Amounts	Group Treasurer	GCFO
Group	Notional amount of hedge expressed in USD (FX loans and leases)	Up to but not exceeding \$100m	Exceeding \$100m
	Notional amount of hedge expressed in ZAR (ZAR loans and leases)	Up to but not exceeding R1 000m	Exceeding R1 000m
Tenure		Not exceeding 5 years	Exceeding 5 years

All breaches of the above limits to be reported to the Audit Committee.

Note: Where no specific limit is mentioned, the FRMF policy on interest rate risk will apply.

The above limits are applicable per hedging submission.

## 5.2.9 Hedging of fuel risk exposures (commodity risk)

Approval Authority →	Group Treasurer	GCFO
Tenure	Not exceeding 6 months	Not Exceeding 18 months
Notional hedge expressed in RAND	Not exceeding R250m	Exceeding R250m

All breaches of the above limits to be reported to the Audit Committee.

Note: The maximum hedge should not exceed 75% of annual budgeted consumption inclusive of energy levy income.

The above limits are applicable per hedging submission.

Note: Where no specific limit is mentioned, the FRMF policy on commodity risk will apply.

## 5.2.10 Granting of InterTransnet Loans (Interest-bearing only) to divisions/subsidiaries

Approval Authority →	Deputy Treasurer: Front Office	Group Treasurer	GCFO	
Operating Division	Up to but not exceeding R750m	Up to but not exceeding R1 000m	Exceeding R1 000m	
Subsidiary	Up to but not exceeding R10m	Up to but not exceeding R25m	Exceeding R25m	

These above limits are cumulative per financial year.

## 5.2.11 Letters of Credit

Approval Authority →	Deputy Treasurer: Front Office	Group Treasurer	GCFO	GCE
Transnet	Up to but not exceeding R100m	Up to but not exceeding R200m	Up to but not exceeding R300m	Exceeding R300m

All breaches of the above limits to be reported to the Audit Committee.

The above limits are per letter of credit.

## Funding Portfolio

**NOTE 1:** Only derivatives approved in terms of the applicable Financial Risk Management Framework and subject to such limits determined in accordance with such framework may be utilised to hedge any risks.

**NOTE 2:** The total nominal funding amount per financial year in respect of Bonds and any other funding transactions shall be as determined per Board approved/Board amended Funding/Borrowing Plan.

**NOTE 3:** A. Signatories mean, subject to such approvals by the Board and the Minister of Finance in terms of section 66 of the PFMA as may be applicable, the Group Treasurer and any other officer so designated in writing by the GCFO.

B. Signatories mean, subject to such approvals by the Board and the Minister of Finance in terms of section 66 of the PFMA as may be applicable, persons so designated in writing by the Group Treasurer.

## 5.2.12 Loan/Funding documentation approvals per instrument per financial year

Approval Authority →	Group Treasurer	GCFO	GCE
Tapping of bonds	-	Not exceeding R5bn (Electronic signatures are utilised on pricing supplements as per standing approval)	Exceeding R5bn (Electronic signatures are utilised on pricing supplements as per standing approval)
Bank Loans (including overnight facilities)	Up to but not exceeding R1bn	Up to but not exceeding R2.5bn	Exceeding R2.5bn
Commercial Paper		Not exceeding R5bn (Electronic signatures are utilised on pricing supplements as per standing approval)	Exceeding R5bn (Electronic signatures are utilised on pricing supplements as per standing approval)
ECA supported funding	Up to but not exceeding R250m	Up to but not exceeding R1bn	Exceeding R1bn
New bond issues (in approved funding plan)	-	Up to but not exceeding R1bn	Exceeding R1bn
Development funding	Up to but not exceeding R250m	Up to but not exceeding R1bn	Exceeding R1bn
Foreign funding	-	Up to but not exceeding R1bn	Exceeding R1bn
Any other source of funding not stipulated above	-	Up to but not exceeding R1bn	Exceeding R1bn
The above is further subjected to the following annual aggregate limit			
	R1.5bn	R10bn	Limited to the annual Board approved borrowing plan *

The above is subject to the following:

- Be executed in accordance with the approved strategy as incorporated in the Corporate Plan (including any approved amendments).
- Be within the laid down cash holding limits of Transnet.
- All breaches of the above limits to be reported to the Audit Committee.
- \* The GCE can increase funding requirements up to 10% of Board approved borrowing plan and needs to be ratified by Board.

## 5.2.13 Signing of legally binding agreements in respect of Treasury related activities (Including ISDA, ISMA agreements and Bank facilities)

Only the GCE and/or the GCFO have authority to sign. The Group Treasurer may sign with a specified delegation of authority.

## 5.2.14 Counterparty Limits: Setting of Limits

Approval Level			
Group Treasurer	GCFO	GCE	Board Audit Committee Counter Party Risk Limits <sup>1</sup>
Price Risk Limits ≤ R25m <sup>3</sup>	Price Risk Limits ≤ R250 m <sup>3</sup>	Price Risk Limits ≤ R500 m <sup>3</sup>	
Recommendation of Bond Issue and Bond Issuer Limits	Approval of Bond Issue and Bond Issuer Limits		
Recommendation of Settlement Limits <sup>2</sup>	Approval of Settlement Limits <sup>2</sup>		
Recommendation of limits where Transnet is exposed to	Approval of limits where Transnet is exposed to		

counterparty issuer risk as a result of advance payment guarantees, performance bonds, retention bonds etc. issued under supplier agreement/contracts <sup>3</sup>	counterparty issuer risk as a result of advance payment guarantees, performance bonds, retention bonds etc. issued under supplier agreement/contracts <sup>3</sup>		
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Note: Where no specific limit is mentioned, the FRMF policy on Counter Party Risk will apply.

Note<sup>1</sup>: The approved counterparty risk may be utilised for price risk, investment risk as well as issuer risk (in respect of advance payment guarantees, performance bonds, retention bonds etc.) as long as the sum of the individual exposures remains within the overall Audit Committee approved risk limit.

Note<sup>2</sup>: Settlement risk limits are set at 1.5 times the approved counterparty limit as stipulated in the FRMF and will be approved with the counterparty limit.

Note<sup>3</sup>: In respect of counterparties not approved by Audit Committee

#### 5.2.15 Appointment of Commercial Bankers and the Opening of Bank Accounts

	Group Treasurer	GCFO
All OD/SU	Recommendation to open bank accounts and the appointment of bankers.	Approval of new bank accounts and the appointment of bankers and the approval of all documentation relating to such accounts, including electronic banking documentation.
Process to follow	There is no delegation to any OD/SU to appoint commercial bankers or to open bank accounts, domestically or internationally; only the GCFO may make such appointments.	

#### 5.2.16 Establishing financial policy with regard to insurance

Authority Level	GCFO after consulting with Chief Risk Officer. (Insurance role moved to Group Treasury according to the PWC Benchmarking Exercise Report.)
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Board Risk Committee to approve.

#### 5.2.17 Authorisation of cheque signatories, Test keys and EFT's

Signing Cheques	Two A signatories or one A and one B signatory
Signing Test keys for paying/receiving	Two A signatories or one A and one B signatory
Electronic transfer of funds	Two A signatories or one A and one B signatory

#### 5.2.18 Payment Instructions and confirmation notes

Signing payment instructions/ receipts/ settlement instructions:	Two A signatories or one A and one B signatory
Signing confirmation notes in respect of approved financial transactions executed:	One A signatory

#### 5.2.19 Approval of Annual Borrowing Plan

	Board
Group	Approve the annual borrowing plan for execution by Treasury

Annual borrowing plan to be recommended by the Group Treasurer, GCFO and the Audit Committee for approval by the Board.

#### 5.2.20 Authorisation to enter into binding transactions

	Group Treasurer
Group	Authorise Treasury employees to enter into binding financial transactions on behalf of the Transnet

#### 5.2.21 Issuing of Guarantees (subject to requirements of section 66 of the PFMA)

	Group Treasurer	GCFO	GCE	Board
Transnet	Up to but not exceeding R25m	Up to but not exceeding R200m	Up to but not exceeding R500m	Exceeding R500m

All breaches of the above limits to be reported to the Audit Committee.

Limits are per transaction.

#### 5.2.22 Issuing Letters of Support

	Board
Group	Only the Board of Directors has authority to issue letters of support

#### 5.2.23 Issuing of security per transaction (subject to section 66 of the PFMA)

	Group Treasurer	GCFO	GCE	Board
Group	Up to but not exceeding R250m	Up to but not exceeding R500m	Up to but not exceeding R1 000m	Exceeding R1 000m

The above limits are per transaction. All breaches of the above limits to be reported to the Audit Committee.

#### 5.2.24 Advance Payment Guarantees (APG) and Performance Bonds (PB) in Supplier Agreements

	OD CFO	Treasury	Group CFO
Notional Value	Up to but not exceeding R25m	Up to but not exceeding R75m	Exceeding R75m
Issuer Acceptance		All issuers	All Issuers

- The limits are cumulative per annum
- The OD CFO is required to obtain legal acceptance from the Divisional Legal Department and or Group Legal in respect of all APGs and PBs
- APGs and PBs should be constructed in a manner that they become payable on demand
- The minimum long term credit rating requirements may not be less than
  - A- from Fitch Ratings or Standard and Poors or
  - A3 from Moody's
  - Issuers not rated will not be accepted
  - Group Treasury may also consider an equivalent rating from other recognised rating agencies as contained in the FRMF

## 5.3 Finance

## 5.3.1 Bad Debt Write-off

## Trade Debtors

Approval Authority →	OD Exco/CE* excluding TFR	TFR Exco/CE	GCFO	Group Exco/ GCE	Audit Committee	Board
Operating Divisions	Up to but not exceeding R10m	Up to but not exceeding R20m	Up to but not exceeding R100m	Up to but not exceeding R250m	Up to but not exceeding R500m	Exceeding R500m
Approval Authority →	Group Exco Member		Transnet Capic/GCFO	Group Exco/ GCE	Board Audit Committee	Board*
Specialist Units	Up to but not exceeding R5m		Up to but not exceeding R100m	Up to but not exceeding R250m	Up to but not exceeding R500m	Exceeding R500m

\*Approval limits are R10m and R20m for TFR per transaction subject to an annual cumulative limit of R50m and R100m for TFR. Specialist unit limit is R5m cumulative per annum.

## 5.3.2 Setting of limits for credit facilities (Trade debtors)

Approval Authority →	Divisional CFO excluding TFR	OD Exco/CE* excluding TFR	TFR CFO	TFR CE	GCFO	GCE
Operating Divisions	Up to but not exceeding R10m	Up to but not exceeding R20m	Up to but not exceeding R100m	Up to but not exceeding R150m	Up to but not exceeding R300m	Exceeding R300m
Specialist Units	Up to but not exceeding R5m	Up to but not exceeding R10m	n/a	n/a	Up to but not exceeding R300m	Exceeding R300m

Limits are per individual customer/client. Credit limits are to be reviewed on an annual basis. The limits are applicable subject to the division following the credit evaluation process. Internal limits between ODs are not applicable.

## 5.3.3 Issuing of Credit notes

Approval Authority →	Divisional CFO	OD Exco *	GCFO	GCE
Operating Divisions	Up to but not exceeding R10m	Up to but not exceeding R20m	Up to but not exceeding R300m	Exceeding R300m
Specialist Units	Up to but not exceeding R5m	Up to but not exceeding R10m	Up to but not exceeding R300m	Exceeding R300m

Limits are per individual credit note and relates to external parties. Issuing of credit notes regarding internal/interdivisional transactions must be within the control of the divisional CFOs.

\* Excludes the product reconciliation process at Transnet Pipelines where the Divisional CFO and Divisional COO approve transactions arising out of the product reconciliation process.



### 5.3.4 Exceeding the operational expenditure budget in total for the year (Operating Divisions/Specialist Units)

The Board of Directors to be informed at every meeting of the financial status and latest estimates of the Company

Approval Authority →	OD CE*	GCFO	GCE	Board
Operating Divisions	Up to but not exceeding 5% of approved budget	Up to but not exceeding 7.5% of approved budget	Exceeding 7.5% of approved budget to a maximum of 10%	>10%
Specialist Units	Up to but not exceeding 5% of approved budget	Up to but not exceeding 7.5% of approved budget	Exceeding 7.5% of approved budget to a maximum of 10%	> 10%

\* To be reported quarterly to the GCFO and GCE together with mitigating action plans to ensure that key financial metrics are maintained or met.

Delegations for operational transactions that are too detailed to include in the Transnet Delegations of Authority Framework will be determined and applied in terms of the details set out by the CE/GE in conjunction with the CFO of the respective OD/SU.

## 5.4 Procurement

All procurement transactions (including reverse logistics – selling of goods) must fully comply with the approved Transnet Supply Chain Policy and Procurement Procedures Manual (PPM), as well as the Transnet Capital Projects Construction Procurement Policy, Processes, Procedures and Methods (CPPPPM) where applicable – Any commercial agreement (for the purchase of goods or services) must be signed off by an authorised employee of Supply Chain Management (Procurement) prior to signing of the contract to indicate that all the steps as per clause 5.5 below have been followed and that all procurement related governance has been adhered to.

### 5.4.1 Appointment of Consultants

Approval Authority →	OD CE*	GCFO	Group Exco/ GCE	Board Acquisitions and Disposals Committee	Board
Operating Divisions	Up to but not exceeding R25m	Up to but not exceeding R50m	Up to but not exceeding R200m	Up to but not exceeding R300m	Exceeding R300m
Approval Authority →	Group Exco Members	GCFO	GCE	Board Acquisitions and Disposals Committee	Board
Specialist Units	R10m	Up to but not exceeding R50m	Up to but not exceeding R200m	Up to but not exceeding R300m	Exceeding R300m

\*Approval limits are cumulative per annum. Excludes appointment of consultants to perform feasibility studies for capital projects.



#### 5.4.2 Approval to approach the market for Open Tenders

Approval Authority →	OD CE and TCP GE	GCSCO	GCFO	GCE	Board Acquisitions and Disposals Committee	Board
Operating Divisions	Up to but not exceeding R450m	Up to but not exceeding R525m	Up to but not exceeding R750m	Up to but not exceeding R1000m	Up to but not exceeding R2000m	Exceeding R2000m
Approval Authority →	Specialist Unit HOD (budget owner)	GCSCO	GCFO	GCE	Board Acquisitions and Disposals Committee	Board
Specialist Units	Up to but not exceeding R75m	Up to but not exceeding R525m	Up to but not exceeding R750m	Up to but not exceeding R1000m	Up to but not exceeding R2000m	Exceeding R2000m

\*The OD CE may only delegate these powers to go to market with Open Tenders to Heads of Procurement. The Requisition (or Request to Purchase) issued to Procurement must be approved by the OD's Budget Owner or his duly authorised delegate. Such approved requisition or Request to Purchase will signify that the acquisition has been approved and that the necessary funds are available. Submissions requiring approval of the GCSCO or higher must also include a procurement strategy document, signed off by the person with the delegated authority.

# The Requisition (or Request to Purchase) issued to Procurement must be approved by the Specialist Unit's HOD or his duly authorised delegate. Such approved requisition or Request to Purchase will signify that the acquisition has been approved and that the necessary funds are available. Submissions requiring approval of the GCSCO or higher must also include a procurement strategy document, signed off by the person with the delegated authority.

#### 5.4.3 Approval to approach the market for confined tenders: Confinement of tenders (not subject to the quotation system)

Approval Authority →	OD CE and TCP GE	GCSCO	GCFO	GCE	Board Acquisitions and Disposals Committee	Board
Operating Divisions	Nil	Nil	Nil	Up to but not exceeding R250m	Up to but not exceeding R1000m	Exceeding R1000m
Approval Authority →	Group Exco Members	GCSCO	GCFO	GCE	Board Acquisitions and Disposals Committee	Board
Specialist Units	Nil	Nil	Nil	Up to but not exceeding R250m	Up to but not exceeding R1000m	Exceeding R1000m

The limits are per transaction/confinement. All requests for approval of confinements must be made by the OD CE/Group Exco Member to the GCE. The OD Specialist Unit shall prepare the submission in collaboration with Transnet integrated supply chain management (iSCM) to ensure that the rules for confinement are met.

In instances where confinement is confidential the GCE may approve such confinement without the confinement request being routed via any other authority.

#### 5.4.4. Management's intervention to address non-compliance with procurement policies and procedures

Approval Authority →	OD CE and TCP GE	GCFO	GCE	Board Acquisitions and Disposals Committee	Board
Operating Divisions	Nil	Nil	Up to but not exceeding R50m	Up to but not exceeding R1000m	Exceeding R1000m
Approval Authority →	Group Exco Members	GCFO	GCE	Board Acquisitions and Disposals Committee	Board
SU	Nil	Nil	Up to but not exceeding R50m	Up to but not exceeding R1000m	Exceeding R1000m

All requests for approval of non-compliance must be made by the OD CE/Group Exco member to the GCE. The OD/Specialist Unit shall prepare the submission in collaboration with Transnet iSCM to ensure that the rules for the addressing of non-compliance are met. Together with the application for approval of non-compliance, the requestor must advise on the steps/corrective measures taken to avoid a repeat of the transgression within 30 days of the transgression being discovered.

#### 5.4.5 Establishing Procurement policy (opex, capex and disposals)

Authority Level	Board Acquisitions and Disposals Committee
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#### 5.4.6 Procurement process approval

**NOTE:** Each OD/SU will have its own main Acquisition Council (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/SU CE to lower the R2 million threshold, or to create Secondary Regional/Local Acquisition Councils. The OD/SU CE may also delegate certain process approval powers to the relevant Manager for matters below the Secondary Acquisition Councils' delegation. Transactions exceeding the OD/SU CE's Delegated Powers will also be considered by the OD's main AC for recommendation to the higher approval body (e.g. the BADC). If it concurs with the recommendation, the matter will be referred to the relevant person/structure with the delegation of authority for approval. Should any process approval body not agree with the recommendation, the matter must be referred back to the recommending officer(s) for reconsideration or re-motivation.

Approval Authority →	OD and TCP (Secondary and/or Main) Acquisition Councils	Group Chief Supply Chain Officer	GCFO	GCE	Board Acquisitions and Disposals Committee	Board
Operating Divisions including TCP	Up to but not exceeding R450m	Up to but not exceeding R525m	Up to but not exceeding R750m	Up to but not exceeding R1000m	Up to but not exceeding R2000m	Exceeding R2000m
Approval Authority	Specialist Unit (Secondary and/or Main) Acquisition Councils	Group Chief Supply Chain Officer	GCFO	GCE	Board Acquisitions and Disposals Committee	Board
Specialist Units excluding TCP	Up to but not exceeding R5m subject to the contract period not exceeding 5 years	Up to but not exceeding R525m	Up to but not exceeding R750m	Up to but not exceeding R1000m	Up to but not exceeding R2000m	Exceeding R2000m

## 5.5 Contracts/Agreements

- NOTE 1:** Any person who has been authorised to execute any legal documents including deeds, leases, assignments, contracts, applications, financial instruments, external submissions to or on behalf of Transnet and/or its OD or any other legal documents may only do so with the prior advice of the relevant Legal Services department as set out in the Transnet Legal Policy.
- NOTE 2:** Unless otherwise indicated in the authorities below, the authority to execute a contract or other binding document carries with it like authority to cancel or modify it, but only with the prior written advice of the relevant Legal Services department as set out in the Transnet Legal Policy and if it relates to Procurement Contracts, the approval of the relevant Acquisition Council (as per the Procurement Procedures Manual - PPM).
- NOTE 3:** Any person authorised to enter into an agreement/contract or other binding document involving capital expenditure must have obtained prior financial approval in terms of the procedures set out in 5.1 prior to entering into such a CAPEX contract.
- NOTE 4:** Approval limits are per transaction/contract.
- NOTE 5:** The authority to execute a contract or other binding document carries with it the understanding that an authorised payment required thereby will be made once proof of receipt has been obtained. No person is authorised to obligate the company to an amount greater than such payment or create more onerous obligations than those contained in the contract or other binding document. Increases to the original scope of the binding document must be supported by authorised amendment.
- 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 as well as by the relevant Acquisition Council where the amendment exceeds 10% of the original contract value. For higher value contracts (i.e. those signed by the operating division's CE, 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.

### 5.5.1 Enter into and signing of Contracts/Agreements and award of business: (including the sale of scrap)

Approval Authority →	OD CE and TCP GE		Group Chief Supply Chain Officer	GCFO	GCE	Board Acquisitions and Disposals Committee	Board
Operating Divisions	Up to but not exceeding R450m		Up to but not exceeding R525m	Up to but not exceeding R750m	Up to but not exceeding R1000m	Up to but not exceeding R2000m	Exceeding R2000m
Approval Authority →	Specialist Unit CE	Group Exco members	Group Chief Supply Chain Officer	GCFO	GCE	Board Acquisitions and Disposals Committee	Board
Specialist units excluding TCP	Up to but not exceeding R5m subject to the contract period not exceeding 5 years	Up to but not exceeding R30m	Up to but not exceeding R525m,	Up to but not exceeding R750m	Up to but not exceeding R1000m	Up to but not exceeding R2000m	Exceeding R2000m

Values are per contract for the full term of the contract (Total value of contract excluding VAT) on condition that approval has been obtained for the related expenditure over the period. Please refer to the conditions stipulated below. Payments: Once the decision to contract has been issued, contract execution will be governed by the Operating Divisions, including the payment process provided that the contract amount is not exceeded.

#### 5.5.1.1 Contracts > R500m, including Transnet's top 60% value opex items and capex contracts

Prior to entering into a high value (greater than R500m) / highly complex contract (especially for Transnet's top 60% value opex items as dealt with by Transnet iSCM Strategic Sourcing commodity teams), any authorised official must first liaise with a multi-disciplinary team of experts at Transnet Corporate Office, who should each sign off on the following parts of any agreement/contract or other binding document:

- Group Legal Services - entire document
- Transnet GCFO to sign-off after sign-off from the finance departments (Group Finance/Reporting, Financial Planning, Tax and Treasury).
- Contracts less than R450m within the OD's limit of authority, require a similar process as set out above to be followed by the relevant OD.

#### 5.5.1.2 International Contracts/Agreements (all contracts)

- Approval to enter into an agreement/contract or other binding document involving foreign currency exposure (including **international agreements**) may not be sub-delegated lower than to the Chief Procurement Officer (CPO) of an OD. Approval of the divisional CFO is required to enter into the contracts that may result in foreign currency exposure.
- The duly authorised official must obtain prior written approval in respect of FX agreements above R50m from Group Legal, Group Treasury, Group Tax and Group Reporting, both where the contract will be concluded in foreign currency and especially in such cases where foreign contracts will be concluded in South African Rand, as this may expose Transnet to an embedded derivative. All FX agreements above R100m must apart from the above also obtain written approval from the GCFO.

#### 5.5.2 Enter into and Signing of Revenue Contracts/Agreements and authority to issue binding quotes locally: (excluding lease contracts and the sale of scrap)

Approval Authority →	OD CE Limit per Annum per contract up to but not exceeding 5 years	GCFO Limit per Annum per contract up to but not exceeding 5 years	GCE Limit per Annum per contract up to but not exceeding 5 years	Board Acquisitions and Disposals Committee Limit per Annum per contract and contracts exceeding 5 years	Board Limit per Annum per contract and contracts exceeding 5 years
Operating Divisions	Up to but not exceeding R300m	Up to but not exceeding R500m	Up to but not exceeding R1000m	Up to but not exceeding R3000m	Exceeding R3000m
Approval Authority →	Specialist Unit CE Limit per Annum per contract up to but not exceeding 5 years	GCFO Limit per Annum per contract up to but not exceeding 5 years	GCE Limit per Annum per contract up to but not exceeding 5 years	Board Acquisitions and Disposals Committee Limit per Annum per contract and contracts exceeding 5 years	Board Limit per Annum per contract and contracts exceeding 5 years
Specialist units	Up to but not exceeding R10m	Up to but not exceeding R500m	Up to but not exceeding R1000m	Up to but not exceeding R3000m	Exceeding R3000m

- Transnet integrated customer agreements where a service incorporates more than one division must be signed off by the GCFO and the Group Executive: Commercial in addition to sign off by the OD CE's, up to but not exceeding revenue of R500m per annum not exceeding 5 years.



- If the contract period is below 12 months the contract value is to be annualised and the delegated authority required to approve the transaction will be determined by the annualised amount.
- All limits indicated above are exclusive of VAT
- Board approval is required if ANY one of the following limits are exceeded:
  - The contract period exceeds 5 years
  - The annual value of the contract exceeds R3000m.
  - The total value of the contract over the contract life exceeds R15000m.

**5.5.3 Enter into and Signing of Revenue Contracts/Agreements and authority to issue binding quotes internationally including cross border contracts: (excluding lease contracts and the sale of scrap)**

Approval Authority →	GCFO Limit per Annum per contract up to but not exceeding 5 years	GCE Limit per Annum per contract up to but not exceeding 5 years	Board Acquisitions and Disposals Committee Limit per Annum per contract and contracts exceeding 5 years	Board Limit per Annum per contract and contracts exceeding 5 years
Operating Divisions	Up to but not exceeding R500m	Up to but not exceeding R1000m	Up to but not exceeding R3000m	Exceeding R3000m
Approval Authority →	GCFO Limit per Annum per contract up to but not exceeding 5 years	GCE Limit per Annum per contract up to but not exceeding 5 years	Board Acquisitions and Disposals Committee Limit per Annum per contract and contracts exceeding 5 years	Board Limit per Annum per contract and contracts exceeding 5 years
Specialist units	Up to but not exceeding R500m	Up to but not exceeding R1000m	Up to but not exceeding R3000m	Exceeding R3000m

**5.5.4 Internal Contracts**

Contracts between divisions such as service level agreements and project specific agreements may be entered into between OD CE's.

**5.5.5 Property and Lease Agreements**

All external Property Lease Agreements (excluding vacant land) as well as other expenditure leases.

Approval Authority →	OD CE and TCP GE	Transnet Property GE	GCFO	GCE	Board Acquisitions and Disposals Committee
Operating Divisions	Up to but not exceeding R15m annualised	Up to but not exceeding R50m annualised	Up to but not exceeding R200m full term	Up to but not exceeding R500m full term	Exceeding R500m full term
	Tenure not exceeding 5 years	Tenure not exceeding 5 years	Tenure not exceeding 10 years	Tenure not exceeding 15 years	Tenure exceeding 15 years

- Tenders that include alienation/leasing out of land for a period longer than 5 years must be submitted to the GCE for approval prior to going out on tender or RFP.
- Cession of leases: All cession or assignment of Lease agreements shall be approved by the Group CFO or Group Executive: Transnet Property. For cession of leases at OD level the Chief Executive of the respective OD may approve cession or assignment of lease agreements.
- Cession of lease agreements with a change to material terms of the existing lease e.g. extension or shortening of the lease period, change of rental terms etc. may be approved in terms of the above limits i.e. where the original lease was approved in terms of the delegated authority above, changes of material terms to be approved by the same approval body.



- All external Lease Agreements (> 5 years) of properties on land/properties adjacent to other land/properties of ODs and/or belonging to Transnet Property, must be communicated and agreed with the relevant division/Transnet Property before entering into any Lease Agreements.
- All leases for vacant land may only be approved by the GCE with the above limits for the GCE applicable i.e. if the lease value exceeds R500m or the tenure exceeds 15 years then Board Acquisitions and Disposals Committee approval is required. For the purposes of this transaction vacant land is considered to be undeveloped land.
- In cases where vacant land is leased out with its own rental premium applicable to it and a separate rental premium for improvements located on the portion of the same leased site, although part of one lease transaction – to the extent that the proposed lease has lettable vacant land, the GCE shall approve such lease transactions in line with his limits of authority as stated in the table above.
- Interdivisional leases for vacant land may be entered into and signed by the respective OD CEs/GE: TCP/GE: Transnet Property.
- Special Delegation to apply to the CE of TNPA in compliance with the National Ports Act of 2005 as amended.
- Internal leases between Transnet Property, Operating Divisions and Specialist Units may be signed by the CEs of the respective ODs/SUs.

## 5.6 Legal Services

**NOTE:** The provision of legal services must be in accordance with the Transnet Legal Policy. In respect of all litigation the bearer of the authority may, after taking legal advice from Transnet, execute all documents and do all things necessary to give effect to his/her authorisation including submission through governance structures.

### 5.6.1 Commencing or settling any litigation, arbitration

Approval Authority →	Divisional Head: Legal and Risk	OD CE, GE: Transnet Property and GE:TCP	GE: Group Legal Services	GCFO	GCE
Operating Divisions	Up to but not exceeding R2m	Up to but not exceeding R10m. Greater than R10m but less than R35m with concurrence of GE: Group Legal Services	Up to but not exceeding R50m	Up to but not exceeding R100m with concurrence of GE: Group Legal Services	Exceeding R100m

Approval limits are per litigation matter and relate to the settlement amount of that particular matter. Commencement may be effected by an authorised person from the legal function

### 5.6.2

Any disputes with government entities or where the outcome of any litigation, arbitration or similar proceedings is likely to have a material effect on the business, financial condition or prospects of the Company	<b>Board of Directors</b>
Matters which pose a reputational risk to the Company should be submitted for consideration.	<b>Board Risk Committee</b>

### 5.6.3

Defending, subject to paragraph 5.6.1 above and Transnet Legal Policy, any litigation (actions or applications) in court or any other competent forum	<b>GE: Group Legal Services/ OD CE</b>
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### 5.6.4 Subject to the Transnet Legal Policy, the appointment of external advisors attorneys, advocates and any other external legal advisors

Approval Authority →	OD CE	GE: Group Legal Services	GCE
<b>OPERATING DIVISION</b>	Up to but not exceeding R10m	Up to but not exceeding R50m	Exceeding R50m
	<b>Specialist Units CEs and Heads of Legal</b>	<b>GE: Group Legal Services</b>	<b>GCE</b>
<b>Specialist Units CEs and Heads of Legal</b>	Up to but not exceeding R5m	Up to but not exceeding R50m	Exceeding R50m

## 5.7 Human Resources

### INTRODUCTION

The Delegation of Authority for Human Resources provides for controls and good governance in the following areas:

- Organisation Management
- Personnel Appointments and Remuneration
- Appointment of Fixed Term Contract Employees
- Interim / Ad-hoc Remuneration Adjustments
- Rewards / Awards / Exceptional Payments / *Ex-gratia* Awards
- Suspension of Employees
- Dismissal of Employees
- Mutual Separation Agreements
- Collective Bargaining and Trade Union Recognition
- Deviation from approved Human Resources Policies

### PRINCIPLES

1. Any approval in the Human Resources environment must be obtained from a manager who is at least two hierarchical reporting levels higher than the employee for whom authorization is required.
2. When acting in a higher capacity, decision for own portfolio or department that will ordinarily be recommended by the acting incumbent must be referred to one level higher.
3. Where an incumbent acts for a period of longer than three months, the full powers of delegation of the position in which the person is acting, may be transferred to the acting incumbent.
4. Each OD may implement stricter delegations and increase the level of authority above those set out in the document. Any such change must be in writing.
5. Board approval is required for the appointment and remuneration of the Transnet GCE and GCFO.
6. The Remuneration, Social and Ethics Committee (REMSEC) provides final approval for the annual reward allocation including the salary mandate.
7. The REMSEC provides final approval for the remuneration packages for Group Exco according to the DPE Remuneration standards.
8. All matters relating to the position of the GCE and GCFO are reserved for the Board and Shareholder Minister in line with the Company's governing legislation and mandates.

### ABBREVIATIONS

The abbreviations used in the Human Resources Delegation of Authority are set out in the table below:

FA	Final Approval
FA:CC	Final Approval for Corporate Centre
R	Recommendation
A	Has provided advice
C	Consultation
N	Noting
GE: HR	Group Executive: Human Resources
CE, GE	Chief Executive of OD or relevant Group Executive of Corporate Staff Department
GM: HRE	General Manager: Human Resources Enablement
GM: ER	General Manager: Group Employee Relations
OD HR GM	General Manager: Human Resources at the Operating Division
LM: GM	Line Management - General Manager

The table below sets out the delegation framework for Human Resources.

<b>1 Organisation Management: Creation of New Positions / Change in Positions / Restructuring</b>						
<ul style="list-style-type: none"> <li>No permanent or fixed term contract position can be created or the grade level changed unless the approved Organisation Management governance was followed in respect of the evaluation of positions and ratification of grade levels.</li> </ul>						
HUMAN RESOURCES	REMSEC	GCE	GE: HR	OD CE/ Group Executive	OD HR GM	LM:GM
1.1 Group Exco (A level)	FA	R				
1.2 General Managers (B level)		FA	R	R		
1.3 Executive Managers (C level)			A	FA	R	R
1.4 Senior Management (D level and below)					FA	R

<b>2 Personnel Remuneration</b>						
<ul style="list-style-type: none"> <li>The REMSEC reviews the GCE's assessment of performance and approves/recommends the remuneration of Group Exco Members, Prescribed Officers and Extended Exco to the Board for approval by the Shareholder</li> <li>The remuneration of the abovementioned category of employees shall be in terms of the Remuneration Standards.</li> <li>The appointment and remuneration of all management level employees (levels A to F) will be guided by the Guidelines and Salary Bands issued by the Group Remuneration Office. These Guidelines and Salary Bands will take into account the occupational specific categories.</li> <li>For managers in levels A and B the Group Remuneration Office will recommend the appropriate remuneration bands based on market information and internal parity. Approval of the final appointment and remuneration package will be in terms of the delegations below.</li> <li>Each OD will apply the Guidelines and Salary Bands when appointing and structuring the packages of management employees in levels C and below. Approval of the final appointment and remuneration package will be in terms of the delegations below.</li> <li>After salary adjustments and before a mandate is sought for the next financial year, the Group Remuneration Office will conduct a comparative analysis of salaries across ODs to inform the Group Guidelines and Salary Bands of managers for the new financial year. Affordability and the need for internal and external parity will inform these guidelines.</li> </ul>						
HUMAN RESOURCES	REMSEC & CORP GOV	GCE	GE: HR	OD CE/ Group Executive	OD HR GM	LM: GM
2.1 Group Exco (A level)	C	*FA	R			
2.2 General Managers (B level)		FA	R	R		
2.3 Executive Managers (C level)			A	FA	R	R
2.4 Senior Management (D level and below)					FA	R

\* The Chairpersons of Remuneration, Social and Ethics and the Corporate Governance and Nominations Committees will be consulted by the GCE for the appointment of Group Exco Members (other than executive directors). The consultation will be through a memorandum submitted to the Chairpersons of the Committees



**3 Appointment of Fixed-Term Contract Employees**

A person appointed on a fixed-term contract (for a specific period of time or to perform a specific project) must be appointed into a graded position.

HUMAN RESOURCES	REMSEC	GCE	GE: HR	OD CE/ Group Executive	OD HR GM	LM: GM
3.1 Group Exco (A Level)	FA	R				
3.2 General Managers (B level)		FA	R	R		
3.3 Executive Managers (C level)				FA	R	R
3.4 Senior Management (D level and below)					FA	R

**4 Counter Offers and Interim Salary Adjustments**

- In line with the Group Remuneration Philosophy approved by the REMSEC, there will be no interim / ad-hoc remuneration adjustments.  
If an employee produces a written and current counter offer of employment with details of the remuneration package, and Transnet seeks to retain the employee based on the criticality of the employee's skill, an interim adjustment of the employee's current remuneration package may be offered in terms of the delegations below. Any counter offer must be in accordance with the Group Guidelines and Salary Bands issued by Group Remuneration.

HUMAN RESOURCES	REMSEC	GCE	GE: HR	OD CE/ Group Executive	OD HR GM	GM: HRE	LM: GM
4.1 Group Exco (A Level)	FA	R	N			R	
4.2 General Managers (B level)		FA	R	R		R	
4.3 Executive Managers (C level)			FA	R	R	R	R
4.4 Senior Management (D level and below)					FA	FA:CC	R

**5 Internal Rewards / Awards / Exceptional Payments / Ex-gratia Awards**

The amounts reflected below are per initiative (not per individual employee payment) per annum

HUMAN RESOURCES	Board	REMSEC	GCE	GE: HR	GCFO	OD CE/ Group Executive	HR GM	GM: HRE	LM: GM
5.1 R10m and above	FA	R	R	R				R	
5.2 Between R5m but not exceeding R10m		FA	R	R				R	
5.3 Between R50 000 but not exceeding R5m			FA	R		R		R	
5.4 Between R20 000 but not exceeding R50 000				FA		FA	R	R	R
5.5 Up to but not exceeding R20 000				FA		FA	R	R	R
5.6 Up to but not exceeding R 10 000						FA	R	R	R



**6 Suspension of Employees**

- The suspension of all employees is per the delegations of authority below.
- In the case of the suspension of a bargaining unit employee, the relevant OD Employee Relations Manager must recommend the suspension based on the merits of the case.

HUMAN RESOURCES	GCE	GE: HR	OD CE/ Group Executive	OD HR GM	GM: ER	LM: GM	Line Manager	ER Manager
6.1 Group Exco (A level)	FA	R			R			
6.2 General Managers (B level)	FA	R	R		R			
6.3 Executive Managers (C level)		FA	R	R	A	R		
6.4 Senior Management (D level to F level)				R	A	FA	R	A
6.5 Bargaining unit employees							FA	R

**7 Dismissal of Employees**

- The dismissal of any employee for reasons of discipline or incapacity must be preceded by a fair hearing in line with Transnet policies.
- The dismissal of an employee for operational requirements must be preceded by a fair consultation process.

HUMAN RESOURCES	GCE	GE: HR	OD CE/ Group Executive	OD HR GM	GM: ER	LM: GM	Line Manager	ER Manager
7.1 Group Exco (A level)	FA	R			R			
7.2 General Managers (B level)	FA	R	R		A			
7.3 Executive Managers (C level)		A	FA	R	R	R		A
7.4 Senior Management (D level to F level)			A	R	R	FA	R	A
7.5 Bargaining unit employees							FA	R

**8 Mutual Separation**

Terms and conditions and financial settlement amounts of mutual separation agreements for A – D Roles will be guided by the Guidelines issued by the Group Remuneration Office.

HUMAN RESOURCES	REMSEC	GCE	GE: HR	OD CE/ Group Executive	OD HR GM	GM:ER	LM:GM
8.1 Group Exco (A level)	FA	R	R			R	
8.2 General Managers (B level)		FA	R	R		R	
8.3 Executive Managers (C level and below)			FA	R	R	R	R

**9 Collective Bargaining and Trade Union Recognition**

HUMAN RESOURCES	REMSEC	GCE	GE: HR	OD CE/ Group Executive	OD HR GM	GM:ER	LM:GM
9.1 Conclusion of any Collective Agreements with Unions excluding shift patterns			FA	R	R	R	
9.2 Mandate for salary and wage negotiations	FA	R	R			R	
9.3 Recognition of Trade Union and Signing of Recognition Agreement	N	N	FA	R	R	R	

**10 Deviation from Approved Human Resources Policies and recommendation of Governance related policies**

HUMAN RESOURCES	Group Exco	GCE	GCFO	GE: HR	OD CEs Group Exco	HR GM	GM: ER	LM: GM
10.1 Any deviation from a Transnet HR Policy		FA		R	R	R	R	R
10.2 Recommendation of Policies to Group Exco	FA							
10.3 Report all human capital risks	N			R				

## 5.8 General Delegations

### 5.8.1 Chartering of Aircraft

Authority Level	OD CE	GCFO	GCE
Chartering of Aircraft	NIL	Up to but not exceeding R3m	Exceeding R3m
Chartering of helicopters for operations	R250 000*	Up to but not exceeding R1m	Exceeding R1m

\* The limits for OD CEs are cumulative per aircraft per month.

### 5.8.2 Mobile phones: Authorising payments exceeding monthly limits (reflected in mobile phone contract)

Transnet Wide	Group Exco Member	GCFO	GCE
	Up to but not exceeding R10 000 per month	Up to but not exceeding R20000 per month	Exceeding R20000 per month

### 5.8.3 Entertainment Expenditure

Authority Level	OD CE	Group Executives	GCE
	Up to but not exceeding R50000 per occasion	Up to but not exceeding R50000 per occasion	Amounts exceeding R50000 per occasion

Costs incurred by any person on behalf of the Company must be authorised by that person's superior and must be within the approved budgetary limits. Supporting documentation should be marked cancelled to prevent re-use thereof. All entertainment expenses must be business related expenses.

### 5.8.4 Rewards/Awards/Exceptional Payments to external parties: (Examples: *Ex-gratia* awards, exceptional performance, recognition payments)

	OD CE	GCFO	GCE	REMSEC	Board
Operating Divisions	Up to but not exceeding R50000	Up to but not exceeding R100000	Up to but not exceeding R5m	Up to but not exceeding R10m	Exceeding R10m
Specialist units	<b>Group Exco Members</b>	<b>GCFO</b>	<b>GCE</b>	<b>REMSEC</b>	<b>Board</b>
	Up to but not exceeding R50000	Up to but not exceeding R100000	Up to but not exceeding R5m	Up to but not exceeding R10m	Exceeding R10m

### 5.8.5 Sponsorships and Donations

Approval Authority →	OD CE	GCFO	GCE	REMSEC	Board
Operating Divisions	Up to but not exceeding R5m	Up to but not exceeding R7m	Up to but not exceeding R10m	Up to but not exceeding R20m	Exceeding R20m
<b>Approval Authority →</b>	<b>Group Exco Members</b>	<b>GCFO</b>	<b>GCE</b>	<b>REMSEC</b>	<b>Board</b>
Specialist Units	Up to but not exceeding R2m	Up to but not exceeding R7m	Up to but not exceeding R10m	Up to but not exceeding R20m	Exceeding R20m

Approval limits are cumulative per annum e.g. the OD CE can approve a total amount of R5m per annum for sponsorships and donations.

### 5.8.6 Annual filing of tariffs with regulators

- Public Policy and Regulation Committee: Approves tariff increase applications from Operating Divisions.
- OD CE in concurrence with the GCFO: Filing of Tariffs with relevant Regulatory body.

#### 5.8.7 International Business Travel (including travel to African countries)

	Approval Authority
Below CE level at Operating Division*	GCE
CE of Operating Division	GCE
Corporate Centre	GCE
Specialist Units	GCE
Group Executives	GCE
GCE and Chairperson	User – Retrospective review by GCE or Chairperson and vice versa.

\*CE of OD must recommend and the GCE to approve

#### 5.8.8 Domestic Business Travel

	Approval Authority
Chairperson/GCE/Group Exco Members	User
CE of Specialist Unit	Group Exco member responsible
General Managers/Extended Exco	OD CE/OD CFO/Group Executives
All other levels	Extended Exco

Travel: All travel must be in line with the approved Travel Policy.

Extended Exco members at an OD/SU unit may sub-delegate to the appropriate lower level.

#### 5.8.9 Communication

	Approval Authority
External communication on strategy and operations	GM: Public and Corporate Affairs or GCE or his Designate
Communication on operational issues relating to an OD	Group Exco Member responsible for OD
Communication with the Shareholder Minister	Office of the GCE or Chairperson of the Board of Directors

Approval to attend seminars and or conduct presentations to external parties which may result in indirect communication may be approved by a Divisional Exco member

#### 5.8.10 Establishment of Special Purpose Vehicles (SPVs), Public Private Partnerships (PPPs) and Trusts

	Approval Authority
Establishment of SPVs, PPPs and Trusts	GCE may approve after recommendation by the GCFO and GE: Group Legal Services. The transaction to be reported to the Board Acquisitions and Disposals Committee

#### 5.8.11 Restructuring and sale of business

	Approval Authority
Restructuring or sale of business	Transnet Board of Directors in accordance with Section 54 of the PFMA

#### 5.8.12 Pension Fund and Medical Fund Rule Amendments as recommended by the Board of Trustees of the Funds

	Approval Authority
Changes to the rules of the pension and medical fund that do not require Ministerial approval	GCE and GCFO
Rule amendments that require Ministerial approval	Board to recommend to the Minister of Public Enterprises for approval

### 5.8.13 Application for Environmental Authorisation

- All environmental impact assessment or basic assessment applications must be prepared by a competent independent environmental assessment practitioner/consultant, unless exemption from this provision has been obtained in writing by the Department of Environmental Affairs and under the supervision of the Environmental Department in the OD/SU.
- The application for environmental authorisation must be signed as per the approval authority below.

	Approval authority to act as applicant for an environmental authorisation for Transnet SOC Ltd
Operating Division	Project Manager/ Operations Manager/Environmental Manager
Specialist Unit (Transnet Property)	Chief Operations Officer of Property
Specialist Unit (Transnet Capital Projects)	Project Director

- The applicant remains legally responsible for the compliance with the environmental authorisation throughout the implementation of the authorisation.
- Should an authorisation for new capital projects contain operational elements after formal handover of the project by TCP, the DEA needs to be informed in writing of the change in names and acknowledgement from DEA be filed.
- Should any of the above applicants leave Transnet, the DEA needs to be informed in writing of the new person responsible for the implementation of the environmental authorisation.

## ANNEXURE PV 48





**national treasury**

Department:  
National Treasury  
REPUBLIC OF SOUTH AFRICA

**TO ALL: ACCOUNTING OFFICERS OF DEPARTMENTS AND  
CONSTITUTIONAL INSTITUTIONS**

**ACCOUNTING AUTHORITIES OF PUBLIC ENTITIES LISTED IN  
SCHEDULES 2 AND 3 TO THE PFMA**

**HEAD OFFICIALS OF PROVINCIAL TREASURIES**

**NATIONAL TREASURY INSTRUCTION 01 OF 2013/2014:  
COST CONTAINMENT MEASURES**

**1. PURPOSE**

- 1.1 The purpose of this *Treasury Instruction* is to prescribe cost containment measures for accounting officers of departments and constitutional institutions and accounting authorities of public entities listed in Schedules 2 and 3 to the Public Finance Management Act (PFMA), 1999 (Act No. 1 of 1999).
- 1.2 Cost containment measures related to executive authorities will be prescribed in the revised Ministerial Handbook.

**2. BACKGROUND**

- 2.1 Section 38(1)(b) of the PFMA makes accounting officers of departments and constitutional institutions responsible for the effective, efficient, economical and transparent use of their respective establishment's resources. Section 38(1)(c)(iii) and 51(b)(iii) of the PFMA requires accounting officers of departments and constitutional institutions and accounting authorities of public entities to take effective and appropriate steps to effectively and efficiently manage the available working capital of their respective institutions.
- 2.2 In light of paragraph 2.1 of this *Treasury Instruction*, it is necessary for accounting officers and accounting authorities to ensure that appropriate expenditure control measures are instituted to provide reasonable assurance that all expenditure in their respective institutions are necessary, appropriate, paid promptly, recorded adequately and reported accordingly in the relevant accountability instruments.
- 2.3 Given the economic problem of scarcity, it is imperative that resources be applied effectively and efficiently to achieve economic and social objectives. The global economic crisis has resulted in the contraction of many economies and in this regard, South Africa has also adopted measures to ensure fiscal prudence.
- 2.4 On 23 October 2013, Cabinet resolved that all departments, constitutional institutions and public entities must implement measures to contain operational costs and eliminate all non-essential expenditure.
- 2.5 In line with the resolutions of the abovementioned Cabinet meeting, accounting officers of departments and constitutional institutions and accounting authorities of public entities listed in Schedules 2 and 3 to the PFMA must, as a minimum, institute

## National Treasury Instruction 01 of 2013/2014:

## Cost containment measures

the measures outlined in paragraph 4 of this *Treasury Instruction* to further reign in operational expenditure of their respective establishments.

- 2.6 The enclosed Annexure A contains cost containment measures that accounting officers and accounting authorities may consider in the spirit of containing operational costs and eliminating non-essential expenditure.

### 3. ENFORCEMENT OF COST CONTAINMENT MEASURES

- 3.1 It is mandatory for accounting officers of departments and constitutional institutions and accounting authorities of public entities listed Schedules 2 and 3 to the PFMA to implement the cost containment measures referred to in paragraph 4 of this *Treasury Instruction*.
- 3.2 The measures referred to in Annexure A are guidelines that accounting officers and accounting authorities may consider in their quest to further contain costs.

### 4. COST CONTAINMENT MEASURES

#### Engagement of consultants

- 4.1 Departments, constitutional institutions and public entities may only contract in consultants after a gap analysis has confirmed that the department, constitutional institution or public entity concerned does not have the requisite skills or resources in its full time employ to perform the assignment in question. Based on a business case, the appointment of consultants may only be approved by the accounting officer, in the case of departments and constitutional institutions, and by the accounting authority or another appropriate authority, in the case of a public entity.
- 4.2 Consultants may only be remunerated at the rates:
- (a) determined in the "Guideline for fees", issued by the South African Institute of Chartered Accountants (SAICA);
  - (b) set out in the "Guide on Hourly Fee Rates for Consultants", by the Department of Public Service and Administration (DPSA); or
  - (c) prescribed by the body regulating the profession of the consultant.
- 4.3 Hotel accommodation and related costs in respect of consultants may not exceed the amount prescribed in paragraph 4.15 of this *Treasury Instruction*, air travel must be restricted to economy class and claims for kilometres may not exceed the rates approved by the Automobile Association of South Africa.
- 4.4 All contracts of consultants must include penalty clauses for poor performance and in this regard, accounting officers and accounting authorities must invoke such clauses where deemed necessary.
- 4.5 Accounting officers and accounting authorities must develop consultancy reduction plans by 31 March of each year for implementation in the ensuing financial year. The first consultancy reduction plan required in terms of this *Treasury Instruction* must be developed before 31 March 2014 for implementation in the 2014/2015 financial year.

#### Travel and Subsistence

- 4.6 Accounting officers of departments and constitutional institutions may only purchase economy class tickets for its employees where the flying time for their flights is for five (5) hours or less.
- 4.7 Notwithstanding the provisions of paragraph 4.6 of this *Treasury Instruction*, the purchase of business class tickets for flights that are less than five (5) hours shall be

## National Treasury Instruction 01 of 2013/2014:

## Cost containment measures

- limited to persons holding the ranks/positions of Directors-General or an equivalent rank (in departments), persons appointed on grounds of policy considerations in terms of section 12A of the Public Service Act, 1994 (i.e. advisors to executive authorities) and chief executive officers of constitutional institutions.
- 4.8 For flights exceeding five (5) hours, business class tickets may only be purchased for persons holding the ranks/positions of Directors-General and Deputy Directors-General or persons holding equivalent ranks (in departments), persons appointed on policy considerations in terms of section 12A of the Public Service Act, 1994, accounting officers of constitutional institutions and employees at the level of management that report directly to the accounting officer of a constitutional institution.
- 4.9 Notwithstanding the provisions of paragraphs 4.7 and 4.8 of this *Treasury Instruction*, the accounting officer may approve the purchase of business class tickets for employees with disabilities or for those with special needs.
- 4.10 Accounting authorities of public entities may only purchase economy class tickets for its employees where the flying time for their flights is for five (5) hours or less.
- 4.11 Notwithstanding the provisions of paragraph 4.10 of this *Treasury Instruction*, the purchase of business class tickets for flights that are less than five (5) hours is limited to members of the accounting authority, non-executive members serving on any of the public entity's governance committees (for example, members of the audit committee) and the chief executive officer or the other person in charge of the public entity.
- 4.12 For flights exceeding five (5) hours, business class tickets may only be purchased for members of the accounting authority, non-executive members serving on any of the public entity's governance committees, the chief executive officer or the other person in charge of the public entity and employees at the level of management that report directly to the chief executive officer or to the other person in charge of the public entity.
- 4.13 Notwithstanding the provisions of paragraphs 4.11 and 4.12 of this *Treasury Instruction*, the accounting authority may approve business class travel for employees with disabilities or for those with special needs.
- 4.14 The accounting officer of a department or constitutional institution and the accounting authority of a public entity may not, under any circumstances, purchase air tickets for first class travel.
- 4.15 Domestic hotel accommodation may not exceed one thousand three hundred rand (R1 300) per night per person (including dinner, breakfast and parking). The National Treasury may periodically review this amount.
- 4.16 Accounting officers and accounting authorities may only approve accommodation costs that exceed the amount prescribed in paragraph 4.15 of this *Treasury Instruction*:
- (a) during peak holiday periods; and
  - (b) when South Africa is hosting an event in the country or in a particular geographical area that results in an abnormal increase in the number of local and/or international guests in the country or in that particular geographical area.
- 4.17 Employees of departments, constitutional institutions and public entities and persons appointed on grounds of policy considerations in terms of section 12A of the Public Service Act, 1994 may not hire vehicles from a category higher than Group B or an equivalent class.

## National Treasury Instruction 01 of 2013/2014:

## Cost containment measures

- 4.18 Where a different class of vehicle is required for a particular terrain or to cater for the special needs of an employee, such a vehicle may only be hired with the prior written approval of the accounting officer, in the case of departments and constitutional institutions, or by the accounting authority or another appropriate authority, in the case of a public entity.
- 4.19 The provisions contained in paragraphs 4.15, 4.16, 4.17 and 4.18 of this *Treasury Instruction* are also applicable to members of the accounting authority of a public entity and to non-executive members serving on any of the public entity's governance committees.
- 4.20 The number of employees travelling to Parliament on official duty for the same matter is limited to three (3) employees, unless otherwise approved in advance by the accounting officer, in the case of departments and constitutional institutions, or by the accounting authority or another appropriate authority, in the case of a public entity.
- 4.21 Similar to paragraph 4.20 of this *Treasury Instruction*, the number of employees of a department, constitutional institution or public entity travelling by air to other centres (for example to regional or district offices) to attend an official engagement on the same matter is also limited to three (3) employees, unless otherwise approved in advance by the accounting officer, in the case of departments and constitutional institutions, or by the accounting authority or another appropriate authority, in the case of a public entity.
- 4.22 Paragraphs 4.20 and 4.21 of this *Treasury Instruction* do not apply to:
- (a) the accounting officer of a department or constitutional institution;
  - (b) Deputy Directors-General or persons holding equivalent ranks (in departments);
  - (c) persons appointed on grounds of policy considerations in terms of section 12A of the Public Service Act, 1994;
  - (d) employees at the level of management that report directly to the chief executive officer of a constitutional institution;
  - (e) members of the accounting authority of a public entity;
  - (f) non-executive members serving on any of the public entity's governance committees;
  - (g) the chief executive officer or the other person in charge of the public entity;
  - (h) employees at the level of management that report directly to the chief executive officer or to the other person in charge of the public entity; and
  - (i) employees performing Parliamentary duties other than those referred to in paragraph 4.20 of this *Treasury Instruction*.

**Expenses related to catering and events**

- 4.23 Departments, constitutional institutions and public entities may not incur catering expenses for internal meetings, i.e. for meetings attended only by persons in its employ, unless approved by the accounting officer, in the case of departments and constitutional institutions, or by the accounting authority or another appropriate authority, in the case of a public entity.
- 4.24 Unless approved otherwise by the relevant accounting officer or accounting authority, entertainment allowances of qualifying persons may not exceed two thousand rand (R2000) per person per financial year. The National Treasury may periodically review this amount.
- 4.25 Departments, constitutional institutions and public entities may not incur expenses on alcoholic beverages except for instances where alcohol is to be served at functions relating to:
- (a) state banquets;
  - (b) the promotion of South Africa and any of its goods or services; or



## National Treasury Instruction 01 of 2013/2014:

## Cost containment measures

- (c) the hosting of foreign dignitaries.
- 4.26 The accounting officer or accounting authority must ensure that team building exercises and social functions, including year-end functions, are not financed from the budgets of their respective establishments or by any suppliers or sponsors.

**Arrangements related to debit and credit cards**

- 4.27 Departments, constitutional institutions and public entities may only operate debit and credit cards in accordance with arrangements set out in Government Gazette No. 37042 dated 15 November 2013.

**5. DEVIATIONS FROM THIS TREASURY INSTRUCTION**

- 5.1 The contents of this *Treasury Instruction* has been finalised in consultation with the Minister's Committee on the Budget (MinComBud) and with Cabinet.
- 5.2 Requests for deviations from paragraphs contained in this *Treasury Instruction* may be considered in terms of section 79 of the PFMA.
- 5.3 All written requests for deviations must be forwarded to:

**The Director-General**  
**National Treasury**  
**Private Bag X115**  
**PRETORIA**  
**0001**

**For attention: The Accountant-General**

Written requests may also be e-mailed to [enquiries@treasury.gov.za](mailto:enquiries@treasury.gov.za)

- 5.4 Any request for a deviation in terms of section 79 of the PFMA shall only be considered after The Presidency has been consulted on the request and has consented to the deviation.

**6. GUIDELINES ON COST CONTAINMENT MEASURES**

In addition to the cost containment measures prescribed in paragraph 4 of this *Treasury Instruction*, accounting officers and accounting authorities are urged to consider additional cost containment measures to enhance fiscal prudence in their respective establishments. Examples of such measures are contained in guidelines enclosed as **Annexure A**.

**7. APPLICABILITY**

This *Treasury Instruction* applies to all departments, constitutional institutions and public entities listed in Schedules 2 and 3 to the PFMA.

**8. EFFECTIVE DATE**

With the exception of paragraph 4.27, all other paragraphs in this *Treasury Instruction* take effect from 1 January 2014.



## National Treasury Instruction 01 of 2013/2014:

## Cost containment measures

**9. DISSEMINATION OF INFORMATION CONTAINED IN THIS TREASURY INSTRUCTION**

- 9.1 Accounting officers of national departments are requested to bring the contents of this *Treasury Instruction* to the attention of all:
- (a) accounting officers of constitutional institutions that receive transfers and subsidies from its vote; and
  - (b) accounting authorities of public entities that report to the executive authority responsible for the accounting officer's department.
- 9.2 Head officials of provincial treasuries are requested to bring the contents of this *Treasury Instruction* to the attention of all accounting officers of departments and accounting authorities of public entities in their respective provinces.

**10. NOTIFICATION TO THE AUDITOR-GENERAL**

The Auditor-General will be notified of the contents of this *Treasury Instruction*.

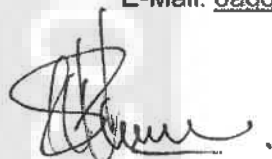
**11. AUTHORITY FOR THIS INSTRUCTION**

This *Treasury Instruction* is issued in terms of sections 76(4) (b) of the PFMA.

**12. CONTACT INFORMATION**

Enquiries related to this *Treasury Instruction* may be directed to:

Jayce M Nair  
Chief Director: Governance Monitoring and Compliance  
Phone: 012 315 5482  
E-Mail: [gaagqueries@treasury.gov.za](mailto:gaagqueries@treasury.gov.za)



**SCHALK HUMAN**

**ACTING ACCOUNTANT-GENERAL**

**DATE: 19/12/2013**

## National Treasury Instruction 01 of 2013/2014:

## Cost containment measures

## ANNEXURE A

**ADDITIONAL COST CONTAINMENT MEASURES FOR CONSIDERATION BY  
ACCOUNTING OFFICERS AND ACCOUNTING AUTHORITIES****Travel and Subsistence**

1. Trips by vehicles must be optimised to reduce costs.
2. Motor vehicle travel claims must be restricted to the actual distance travelled in excess of the normal distance from the employee's residence to his or her place of work.
3. International travel must be limited to meetings or events that are considered absolutely critical and the number of employees attending such meetings or events must be limited to those employees that are directly involved in the subject matter related to such meetings or events.
4. At least three quotations must be obtained for all accommodation.
5. Corporate air miles accumulated through loyalty programmes must be used to acquire air tickets.
6. Overnight accommodation must be limited to instances where the distance by road exceeds 500 kilometers to and from the destination (return journey).
7. Claims for meals must be prohibited if the hotel rate already includes dinner and/or breakfast or if the conference fee includes lunch and/or dinner.
8. To the extent feasible, air travel must be properly planned to ensure that restricted airline tickets are used as opposed to the more expensive flexible tickets.

**Inventory**

9. Bulk purchases should be considered for regularly consumed inventory.
10. Supplier and early settlement discounts must be negotiated to secure lower prices.
11. Corporate branded items availed to employees must be recovered at least at full cost.
12. Production costs related to publications must be minimised for example, by limiting the number of photographs, paying due attention to the quality of paper and giving consideration to the number of copies printed.
13. Savings on the amount of paper used must be considered by printing draft documents 'back to back' and by using colour printing facilities prudently.
14. The use of electronic mail (email) must be encouraged instead of postage.
15. All newspapers and other publications for employees should be discontinued. In instances where a department, constitutional institution or public entity has an existing contract for the supply and delivery of newspapers or other publications, such contracts should not be renewed.
16. Consideration should be given to purchasing software licenses through the State Information Technology Agency (SITA) to leverage economies of scale and preferential rates.

**Water and Electricity**

17. The prudent use of water and electricity must be encouraged to lower utility costs.

**Communication**

18. Allowances to employees for private calls must be limited to a reasonable value.

**National Treasury Instruction 01 of 2013/2014:****Cost containment measures**

19. The allocation of cellular phones and data facilities to employees must be based on the nature of their work as opposed to the positions they hold.
20. Telephone and/or video conferencing facilities must be used, where possible, to avoid unnecessary travel and subsistence costs.

**Advertising**

21. Advertisements for vacancies should be placed through bulk advertisements. The job specification content of advertised vacancies should be provided in detail on the website of the department, constitutional institution or public entity concerned.
22. Consideration should be given to utilising the services of the Government Communications and Information System (GCIS) for media related needs.

**Financial assets**

23. Every effort must be made to recover debts from debtors before giving any consideration to writing off those debts.

**Hiring of venues**

24. Meetings and planning sessions must, as far as practically possible, be held in-house. In instances where such sessions cannot be held in-house, alternate facilities at other government institutions must be sought.

**Miscellaneous measures**

25. There should be synergy between similar business activities to avoid duplication of processes and efforts.
26. Labour saving devices should be shared within the establishment to optimize the capacity utilization of each device.
27. Warranties on motor vehicles and computer equipment should, where possible, be extended for reasonable periods instead of procuring new motor vehicles and computer equipment.
28. Purchasing of new furniture and equipment and office refurbishments should only be undertaken where absolutely necessary.
29. Caution should be exercised in the selection of training service providers by ensuring that courses attended by employees are of sufficient quality to derive value for money. E-Learning methods should be considered for in-house training.
30. Where possible, transversal contracts must be used for the procurement of goods or services.

## ANNEXURE PV 49



**national treasury**Department:  
National Treasury  
REPUBLIC OF SOUTH AFRICA

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Mr B Molefe  
Group Chief Executive  
Transnet  
PO Box 72501  
PARKVIEW  
2122

Dear Mr Molefe

**IMPLEMENTATION OF NATIONAL TREASURY INSTRUCTION 01 OF 2013/2014 COST CONTAINMENT MEASURES**

1. Your letter dated 16 May 2014 with regard to the above has reference.
2. Due to the current economic climate, Cabinet recently resolved that all PFMA compliant institutions must implement cost containment measures to reign in operational costs and to eliminate non-essential expenditure. Pursuant to these discussions at Cabinet, the National Treasury issued Treasury Instruction No. 1 of 2013/2014 on Cost Containment Measures.
3. The Treasury Instruction, referred to in paragraph 1, was discussed at length in Cabinet on at least three occasions and was eventually finalised in consultation with the Minister's Committee on the Budget.
4. It is therefore clear that the decision to contain costs was taken at a strategic level of government and spending agencies are therefore expected to institute meaningful measures to ensure prudent expenditure.
5. From the information contained in your letter dated 16 May 2014, the National Treasury notes and appreciates the measures that Transnet has undertaken to contain costs.
6. The National Treasury has assessed Transnet's request for clarity on provisions related to the use of consultants and its application for exemption from provisions related to travel expenditure, as contained in Treasury Instruction No. 1 of 2013/2014 and, in this regard, responds accordingly in the paragraphs that follow.



## Implementation of National Treasury Instruction No. 1 of 2013/2014 – Cost Containment Measures

### **Use of consultants**

7. Paragraph 4.2 of the Treasury Instruction on Cost Containment Measures provides that consultants may only be remunerated at rates determined in (a) "Guidelines for Fees", issued by the South African Institute of Chartered Accountants (SAICA), (b) set out in the "Guide on Hourly Fee Rates for Consultants by the Department of Public Service and Administration (DPSA) or (c) in terms of rates prescribed by the body regulating the profession of the consultant.
8. The abovementioned documents merely provide the tariffs that PFMA compliant institutions may pay consultants and these tariffs are not related to additional revenue or earnings, if any, that entities may realize or benefit from their appointment.

### **Travel and Subsistence**

9. Paragraph 4.12 of the Treasury Instruction on Cost Containment Measures provides that, for flights exceeding 5 hours, business class tickets may only be purchased for members of the accounting authority, non-executive members serving on any of the public entity's governance committees, the chief executive officer (CEO) or the other person in charge of the public entity and employees at the level of management that report directly to the CEO or to the other person in charge of the public entity.
10. In your letter dated 16 May 2014, a cost benefit analysis is provided to illustrate the economic advantages for should a Transnet General Manager undertake a 9 day business trip from South Africa to Munich or New York. In this instance, the analysis indicates that it would be more economical for the incumbent to fly business class as opposed to economic class whereby Transnet will realize savings of R1 371.94 and R4 631.34 respectively. In view thereof, Transnet also makes application to the National to deviate from the Treasury Instruction to allow for its employees to fly business class as opposed to economy class.
11. Whilst section 79 of the Public Finance Management Act (PFMA), 1999 (Act No. 1 of 1999) provides for the National Treasury, on good grounds, to approve a departure from a Treasury Regulation or instruction, blanket departures are not provided especially where there are financial implications. Such departures are only considered on a case by case basis after considering the motivations provided by the applicant institutions. In view thereof, your request to deviate from the air travel provisions in the Treasury Instruction cannot be approved.
12. I trust that the aforementioned explanations provide clarity relating to the remuneration of consultants and regarding applications related to deviations from Treasury Regulations or instructions in terms of section 79 of the PFMA.

Kind regards

  
**MICHAEL SASS**  
**ACCOUNTANT-GENERAL**

DATE: 25 June 2014