

FUNDUDZI

# NATIONAL TREASURY

Final Report: Forensic Investigation into Various Allegations at Transnet And Eskom:  
Tender Number NT 022-2016 RFQ 026-2017

CHAPTER I: FINAL REPORT: FORENSIC INVESTIGATION  
INTO VARIOUS ALLEGATIONS AT TRANSNET

NOVEMBER 2018



**PUBLIC ENTITIES CAPTURED AS RESULT OF  
DYSFUNCTIONAL GOVERNANCE STRUCTURES**

## **1. EXECUTIVE SUMMARY -**

### **1.1. ACQUISITION OF 95 LOCOMOTIVES**

#### **Provision of tender documents to CSR**

1.1.1. Transnet officials went out of their way to assist China South Rail (“CSR”) in their bid to be appointed for the supply of 95 locomotives.

1.1.1.1. Mdletshe played a part in the said assistance by emailing tender documents to CSR before Transnet received the R20 000 in respect of the tender document in its bank account;

1.1.1.2. Mdletshe failed to comply with Transnet’s procurement processes which required physical collection of the tender document;

1.1.1.3. Mdletshe’s conduct contravened paragraph 13, of the Code of ethics and conflict of interest, of the Transnet Procurement Policy which states that “Transnet insists on honesty, and integrity beyond reproach at all times.

#### **Communication between Pan and Molefe**

1.1.2. CSR compromised the integrity of the procurement processes by communicating with Molefe during the bidding process; and

Molefe’s communication with Pan (CSR) was sent to individuals who have links with the Guptas and companies associated with the Gupta family.

#### **Appointment of CFET Team**

1.1.3. CFET commenced with the evaluation of the tender for the acquisition of the 95 locomotives prior to receiving appointment letters

#### **Amendment of the conditions of the bid**

1.1.4. Gama, Jiyane, Molefe, BADC and Board members compromised the integrity of the procurement process and benefited CSR by changing the prescribed conditions after the bid closed.

1.1.5. The amendment of the prescribed conditions after the bid closed prejudiced other potential bidders who bought the bid documents and never submitted the bids.

1.1.6. Molefe, Gama, Jiyane and the Board members’ actions exposed Transnet to potential litigation and reputational risk, should other tenderers become aware of the irregular amendment of the evaluation criteria.

1.1.7. Gama, Jiyane, Molefe, the BADC and the Transnet Board members failed to act in the best interest of Transnet when they amended the conditions prescribed in the bid document.

- 1.1.8. Gama, Jiyane, Molefe, the BADC and the Transnet Board members contravened section 217(1) of the Constitution in that they failed to ensure that the procurement process for the acquisition of the 95 locomotives was fair, equitable, transparent, competitive and cost effective.
- 1.1.9. The Board failed to comply with the provisions of section 76(3) of the Companies Act relating to the standard of conduct expected of them.
- 1.1.10. CSR was irregularly appointed in that it should have been disqualified for receiving bid documents unlawfully, communicating with Molefe, failing B-BBEE requirement and not submitting all returnable documents.
- 1.1.11. CSR submitted Company Registration Certificates, B-BBEE Certificate and Tax Clearance Certificate and other relevant documents after the tender closed.

#### **Witnessing of the LSA by Gigaba**

- 1.1.12. Minister Gigaba compromised the procurement process by signing the LSA between Transnet and CSR as a witness.

#### **Deliveries of the 95 locomotives**

- 1.1.13. CSR failed to deliver 85 locomotives on the specified timelines in line with the schedule contained in the LSA.

### **1.2. ACQUISITION OF 100 LOCOMOTIVES**

- 1.2.1. Transnet Board approved confinement to CSR on 24 January 2014 before receiving proposal from CSR.
- 1.2.2. Molefe and Singh failed to conduct a cost /benefit analysis when a decision to change the locomotives from the 19E Mitsui locomotive to 21E CSR locomotives was taken.
- 1.2.3. Transnet would have saved R1.2 billion if it procured 100 locomotives from Mitsui at R3.188 billion than procuring from CSR at R4.4 billion.
- 1.2.4. Molefe and Singh failed to follow a proper confinement process when motivating for the acquisition of 100 locomotives from CSR.
- 1.2.5. Transnet Board failed to notify the Shareholder of acquisitions and disposal above R2 billion before the conclusion of the contract with CSR as required by 2013-2014 Shareholders Compact agreement.

### **1.3. ACQUISITION OF 1064 LOCOMOTIVES**

#### **Requirement for approval in terms of Section 54 of the PFMA**

- 1.3.1. Molefe failed to obtain Shareholder approval in terms of section 54 of the PFMA prior to the advertisement of the RFP for the acquisition of the 1064 locomotives as

per the Boards instruction which clearly indicated that the RFPs should be issued subject to Shareholder approval.

- 1.3.2. Transnet Board obtained approval from the Shareholder Minister in terms section 54 of the PFMA on 3 August 2013 after the tender advertisement was issued on 23 July 2012.

#### **Exemption from PPPFA**

- 1.3.3. Minister Gigaba acted outside his authority in advising Transnet to continue to procure the locomotives as if the exemption of the PPPFA was in place before Finance Minister granted full exemption.

#### **Business Case for the 1064 locomotives**

- 1.3.4. Molefe and Singh misrepresented facts to the Transnet Board by indicating that the amount of R38.6 billion excluded potential effects from forex and hedging.

The misrepresentation by Molefe and Singh contributed to the increase in ETC by at least R6.7 billion (Escalations, Forex and Contingencies).

#### **Evaluation of the tender**

- 1.3.5. The evaluation team amended the evaluation scores which changed the ranking in favour of CSR.

#### **Request for Best and Final Offers (BAFO)**

- 1.3.6. The inconsistencies in the manner in which the request for best and final offer was applied between the 599 tender and the 465 tender compromised the integrity of the procurement process.

#### **Splitting of locomotives per supplier**

- 1.3.7. Transnet saved at least R229 609 887.00 for splitting electric locomotives 60/40 between CSR and Bombardier.

#### **Increase in ETC from R38.6 billion to R54.5 billion**

- 1.3.8. Molefe and other Transnet officials contravened section 57 of the PFMA in that they failed to take effective and appropriate steps to prevent irregular expenditure and fruitless and wasteful expenditure
- 1.3.9. Singh and Molefe misled the Board into believing that the R38.6 billion only excluded borrowing costs when in fact the said estimated value included potential effects from forex hedging, forex escalation, other price escalations.
- 1.3.10. The initial business case prepared by Callard made provision for forex, escalations and contingency in the ETC of R38.6 billion. McKinsey's business case also included

the costs of hedging and South African inflation (at 5.2% per annum) and US inflation (at 2.2% per annum) in the ETC of R38.6 billion.

- 1.3.11. Mahomed admitted that he changed the business case figures to indicate that the amount of R38.6 billion excluded potential effects from forex hedging, forex escalation and other price escalations on Singh's verbal instruction.
- 1.3.12. On his admission, Mohamed confirmed that prior to him changing the business case figures, the business case indicated that R38.6 billion was inclusive of potential effects from forex hedging, forex escalation and other price escalations and excluded borrowing costs.
- 1.3.13. Transnet Board members failed to act in the best interest of Transnet when they ratified the increase of ETC for the acquisition of 1064 locomotives from R38.6 billion to R54.5 billion.

#### **TE Scope**

- 1.3.14. The total TE scope of R2 589 816 609 as reflected in the memorandum dated 23 May 2014 is different to the TE scope contracts concluded between the OEM and TE at a cost of R7.5 billion;

#### **Penalties**

- 1.3.15. CSR, Bombardier, CNR and GE failed to deliver the locomotives on the specified timelines in line with the schedule contained in the LSA.
- 1.3.16. GE paid R80 million in penalties whereas TFR failed to collect penalties from other OEM's for late deliveries.

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## ROLE PLAYERS IDENTIFIED

<b>Name</b>	<b>Description</b>
<b>Assegai</b>	Sarah Assegai: Governance Manager, Transnet
<b>Callard</b>	Francis Callard: Former Transnet official
<b>Ceba</b>	ANC Ceba: Former Group Company Secretary
<b>Daniels</b>	Susan Daniels: Former Head of Legal, Eskom
<b>Difeto</b>	P Difeto: GM: Office of the GCE
<b>Fanucchi</b>	MA Fanucchi: Former Board Member, Transnet
<b>Forbes</b>	Y Forbes: Former Board Member, Transnet
<b>Foster</b>	Tarryn Foster: Commercial Specialist, Transnet
<b>Gama</b>	Siyabonga Gama, Group Chief Executive, Transnet
<b>Gazendam</b>	HD Gezendam: Former Board Member, Transnet
<b>Harris</b>	Frikkie Harris: Electrical Engineer, Transnet
<b>Howa</b>	Nazeem Howa: Director, Oakbay Investments
<b>Essa</b>	Salim Essa: Director Elgasolve (Pty) Ltd
<b>Jiyane</b>	Thamsanqa Jiyane: Group Chief Procurement Officer, Transnet
<b>Khoza</b>	Zethembe Khoza: former Chairperson of the Board; Eskom
<b>Khumalo</b>	Nokuthula Khumalo: Group Company Secretary, Transnet
<b>Laher</b>	Yousuf Laher: Executive Manager; Finance, Transnet
<b>M Moola</b>	Mohammed Moola: Senior Manager, Finance
<b>Mabaso</b>	LC Mabaso: Former Chairperson, Transnet
<b>Mahomedy</b>	Mohamed Mahomedy: Acting GCFO, Transnet
<b>Mdletshe</b>	Lindiwe Mdletshe: Executive Manger Sourcing , Transnet

<b>Name</b>	<b>Description</b>
<b>ME Mkwanazi</b>	ME Mkwanazi: Former Board Member, Transnet
<b>Minister Gigaba</b>	Minister Malusi Gigaba: Former Minister, Department of Public Enterprises
<b>Minister Gordhan</b>	Minister Pravin Gordhan in his capacity as the then Minister of Finance
<b>Mnxasana</b>	P Mnxasana: Former Board Member, Transnet
<b>Molefe</b>	Brian Molefe: Former Group Chief Executive, Transnet and Eskom
<b>Molotsane</b>	Emma Molotsane : Transnet Internal Auditor, Transnet
<b>Moropa</b>	Sithokozile Moropa: Head of Forensics, Transnet
<b>Mosia</b>	KL Mosia: Company Secretary, Transnet
<b>N Moola</b>	N Moola: Former Board Member, Transnet
<b>Ngubane</b>	Ben Ngubane : former Chairman, Eskom
<b>Njeke</b>	NR: Former Board Member, Transnet
<b>Nsibande</b>	Princess Nsibande: Transnet Internal Auditor,
<b>Pita</b>	Garry Pita: Former Group Chief Financial Officer, Transnet
<b>Ramage</b>	Cliffy Ramages: Transnet
<b>Ramnarain</b>	Natasha Ramnarain: Assistant Manager; Forensics, Transnet
<b>Seapi</b>	Thabo Seapi : Senior Manager; Finance Transnet
<b>Shabalala</b>	Londiwe Shabalala: Graduate in Training, Transnet
<b>Sharma</b>	Igbal Sharma: Former Board Member, Transnet
<b>Shiceka</b>	Cleopatra Shiceka: General Manager; office of the Chief Executive Officer, Transnet
<b>Singh</b>	Anoj Singh: Former Group Chief Financial Officer, Transnet and Eskom



<b>Name</b>	<b>Description</b>
<b>Skosana</b>	IS Skosana: Former Board Member, Transnet
<b>Tshabalala</b>	E Tshabalala: Former Board Member, Transnet
<b>Tshepe</b>	DLJ Tshepe: Former Board Member, Transnet
<b>Vally</b>	Zunaid Vally: Executive Manager; Finance; Transnet

#### TERMINOLOGY USED

<b>Term</b>	<b>Description</b>
AC	Acquisition Committee
BADC	Board Acquisition and Disposal Council
BBBEE	Broad-Based Black Economic Empowerment
BIS	Business Intelligent Searches
BOD	Board of Directors
CAPIC	Capital Planning and Investment Committee
CE	Chief Executive
CEO	Chief Executive Officer
CFET	Cross Functional Evaluation Team
CFET	Cross Functional Evaluation Team
CFO	Chief Financial Officer
CNR	China North Rail
COS	Chief of Staff
CPO	Chief Procurement Officer
CSR	China South Rail
DAF	Delegation of Authority Framework

<b>Term</b>	<b>Description</b>
DG	Director- General
DPCI	Directorate of Priority Crime Investigations
ETC	Estimated Total Cost
EXCO	Executive Committee
EY	Ernst & Young
FRC	Future Recognition Criteria
GCE	Group Chief Executive
GCSCO	Group Chief Supply Chain officer
GESAT	General Electric South Africa Technology (Pty) Ltd
GF	General Freight
GFB	General Freight Business
GM	General Manager
iSCM	Integrated Supply Chain Management
JV	Joint Venture
LC	Local Content
MARS	Mitsui & Co African Railway Solution (Pty) Ltd
MDS	Market Demand Strategy
MRS	Materials and Reliability Support
NT	National Treasury
OD	Operational Division
OD's CE	Operational Division Chief Executive
OD's CPO	Operational Division Chief Procurement Officer

<b>Term</b>	<b>Description</b>
OEM's	Original Equipment Manufacturers
PFMA	Public Finance Management Act, 1999 (Act 1 of 1999)
PED	Primary Energy Division
PPM	Procurement Procedure Manual
PPPPFA	Preferential Procurement Policy Framework Act; 2000 (Act 5 of 2000)
RFP	Request for Proposal
SAPS	South African Police Service
SCS	Supply Chain Services
SD	Supplier Development
SOC	State Owned Company
TCO	Total Cost of Ownership
TE	Transnet Engineering
TFR	Transnet Freight Rail
TFRIC	Transnet Freight Rail Investment Committee
TIA	Transnet Internal Audit
TRE	Transnet Rail Engineering
VAT	Value Added Tax

**EXHIBIT LIST**

<b>Annexure No</b>	<b>Description</b>
<b>Acquisition of 95 Locomotives</b>	
<b>A1</b>	Copy of approval to proceed with the acquisition of locomotives by TFR dated 26 July 2011.

<b>Annexure No</b>	<b>Description</b>
<b>A 2</b>	Copy of BADC TFR Locomotive Procurement Strategy
<b>A 3</b>	Copy of the minutes of the BADC meeting held 03 August 2011
<b>A4</b>	Copy CAPIC minutes for the meeting held 21 August 2011
<b>A5</b>	Copy of Paragraph 8.4.1 of the PPM of 2009
<b>A6</b>	Copy of the minutes of the Board meeting held on 31 August 2011
<b>A7</b>	Copy of Section 54(2)(d) of the PFMA
<b>A8</b>	Copy of PFMA Section 54 application by Mkwanazi to DPE signed 24 October 2011
<b>A9</b>	Copy of PFMA Section 54 approval by DPE signed 21 December 2011
<b>A10</b>	Copy of advertisement of Tender RFP: HOAC-HO-7801
<b>A11</b>	Copy of a letter of extension of tender closing date of 24 January 2012
<b>A12</b>	Copy of Alstom Transport S&E (Pty) Ltd letter requesting extension of tender closing date
<b>A13</b>	Copy of Siemens letter requesting extension of tender closing date
<b>A14</b>	Copy of CSR's letter requesting extension of tender closing date
<b>A15</b>	Copy of Paragraph 3.15.1 of the PPM of 2009
<b>A16</b>	Copy of a letter informing the Tenderers of the extension of the closing date.
<b>A17</b>	Copy of tender documents collection list
<b>A18</b>	Copy of Mdletshe's explanation as to why she signed the tender document collection list on behalf of CSR
<b>A19</b>	Copy of CSR's written response dated August 2018

<b>Annexure No</b>	<b>Description</b>
A20	Copy of RFP and advertisement proof that tender documentation cannot be emailed to tenderers.
A21	Copy of Mdletshe's communication with CSR regarding the sending of documentation once payment is received.
A22	Copy of Assegai's affidavit dated 25 June 2018
A23	Copy of Erasmus affidavit dated 25 June 2018
A24	Copy of a proof of payment from CSR dated 20 December 2011
A25	Copy of a proof of payment dated 21 December 2011
A26	Copy of Gama's response dated 17 August 2015
A27	Copy of a letter from Wang pan to Molefe dated 19 January 2011
A28	Copy of a Gupta leaks email dated 19 January 2012
A29	Copy of searches conducted on Ashu (SES) ( Khanyi to provide the annexure)
A30	Copy of searches conducted on Kamal Singhala
A31	Copy of searches conducted on Rupesh Bansal
A32	Copy of searches conducted on e-mail address <a href="mailto:zhangminyu54642@qq.com">zhangminyu54642@qq.com</a>
A32a	CSR's response dated 12 October 2018
A33	Copy of RFP, Paragraph 7
A34	Copy of briefing session attendance register
A35	Copy of TRF Representatives at the Compulsory tender briefing session
A36	Copy of 2009 PPM paragraph 3.3.3
A37	Copy of TFR Tender Opening Form dated 17 April 2012

<b>Annexure No</b>	<b>Description</b>
A38	Copy of annexure C: Technical Specifications and Drawings
A39	Copy of CSR Vendor application form and confirming that they will set up in South Africa
A40	Copy of CSR's background search
A41	Copy of CSR B-BEE certificate issued 11 December 2012
A42	Copy of RFP returnable documents
A43	Copy of a memorandum from Gama to Molefe dated 20 April 2012
A44	Copy of appointment letters issued by Gama to CFET members dated 30 May 2012
A45	Copy of an SD evaluations minutes dated 9, 10 and 24 May 2012
A46	Copy of CFET (SCS) team report on Supplier Development
A47	Copy of CFET (SCS) team report on B-BBEE evaluations on 9 tenderers
A48	Copy of Procurement Policy 2009
A49	Copy of High level SD/B-BBEE Evaluation overview
A50	Copy of a memorandum from Gama to Molefe dated 06 June 2012 "request to approve the short listing of the tenders who met the SD threshold
A51	Copy of the BADC minutes for the meeting held on 21 August 2012 at 12:30
A52	Copy of the BOD minutes for the meeting held on 29 August 2012 at 13:00
A53	Copy of a Technical Report dated 10 July 2012
A54	Copy of Nelesco technical specification drawings (Annexure C)
A55	Copy of Saturn Railway (Pty) Ltd technical specification drawings

<b>Annexure No</b>	<b>Description</b>
<b>A56</b>	Copy of CSR Completed Section 10, Technical Specifications & drawings submission
<b>A57</b>	Copy of a memorandum from Jiyane to Gama titled " <i>provision of updates on progress on acquisition of 95 Locomotives</i> " and dated 12 July 2012
<b>A58</b>	Copy of a memorandum from Singh to the Chairperson of the BADC dated 08 August 2012
<b>A59</b>	Copy of CRRC E-Loco Windeed report
<b>A60</b>	Copy of a Report of the Functional Evaluation Team (Finance) dated 08 August 2012
<b>A61</b>	Copy of a memorandum from Gama and Molefe "Request for approval to award business to CSR dated 4 September 2012
<b>A62</b>	Copy of letter dated 16 April 2014 from Frikkie Harris
<b>A63</b>	Copy of CSR Tax Invoice dated 22 June 2015
<b>A64</b>	Copy of a letter from Molefe (Transnet) to Wang Pan (CSR) dated 5 September 2012
<b>AA65</b>	Copy of a memorandum from Gama to Molefe dated 17 September 2012 "for urgent international trip approval to China"
<b>A66</b>	Copy of Locomotive agreement between Transnet and CSR E-Loco dated 17 March 2014
<b>A66a</b>	Copy of Minister Gigaba's written response dated 31 October 2018
<b>A67</b>	Copy of Locomotives acceptance certificates
<b>A68</b>	Copy of 95 locomotives delivery schedule
<b>A69</b>	Copy of 95 locomotives Sprint locations and GPS allocations
<b>A70</b>	Copy of a letter from Saturn Railway Solutions to Gama and Jiyane dated 27 June 2012

<b>Annexure No</b>	<b>Description</b>
<b>A71</b>	Copy of Matsete Consortium background search
<b>Acquisition of 100 locomotives</b>	
<b>B1</b>	Copy of a Business Case dated 30 August 2013
<b>B2</b>	Copy of a Memorandum from Molefe to the BADC dated 30 August 2013
<b>B3</b>	Copy of a Memorandum from Molefe to the BADC dated 21 January 2014
<b>B4</b>	Copy of a Memorandum from Molefe to Board dated 21 January 2014
<b>B5</b>	Copy of Section 15.1 of the PPM dated August 2012
<b>B6</b>	Copy of Section 15.1 of the PPM dated October 2013
<b>B7</b>	Copy of an unsigned Memorandum to CAPIC dated 24 July 2013
<b>B8</b>	Copy of Mitsui Unsolicited Proposal for additional 19E loco dated 15 July 2013
<b>B9</b>	Copy of Mitsui Delivery Schedule dated 27 November 2013
<b>B10</b>	Copy of Minutes of the BADC meeting held 27 September 2013 at 09:17
<b>B11</b>	Copy of Memorandum to BADC from Molefe to BADC dated 15 October 2013
<b>B12</b>	Copy of a letter from Sharma to Tshediso Matona ("Matona"), then DPE Director General dated 14 October 2013
<b>B13</b>	Copy of questions presented to Sharma dated 15 August 2018
<b>B14</b>	Copy of Sharma's response to the questions presented to him dated 15 August 2018
<b>B15</b>	Copy of an email from Sharma to Tony Gupta



<b>Annexure No</b>	<b>Description</b>
<b>B16</b>	Copy of an email from Matona to Sharma dated 20 October 2013 at 11:24
<b>B17</b>	Email sent by Sharma from <a href="mailto:Iqbalsharma3@gmail.com">Iqbalsharma3@gmail.com</a> to Tony Gupta dated 17 October 2013
<b>B18</b>	Copy of an email communication between Fundudzi and Sharma dated 03 and 06 August 2018
<b>B19</b>	Copy of Minutes of the BADC meeting held 21 October 2013 at 09:00
<b>B20</b>	Copy of questions presented to Sharma dated 13 August 2018
<b>B21</b>	Copy of Minutes of the BADC meeting held 21 November 2013 at 9:00
<b>B22</b>	Copy an unsigned memorandum from Molefe to Board dated 25 November 2013
<b>B23</b>	Copy of Mitsui delivery schedule dated 27 November 2013
<b>B24</b>	Copy of Mr Francis Callard timeline Version 2 dated 21 November 2017
<b>B26</b>	Copy of an email from Mdletshe to Callard dated 22 January 2014
<b>B27</b>	Copy of FX rate of 25 November 2013
<b>B28</b>	Copy of the Minutes of the BADC meeting held 24 January 2014 at 11:50
<b>B29</b>	Copy of a letter by Molefe to CSR " <i>Request For Proposal (RFP) for a 100 20E Dual Voltage Electric Locomotives</i> ", dated 25 February 2014
<b>B30</b>	Copy of the minutes of the BOD meeting dated 24 January 2014 at 16:10
<b>B31</b>	Copy of CSR response dated August 2018
<b>B32</b>	Copy of a letter signed by Molefe dated 25 February 2014 and

<b>Annexure No</b>	<b>Description</b>
	signed 26 February 2014 to CSR
<b>B33</b>	Copy of the Shareholder's Compact agreement 2013-2014 signed 25 June 2013
<b>B34</b>	Copy of a Locomotive Supply Agreement/Contract dated 17 March 2014
<b>B35</b>	Copy of a Memorandum from Molefe to the Board signed 23 May 2014 Request an increase in ETC for 100 locomotives
<b>B36</b>	Copy of the Certified Excerpt from the minutes of the BADC meeting held 28 May 2014 at 9:15
<b>B37</b>	Copy of Section 54 (2)(a) of PFMA
<b>B38</b>	Copy of a Letter from Mkhwanazi to Minister Gigaba DPE signed 10 April 2014
<b>B39</b>	Copy of Memorandum from Kgomotso Modise advising Minister Gigaba in regard to Section 54 of the PFMA dated 19 May 2014
<b>B40</b>	Copy of a Letter from Minister Gigaba to Mkhwanazi signed 23 May 2014
<b>B41</b>	Copy of Section 76 (3) of the Company Act 71 of 2008
<b>B42</b>	Copy of section 50 of the PFMA
<b>B43</b>	Copy of King III report Principle 2.9 and 2.14
<b>B44</b>	Copy of a Letter from Mkhwanazi to Minister Gordhan NT signed 10 April 2014
<b>B45</b>	Copy of Windeed report of Matsete Basadi Consortium
<b>B46</b>	Copy of a confirmation of Receipt of Documentary Conditions letter from Transnet to CSR dated 27 March 2014
<b>B47</b>	Copy of Effective date Notice from Transnet to CSR dated 27 March 2014

<b>Annexure No</b>	<b>Description</b>
<b>Acquisition of 1064 Locomotives</b>	
<b>C1</b>	Copy of Business Case dated 25 April 2013
<b>C 2</b>	Copy of a Memorandum dated 13 April 2012
<b>C 3</b>	Copy of a presentation - TFR General Freight (1064) Locomotive Procurement Strategy 7 Year Plan
<b>C 4</b>	Copy of a Minutes of Board meeting held 25 April 2012
<b>C 5</b>	Copy of Transnet Group Limits Authority ("Limit of Authority")
<b>C 6</b>	Copy of shareholders impact agreement 2012/2013
<b>C 7</b>	Copy of a Section NT application dated 30 April 2013
<b>C8</b>	Copy of Exemption granted by Finance Minister dated 7 December 2011
<b>C 9</b>	Copy of Instruction note dated 16 July 2012
<b>C 10</b>	Copy of a Memorandum dated 23 July 2012
<b>C 11</b>	Copy of Minutes of the BADC meeting held on 31 July 2012
<b>C 12</b>	Copy of a Letter from Minister Gigaba to Mkhwanazi dated 7 December 2012
<b>C 13</b>	Copy of a Letter from Mkhwanazi to Minister Gigaba dated 28 December 2012
<b>C 14</b>	Copy of a Letter from Mkhwanazi to Minister Gigaba dated 15 April 2013
<b>C 15</b>	Copy of a Letter from Minister Gigaba to Minister Gordhan dated 16 April 2013
<b>C 16</b>	Copy of a letter from Minister Gordhan to Minister Gigaba dated 24 April 2013
<b>C 17</b>	Copy of Minutes of the BADC meeting held on 25 April 2013

<b>Annexure No</b>	<b>Description</b>
C 18	Copy of Minutes of the CAPIC meeting held on 18 April 2013
C 19	Copy of memorandum to BADC dated 18 April 2013
C 20	Copy of memorandum to Board dated 18 April 2013
C 21	Copy of Excerpt of Group EXCO meeting held on 22 April 2013
C 22	Copy of Excerpt of Special BADC meeting held on 23 April 2013
C 23	Copy of Minutes of the Special Board meeting held on 25 April 2013
C 24	Copy of Callard's reconciliation of the ETC of R38.6 billion
C 25	Copy of Business Case dated 25 April 2013 with tracked changes
C 26	Copy of a letter from Mkwanzazi to Minister Gigaba dated 30 April 2013
C 27	Copy of a letter from Mkwanzazi to Minister Gordhan dated 30 April 2013
C 28	Copy of letter form Minister Gigaba to Mkwanzazi dated 3 August 2013
C 29	Copy of a letter dated 30 October 2013 from Gordhan to
C 30	Copy of memorandum to the BADC dated 23 May 2014
C 31	Copy of minutes of BADC meeting held on 26 May 2014
C 32	Copy of minutes of Transnet Board held 28 May 2014
C 33	Copy of delegation of authority effective 01 September 2012
C 34	Copy of PFMA section 51 (1) (b) (ii)
C 35	Copy of PFMA section 50 (2) (a)
C 36	Copy of an email from Moola to Nomfuyo Galeni with attached reconciliations
C 37	Copy of Business case dated 18 April 2013

<b>Annexure No</b>	<b>Description</b>
<b>C 38</b>	Copy of Advertisement in respect of RFP: TFRAC-HO-8608 for the supply of 599 new dual voltage electric locomotives
<b>C 39</b>	Copy of an RFP dated 30 April 2013
<b>C 40</b>	Copy of Advertisement and RFP that shows changes on the venue and the date of the compulsory briefing meeting
<b>C 41</b>	Copy of Briefing session attendance register for RFP: TFRAC-HO-8608 dated 14 December 2014
<b>C 42</b>	Copy of e-mail correspondence between Johan and Shabalala dated 18 December 2012
<b>C 43</b>	Copy of CNR briefing session attendance certificate
<b>C 44</b>	Copy of CSR briefing session attendance certificate dated 14 December 2012
<b>C 45</b>	Copy of a spread sheet of CSR clarification
<b>C 46</b>	Copy of the memorandum where Volmink was informing the Board on 10645 procurement status
<b>C 47</b>	Copy of 2012 PPM
<b>C 48</b>	Copy of a tender opening register
<b>C49</b>	Copy of the HVT report lead by Sekela Xabiso
<b>C 50</b>	Copy of the CFET finance report dated 6 December 2013
<b>C 51</b>	Copy of undated CFET in respect of pre-qualification evaluation
<b>C 52</b>	Copy of Mandatory and Essential returnable documents
<b>C 53</b>	Copy of Local content scoring report dated 30 July 2013
<b>C 54</b>	Copy of CFET finance report dated 24 July 2013
<b>C 55</b>	Copy of the BBBEE and Supplier Development evaluation report dated 8 August 2013

<b>Annexure No</b>	<b>Description</b>
C 56	Copy of a Technical Evaluation report dated 25 October 2013
C 57	Copy of Draft technical evaluation report dated 23 October 2013
C 58	Copy of the CFET finance report dated 6 December 2012
C 59	Copy of SD/ BBBEE/ Further Recognition dated 29 January 2014
C 60	Copy of a memorandum from Molefe and Singh to Jiyane dated 27 December 2013
C 61	Copy of two memorandum from CFET (Finance) to 1064 locomotives steering committee dated 15 January 2014
C 62	Copy of undated CFET report
C 63	Copy of a memorandum from Jiyane to Gama dated 24 October 2013
C 64	Copy of a memorandum dated 16 January 2014 from Thamsanqa Jiyane ("Jiyane") addressed to Molefe, Singh and Gama
C 65	Copy of memorandum to BADC dated 17 January 2014
C 66	Copy of the minutes of the Special Board Meeting held 24 January 2014
C 67	Copy of our calculations on the effects of the 60/40 split comparison (Electric locomotives)
C 68	Copy of our calculations in relations to the 465 diesel locomotives
C 69	Copy of the letter from Molefe to Wang Pan dated 28 January 2014
C 70	Copy of a presentation to the BADC dated February 2014
C 71	Copy of E Supply agreement signed 17 March 2014
C 72	Copy of Schedule 1 attached to the E Supply agreement
C 73	Copy of an advance payment to CSR (Invoice of R2 065 944 480.00) Incl. VAT

<b>Annexure No</b>	<b>Description</b>
<b>C 74</b>	Copy of a cash flow projection spreadsheet dated 17 March 2014
<b>C 75</b>	Copy of Transnet penalties document levied to CSR
<b>C 76</b>	Copy of memorandum from Galeni to Gama dated 28 September 2017 requesting Gama to Accept Bombardier revised delivery schedule
<b>C 77</b>	Copy of Transnet penalties levied to GE
<b>C 78</b>	Copy of Transnet penalties document levied to CNR
<b>C 79</b>	Copy of Business Case with tract changes effected by Yusuf Mohamed
<b>C 80</b>	Copy of an e-mail dated 31 March 2014 from Ngoako Huma ("Huma") (DPE employee) to Singh where Molefe was copied. <i>"Increase on ETC from R38.6 Billion to R54.5 billion"</i>
<b>C81</b>	Copy of Sigh's response to Huma's email on 31 March 2014 copied Molefe
<b>C82</b>	Copy of BAFO negotiations spreadsheet

## 1. INTRODUCTION

- 1.1. National Treasury issued a request for quotation with reference number RFQ 026-2017, for the appointment of a forensic audit firm to investigate issues raised on Eskom-Tegeta Exploration and Resources (Pty) Ltd (“Tegeta”) report, as well as the National Treasury’s preliminary investigations at Transnet.
- 1.2. We understand that National Treasury conducted a preliminary investigation into various allegations at both Eskom and Transnet. Based on National Treasury’s preliminary findings, they sought to appoint a forensic audit investigation firm to conduct a thorough and detailed investigation into the issues raised at the two state owned companies.
- 1.3. Fundudzi Forensic Services was appointed to conduct investigations into allegations at Transnet and Eskom regarding the Locomotives tender and Tegeta, respectively.
- 1.4. This report is privileged and confidential and was prepared solely for purpose of our findings to National Treasury and should therefore not be utilised for any other purpose without our prior written consent.

## TRANSNET INVESTIGATIONS

- 1.5. This report relates to investigations into the procurement process followed in the procurement of 95, 100 and 1064 locomotives at Transnet.
- 1.6. We have prepared four separate reports relating to the allegations discussed above. The said reports were issued as follows:
  - 1.6.1. Chapter 1: Acquisition of 95, 100 and 1064 locomotives for Transnet Freight Rail;
  - 1.6.2. Chapter 2: Appointment of McKinsey, Regiments and Trillian at Eskom and Transnet; and
  - 1.6.3. Chapter 3: Investigations relating to Tegeta.
- 1.7. It is our understanding that National Treasury conducted initial investigations relating to various issues of alleged irregularities at Transnet. The said allegations, which National Treasury appointed us to conduct investigations on, related to appointment of suppliers for the following locomotive tenders:
  - 1.7.1. 95 locomotives;
  - 1.7.2. 100 locomotives; and the
  - 1.7.3. 1 064 locomotives.



- 1.8. The request for investigation relating to the locomotives tender was to focus on the appointment of China South Rail (“CSR”) as there were allegations that the company’s appointment and involvement of the Group Chief Executive (“GCE”) and Group Chief Financial Officer (“GCFO”) in the said appointment may have been irregular.
- 1.9. We understand that Molefe was employed at Transnet as GCE for the period February 2011 to March 2015. Molefe was appointed Acting GCE of Eskom and later GCE from 1 March 2015 until early 2017.
- 1.10. We further understand that Singh was appointed as GCFO at Transnet for the period 1 July 2012 to 30 September 2015. Singh was later appointed GCFO at Eskom on 1 August 2015 until January 2018.
- 1.11. We were further mandated to investigate allegations of irregularities pertaining to the following appointments:
  - 1.11.1. Appointment of McKinsey and Company South Africa (“McKinsey”);
  - 1.11.2. Regiments Capita Management (“Regiments”); and
  - 1.11.3. Trillian Capital Partners or Asset Management (“Trillian”).

## **2. LIMITATIONS**

- 2.1. Our mandate was limited to investigations relating to compliance issues at both Transnet and Eskom. Issues relating to any criminal investigations, where identified, will be highlighted and referred to the relevant state organs for further investigations.
- 2.2. The majority of the critical role players at both State Owned Companies either resigned or were suspended or dismissed prior to or during our investigations. Where possible, we consulted with some of the said individuals and their versions are contained in the report.
- 2.3. We issued questions to various individuals who in our view had information relevant to the investigation. As at date of this report we had not received responses from Molefe.
- 2.4. During the course of our investigations we provided various individuals with opportunities to consult with us in order to hear their side of the story as it were. Prior to the issuing of our draft report, we provided Molefe with an opportunity to consult with us. In this regard, we provided Molefe with questions, our appointment letter as well as the terms of reference. Molefe however failed to respond to our questions or avail himself for consultations with us.
- 2.5. On 27 July 2018 we issued our second draft report, after which National Treasury requested Molefe for his response thereto. Molefe approached National Treasury and requested that he be provided with documentation relating to the Transnet procurement of 95 and 1064

locomotives in order for him to prepare his responses to our report. On 15 August 2018 and through National Treasury, we provided Molefe with various files containing the documentation he requested.

- 2.6. Molefe however failed to respond to our report regardless being provided with the requested files. Molefe had not responded to our questions or the second draft report as at date of this final report.

### **3. SCOPE AND METHODOLOGY**

- 3.1. The scope and methodology performed during the course of our investigation is discussed below.

#### **SCOPE**

- 3.2. The objective of our appointment was to conduct investigations into alleged transgressions identified by National Treasury.
- 3.3. Based on the terms of reference provided to us by National Treasury, we understand that the scope of the forensic investigation will include *inter alia* the following:
  - 3.3.1. Assess and conduct an objective and independent investigation of all allegations involving Tegeta and three locomotive tenders at Eskom and Transnet, respectively;
  - 3.3.2. Investigate allegations of irregularities in the appointment and management of work done by the following companies both at Eskom and Transnet:
    - 3.3.2.1. McKinsey;
    - 3.3.2.2. Regiments; and
    - 3.3.2.3. Trillian.
  - 3.3.3. Enable the process of conducting further investigations, detection and prosecution, in terms of prevailing legislation and procedures;
  - 3.3.4. Refer any matter to the National Treasury if it is assessed and found not to be a forensic matter;
  - 3.3.5. Safeguard evidence uplifted and/or confiscated, through any processes including evidence collected from any computers and/or IT systems;
  - 3.3.6. Issue reports arising from the forensic investigation to enable the Shareholder to effectively manage incidents and take appropriate steps to prevent recurrences thereof;

- 3.3.7. Refer matters of a criminal nature, after consultation with the National Treasury, to the South African Police Services (SAPS) for further investigation;
- 3.3.8. Identify weaknesses and gaps within the internal control environment;
- 3.3.9. Communicate risks identified during the investigation to National Treasury;
- 3.3.10. Conduct investigation/s and/or review of any other issues that may be pertinent, relevant and/or critical to the forensic investigation; and
- 3.3.11. Provide National Treasury with a report on our factual findings which will include our conclusions and recommendations.

## **METHODOLOGY**

- 3.4. The nature of the assignment included consultation with various parties, review of documentation, background intelligence services and other investigative procedures deemed necessary to address the scope of our mandate as reflected in paragraph 3.3 above.

### **General procedures performed**

- 3.5. In order to address the objectives mentioned above, we conducted the following procedures:

### **Consultations conducted**

- 3.6. The investigation team consulted with the following role players:

#### **Transnet**

- 3.6.1. Cleopatra Shiceka;
- 3.6.2. Siyabonga Gama;
- 3.6.3. Sithokozile Moropa;
- 3.6.4. Natasha Ramnarain,;
- 3.6.5. Thamsanqa Jiyane;
- 3.6.6. Lindiwe Mdletshe;
- 3.6.7. Frikkie Harris;
- 3.6.8. Francis Callard;
- 3.6.9. Nokuthula Khumalo;
- 3.6.10. Sarah Assegai;
- 3.6.11. JD Pillay;

- 3.6.12. Gene Beilings;
- 3.6.13. Edward Thomas;
- 3.6.14. Yusuf Laher;
- 3.6.15. Janse Marais;
- 3.6.16. Peter Volmink;
- 3.6.17. Londiwe Shabalala; and
- 3.6.18. Abdool Lutchka

**Review of documentation**

- 3.7. We reviewed, *inter alia* the following documentation provided to us by individuals we consulted with and members of staff at Transnet:

**Media searches**

- 3.8. We conducted and reviewed media searches on the following individuals and entities.

**Individuals relating to Transnet:**

- 3.8.1. Anoj Singh;
- 3.8.2. Brian Molefe;
- 3.8.3. Francis Callard;
- 3.8.4. Garry Pita;
- 3.8.5. Siyabonga Gama;
- 3.8.6. Thamsanqa Jiyane; and
- 3.8.7. Iqbal Sharma.

**Entities relating to Transnet:**

- 3.8.8. China North Rail;
- 3.8.9. China South Rail;
- 3.8.10. General Electric South Africa Technologies;
- 3.8.11. McKinsey and Company;
- 3.8.12. Mitsui and Co African Railway Solution;
- 3.8.13. Regiments Capital;
- 3.8.14. Tequesta Group Limited; and

3.8.15. Trillian Capital Partners.

**Mimecast E-mail Review**

3.9. During our review, we were given remote access to Mimecast e-mails for the following individuals:

3.9.1. Anoj Singh;

3.9.2. Brian Molefe; and

3.9.3. Siyabonga Gama.

**4. LEGISLATION, POLICIES AND PROCEDURES**

4.1. We received and reviewed the policies and prescripts reflected below for the purpose of our investigation.

**4.2. The Constitution of the Republic of South Africa Act 108 of 1996 (“the Constitution”)**

*In terms of section 217 of the Constitution, “when an organ of state in the national 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”.*

**4.3. Public Finance Management Act, of 1999 (“the PFMA”)**

4.3.1. Section 51 - General responsibilities of accounting authorities, provides that:

*ss(1) (b) (ii) “An accounting authority for a public entity must take effective and appropriate steps to prevent irregular expenditure, fruitless and wasteful expenditure, losses resulting from criminal conduct, and expenditure not complying with the operational policies of the public entity”.*

4.3.2. Section 54 - Information to be submitted by accounting authorities , provides that”

“ An official in a public entity –

*ss(2) Before a public entity concludes any of the following transactions, the accounting authority for the public entity must promptly and in writing inform the relevant treasury of the transaction and submit relevant particulars of the transaction to its executive authority for approval of the transaction:*

*(d) acquisition or disposal of a significant asset”*

#### **4.3.3. Section 57 - Responsibility of other officials**

(c) *“An official of a public entity must take effective and appropriate steps to prevent, within that official’s area of responsibility, any irregular expenditure and fruitless and wasteful expenditure and any under collection of revenue due;*

#### **4.3.4. Section 83 - Financial misconduct by accounting authorities and officials of public entities**

ss (1) *“The accounting authority for a public entity commits an act of financial misconduct if that accounting authority wilfully or negligently:*

(a) *fails to comply with a requirement of section 50, 51, 52, 53, 54 or 55; or*

(b) *makes or permits an irregular expenditure or a fruitless and wasteful expenditure.*

ss (2) *If the accounting authority is a board or other body consisting of members, every member is individually and severally liable for any financial misconduct of the accounting authority.*

ss(3) *An official of a public entity to whom a power or duty is assigned in terms of section 56 commits an act of financial misconduct if that official wilfully or negligently fails to exercise that power or perform that duty.*

ss(4) *Financial misconduct is a ground for dismissal or suspension of, or other sanction against, a member or person referred to in subsection (2) or (3) despite any other legislation.”*

#### **4.3.5. Section 84 - Applicable legal regime for disciplinary proceedings**

*“A charge of financial misconduct against an accounting officer or official referred to in section 81 or 83, or an accounting authority or a member of an accounting authority or an official referred to in section 82, must be investigated, heard and disposed of in terms of the statutory or other conditions of appointment or employment applicable to that accounting officer or authority, or member or official, and any regulations prescribed by the Minister in terms of section 85.”*

#### **4.3.6. Section 86 - Offences and penalties**

(1) *“An accounting officer is guilty of an offence and liable on conviction to a fine, or to imprisonment for a period not exceeding five years, if that accounting officer wilfully or in a grossly negligent way fails to comply with a provision of section 38, 39 or 40.*

(2) *An accounting authority is guilty of an offence and liable on conviction to a fine, or to imprisonment for a period not exceeding five years, if that accounting authority wilfully or in a grossly negligent way fails to comply with a provision of section 50, 51 or 55.”*

#### 4.4. **Transnet Group Limits of Authority**

##### **Section 5.1 - Capital Expenditure**

*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"*

##### **Section 5.1.1 - CAPEX in approved budget/Corporate Plan: To commence projects**

*"If the set limit (currently 1% of total assets) is exceeded then the Board to consider and recommend to Shareholder Minister for approval. Approval limits are per individual project, reported on a monthly basis to Group Financial Planning".*

##### **Section 5.1.3 - Increase in Estimate Total Cost (ETC) of Existing/Approved Projects**

*"Increase in Estimated Total Cost (ETC) of Existing/Approved Projects...up to but not exceeding R500m" must be approved by Group EXCO/GCE".*

#### 4.5. **Transnet Delegation of Authority Framework approved by the Board on 29 August 2012 effective from 1 September 2012**

##### **Section 5.1.3 - Increase in Total Estimated Cost (ETC) of Existing/Approved Projects**

*"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%"*

#### 4.6. **National Treasury Instruction and Practice Notes**

##### **Instruction Note**

*"Only bids that achieve the minimum stipulated threshold for local production and content may be evaluated further. The evaluation must be done in accordance with 80/20 or 90/10 preference point system prescribed in Preferred Procurement Regulations, 2011."*

#### 4.7. **Transnet Procurement Procedures Manual Version 1 -August 2012**

##### **Section 17.1.8 - Amendment before the closing date**

- (a) *"Transnet is entitled to amend any bid condition, validity, period, specification or plan, or extend the closing date before the closing date, or in case of a compulsory briefing session, before the scheduled session". However, such amendments or extension must be advertised and/or all bidders who obtained bid documents must be advised in writing per fax or e-mail of such amendments or extension a minimum of three working days before schedule date. The new closing date and time must be clearly reflected".*

#### 4.8. Treasury Regulations

The Accounting Officer, through the Chief Financial Officer, is responsible for establishing systems, procedures, processes and training and awareness programmes to ensure efficient and effective banking and cash management.

**In terms of Section 15. 10.1.2, sound cash management includes:**

- (a) *collecting revenue when it is due and banking it promptly;*
- (b) *making payments, including transfers to other levels of government and nongovernment entities, no earlier than necessary, with due regard for efficient, effective and economical programme delivery and the government's normal terms for account payments;*
- (c) *avoiding prepayments for goods or services (i.e. payments in advance of the receipt of the goods or services), unless required by the contractual arrangements with the supplier;*
- (d) *accepting discounts to effect early payment only when the payment has been included in the monthly cash flow estimates provided to the relevant treasury;*
- (e) *pursuing debtors with appropriate sensitivity and rigour to ensure that amounts receivable by the government are collected and banked promptly;*
- (f) *accurately forecasting the institution's cash flow requirements so that the national Treasury can optimise its central cash management responsibilities on behalf of the government;*
- (g) *timing the in- and outflow of cash;*
- (h) *recognising the time value of money, i.e. economically, efficiently and effectively managing cash; and*
- (i) *taking any other action that avoids locking up money unnecessarily and inefficiently, such as managing inventories to the minimum level necessary for efficient and effective programme delivery, and selling surplus or underutilised assets.*

#### 4.9. PRECCA

Section 3 of PRECCA provides that any person who, directly or indirectly:

- “(a) Accepts or agree or offers to accept any gratification from any other person, whether for the benefit of himself or herself or for the benefit of another person; or*
  - (b) Gives or agrees or offers to give to any other person any gratification, whether for the benefit of that other person or for the benefit of another person,*
- in order to act, personally or by influencing another person so to act, in a manner-*



- (i) *that amounts to the –*
  - (aa) *illegal, dishonest, unauthorised, incomplete, or biased; o*
  - (bb) *misuse or selling of information or material acquired in the course of the, exercise, carrying out or performance of any powers, duties or functions arising out of a constitutional, statutory, contractual or any other legal obligation;*
- (ii) *that amounts to-*
  - (aa) *the abuse of a position of authority;*
  - (bb) *a breach of trust; or*
  - (cc) *the violation of a legal duty or a set of rules;*
- (iii) *designed to achieve an unjustified result; or*
- (iv) *that amounts to any other unauthorised or improper inducement to or not to do anything,*

*is guilty of the offence of corruption.*

Section 34 (1) (b) of PRECCA provides that – *“any person who holds a position of authority and who knows or ought reasonably to have known or suspected that any other person has committed - the offence of theft, fraud, extortion, forgery or uttering a forged document, involving an amount of R100 000.00 or more, must report such knowledge or suspicion or cause such knowledge or suspicion to be reported to any police official.”*

Section 34 (2) of PRECCA, subject to the provisions of section 37(2), any person who fails to comply with subsection (1), is guilty of an offence.

*Basic Value and principles governing public administration”.*

#### **4.10. National Water Act, 36 of 1998 (“the NWA”)**

- 4.10.1. In terms of section 4 (4) (b) and section 4 (4) (f) of the NWA: *“Any entitlement granted to a person by or under the NWA replaces any right to use water which that person might otherwise have been able to enjoy or enforces under any other law to obstruct or divert a flow of water and to construct, operate any water work”.*
- 4.10.2. Section 21 (a) and 21 (c) of the NWA, provide that water use includes taking water from a water resource and impeding or diverting the flow of water in a watercourse.

4.10.3. According to section 151 (1) (a) of the NWA - *“No person may use water otherwise than as permitted under this Act”*

4.10.4. Section 151 (2) provides that -

*“Any person who uses water without a required water use licence is guilty of an offence and liable, on the first conviction, to a fine or imprisonment for a period not exceeding five years, or to both a fine and such imprisonment and, in the case of a second or subsequent conviction, to a fine or imprisonment for a period not exceeding ten years or to both a fine and such imprisonment”.*

## **5. FINDINGS**

5.1. The findings discussed below are based on various consultations and review of documentation made available to us during the course of our investigation.

5.2. In line with Fundudzi Forensic Services practice, due care was taken to confirm the factual accuracy of the findings in this report. This includes consultations with individuals who in our opinion had information relevant for our investigation.

5.3. The findings in this report should be addressed decisively by National Treasury. We believe that corrective action limited to the specific individual findings alone would likely address symptoms but not the underlying causes. The approach carries the risk of deficiencies recurring in the future. It is therefore imperative that the underlying causes contributing to the deficiencies be properly understood and addressed as part of the corrective actions to be taken in response to our report.

### **5.4. Background**

5.4.1. It is our understanding that following allegations of irregularities levelled against certain companies and individuals relating to contracts at Eskom and Transnet, National Treasury conducted an investigation to determine the veracity of the said allegations. We further understand that National Treasury produced a report of their factual findings at the end of the said investigations.

5.4.2. Part of the recommendations of National Treasury’s report was that a forensic investigation company be appointed to conduct a full investigation on the said allegations.

- 5.4.3. The investigations which National Treasury sought to be conducted related to the following:

#### **TRANSNET RELATED INVESTIGATIONS**

- 5.4.4. Investigate whether Singh facilitated the appointment of McKinsey/Trillian or Regiment Capital in Eskom and Transnet and whether such facilitation amounts to abuse of a position of authority, a breach of trust or violation of legal duty or set of rules in terms of PRECCA;
- 5.4.4.1. The appointment of CSR relating to the following locomotives tenders:
- 5.4.4.1.1. 95 locomotives;
  - 5.4.4.1.2. 100 locomotives; and
  - 5.4.4.1.3. 1 064 locomotives.
- 5.4.5. It is our understanding that the allegations relating to CSR were that their appointment may have been irregular.
- 5.4.6. We understand that the Molefe and Singh are alleged to have been involved in the said irregular appointment of CSR.
- 5.4.7. We discuss below the process followed in the appointment of CSR relating to the acquisition of 95, 100 and 1064 locomotives.

#### **TRANSNET LOCOMOTIVE TENDERS**

##### **5.5. ACQUISITION OF 95 LOCOMOTIVES - RFP: HOAC-HO-7801**

###### **Background**

- 5.5.1. We determined from documentation reviewed that during 2011, Transnet went out on a tender for the acquisition of 95 electric locomotives for the General Freight Business (“GFB”). The relevant tender was referenced as RFP: HOAC-HO-7801.
- 5.5.2. We obtained and reviewed a memorandum dated 26 July 2011, titled “*Approval to proceed with the acquisition of locomotives by Freight Rail in respect of GFB Diesel and Electric Fleets, the locomotive fleet modernisation plan (“The fleet plan”)*”, which sets out the fleet modernisation framework for Transnet Freight Rail (“TFR”) fleet. (**Annexure 1**)
- 5.5.3. The memorandum of 26 July 2011 reflected *inter alia* that the fleet plan was presented and approved by the Transnet Board on 20 April 2011. We confirmed from the minutes of the meeting of 20 April 2011 that the fleet modernisation plan was indeed approved by the Transnet Board.

- 5.5.4. As per the memorandum of 26 July 2011, TFR commenced with the process of finalising and assessing the funding and affordability concerns relating to the revised fleet plan.
- 5.5.5. The memorandum further reflected that in order to address the urgent need for tractive effort, it was recommended that TFR undertake the procurement of locomotives included in the 2011/2012 Corporate Plan, whilst the revised fleet plan was being finalised.
- 5.5.6. We determined that the following TFR individuals played a critical role in the procurement of the 95 locomotives for Transnet:
- 5.5.6.1. Siyabonga Gama CEO: TFR at the time;
  - 5.5.6.2. Thamsanqa Jiyane CPO: TFR at the time; and
  - 5.5.6.3. Lindiwe Mdletshe SCM: TFR at the time.
- 5.5.7. The following individuals from Transnet Group played a critical role in the procurement of 95 locomotives for Transnet:
- 5.5.7.1. Anoj Singh Acting GCFO at the time; and
  - 5.5.7.2. Brian Molefe GCE at the time.
- 5.5.8. According to the TFR locomotive procurement strategy dated 3 August 2011, the reasons to go on programmatic open tender were the following (**Annexure A2**):
- 5.5.8.1. To ensure bidding process is as fair and transparent as possible;
  - 5.5.8.2. As a long term procurement event, open tender would identify a supplier with whom TFR could partner with, to ensure value for money and comply with Transnet support for the NGP and government objectives;
  - 5.5.8.3. The programmatic nature of the purchase required TFR to find suppliers who could commit to delivering on government's industrialisation objectives, the said objectives include:
    - i. The creation of jobs;
    - ii. Transfer of technical skills and knowhow to South African industry;
    - iii. Increasing the capability and capacity of the South African rolling stock industry;
    - iv. Reducing capital leakage;
    - v. Increasing South Africa's exports; and

vi. The integration of the South African suppliers into the locomotives OEM's global supply chains.

5.5.8.4. Long term security of demand would allow suppliers to commit to investing in SA operations; and

5.5.8.5. Suppliers were expected to commit to the transferring of skills to TE to allow for the long term maintenance of the locomotives post warranty period.

**5.5.9. Request for approval to acquire 95 locomotives**

5.5.9.1. We determined that Siyabonga Gama ("Gama") prepared a memorandum dated 26 July 2011 for submission to the chairman of the Board Acquisition and Disposal Committee ("BADC") requesting approval to proceed with the acquisition of locomotives by TFR in respect of General Freight Business ("GFB") Diesel and Electric Fleets. **(Annexure A1)**

**Memorandum dated 26 July 2011 to BADC**

5.5.9.2. The purpose of the memorandum dated 26 July 2011 was to request the BADC to consider and recommend to the Transnet Board that:

5.5.9.2.1. Transnet proceed with the acquisition of 43 diesel locomotives on the confined tender basis to General Electric (GE);

5.5.9.2.2. Transnet proceed with an open tender to acquire 45 electric locomotives in 2012/13 and a further 50 electric locomotives in 2013/14; and

5.5.9.2.3. That the GCE be authorised, with powers to sub-delegate the above-mentioned resolutions.

5.5.9.3. The memorandum reflected that Gama confirmed that Transnet was able to fund the acquisition of 43 diesel and 95 electric locomotives.

5.5.9.4. Gama initiated the request which was reviewed by Singh and recommended by Molefe on 27 July 2011 respectively.

5.5.9.5. During our consultations with Gama, he confirmed that he submitted the said memorandum to BADC for submission to the Transnet Board for approval.

5.5.9.6. We were not required to and did not investigate the processes followed in the acquisition of 43 diesel locomotives confined through General Electric.

**BADC of 3 August 2011**

5.5.9.7. We determined that the BADC held a meeting on 3 August 2011 to *inter alia* consider the submission presented by Molefe and Gama to proceed with the acquisition of locomotives in respect of GFB 43 diesel and 95 electric locomotives. (**Annexure A3**)

5.5.9.8. The following individuals were present at the BADC meeting of 3 August 2011:

<b>Present</b>	<b>Position</b>
BD Mkwanazi	Charmain
ME Mkwanazi	Member
IM Sharma	Member
E Tshabalala	Member
DLJ Tshepe	Member
B Molefe	GCE (Ex officio)
A Singh	Acting CFO (Ex officio)
<b>In Attendance</b>	
G. Pita	Group Chief Supply Chain Officer (“GCSCO”)
P Difeto	General Manager (Office of the GCE)
ANC Ceba	Group Company Secretary

5.5.9.9. Based on the minutes of the BADC meeting we determined that the committee approved the proposal to:

- 5.5.9.9.1. Acquire 43 diesel locomotives on confined tender basis to GE to be deployed in the GFB operations;
- 5.5.9.9.2. Proceed with a transparent procurement process to acquire 45 electric locomotives in the 2012/13 financial year and a further 50 in the 2013/14 financial year for deployment in the GFB operations;
- 5.5.9.9.3. The GCE be authorised with powers to sub-delegate the resolution above; and

- 5.5.9.9.4. Submit a PFMA application on the approved acquisition to the Shareholder Minister for the acquisition of 95 electric locomotives.

**Submission to CAPIC dated 21 August 2011**

5.5.9.10. We determined that a submission titled, “*Approval for Transnet Freight Rail to proceed with the acquisition of 138 locomotives (43 diesel and 95 electric locomotives.)*”, and dated 21 August 2011 was prepared by Andre Jonck, Johan Bouwer and Francis Callard for presentation to the Transnet Capital Planning Investment Committee (“CAPIC”). According to the submission, the acquisition of 138 locomotives would run over three years, 2011/12, 2012/13 and 2013/14 at an estimated total cost of R3.6 billion. The purpose of the acquisition of 138 locomotives was to expand the core business and for the replacement of capacity. (**Annexure A4**)

5.5.9.11. Based on the submission, the commitment dates and key milestones were as follows:

Key Milestones	Date
Submission to Transnet Freight Rail Investment Committee (“TFRIC”)	August 2011
Warranty issued	September 2011
Project commencement	Feb / March 2012
Project completed	March 2014
Post evaluation review	March 2015

- 5.5.9.12. We further determined that the submission was reviewed by Gene Beilings (“Beilings”) and Deidre Strydom (“Strydom”), TFR. The financial model was compiled by André Jonck (“Jonck”), Johan Bouwer (“Bouwer”) and Francis Callard (“Callard”), supported by Rita Roper (“Roper”) on 22 August 2011.
- 5.5.9.13. Roper and Gama as General Manager Capital Program and Chairman of TFRIC supported the submission on 22 August 2011 and 23 August 2011 respectively.
- 5.5.9.14. Singh and Molefe supported and recommended the TFRIC submission on 24 August 2011 and 5 September 2011 respectively. We determined that paragraph 8.4.1 of the Procurement Procedure Manual of 2009 (“PPM”) delegated Molefe and Singh authority to support and recommend the submission.

5.5.9.15. Paragraph 8.4.1 of the PPM provides that “*the CAPIC shall ensure that the resources that Transnet Limited (the Group)*” invests for the development of capital projects are strategically managed and shall to this end-

- *Ensure that decisions relating to capital expenditure are consistent with the strategic focus of the Group and*
- *Ensure that capital expenditure complies with the budget and business plans approved by the BOD.*

*CAPIC is constituted as a committee of the Transnet Limited Group Executive Committee.*

*The Chairman will be the Group Chief Financial Officer.*

*The secretary shall be the Group Company Secretary.*

*The following shall be members of CAPIC.*

- *The Group Chief Financial Officer (Chairman),*
- *The Group Chief Executive (ex officio),*
- *The Group Chief Operating Officer,*
- *The Group Executive Transnet Projects,*
- *The Chief Executive Officer: TNPA, TPT, TFR, TRE and Pipelines,*
- *The Chief Information Officer,*
- *The Group Treasurer,*
- *The General Manager: Group Financial Planning and*
- *The General Manager: Group Strategic Supply Management.” (Annexure A5)*

#### **Transnet Board Meeting of 31 August 2011**

5.5.9.16. On 31 August 2011, the Transnet Board held a meeting to *inter alia* consider the submission presented by Management for the approval of TFR to proceed with the acquisition of the 138 locomotives. **(Annexure A6)**

5.5.9.17. We further determined that the Transnet Board was requested to consider, support and recommend the following to the Shareholder Minister:

5.5.9.17.1. *“Transnet proceed with the acquisition of 45 locomotives on confined tender basis to GE to deploy in the GFB operations;*



5.5.9.17.2. *Transnet proceeds with a transparent procurement process to acquire 45 electric locomotives in the 2012/13FY and further 50 electric locomotives in the 2013/14FY for the deployment in the GFB operations; and*

5.5.9.17.3. *The GCE be authorised with powers to further delegate the resolutions above."*

5.5.9.18. We determined that the following individuals were present in the Board meeting:

Present	Position
ME Mkwanazi	Chairman
B Molefe	GCE
NK Choubey	Non-Executive Director
Y Forbes	Non-Executive Director
MA Fanucchi	Non-Executive Director
HD Gazendam	Non-Executive Director
NBP Gcaba	Non-Executive Director
MP Malungani	Non-Executive Director
BD Mkhwanazi	Non-Executive Director
T Mnyaka	Non-Executive Director
N Moola	Non-Executive Director
MP Moyo	Non-Executive Director
NR Ntshingila	Non-Executive Director
IM Sharma	Non-Executive Director
A Singh	Acting CFO
IB Skosana	Non-Executive Director (Partial attendance)
E Tshabalala	Non-Executive Director

Present	Position
<b>In attendance</b>	
P Difeto	General Manager: Office of the GCE
Z Stephen	Group Executive: Corporate Services
ANC Ceba	Group Company Secretary
<b>Partial attendance</b>	
SI Gama	

5.5.9.19. According to minutes of the meeting, the Board resolved to approve the following:

- 5.5.9.19.1. *“The Interim Locomotive Fleet Acquisition Plan at a value of approximately R3.6 billion;*
- 5.5.9.19.2. *Transnet proceed with the acquisition of 43 locomotives on confirmed tender basis following transactions, the accounting authority for the public entity must promptly and in writing inform the relevant treasury of the transaction and submit relevant particulars of the transaction to GE to deploy in the GFB operations;*
- 5.5.9.19.3. *Transnet proceed with a transparent procurement process to acquire 45 Electric locomotives in the 2012/13 financial year and a further 50 in the 2013/14 financial year for deployment in the GFB operations;*
- 5.5.9.19.4. *Molefe be authorised with powers to sub-delegate the resolution above; and*
- 5.5.9.19.5. *Transnet may submit a PFMA application on the approved acquisition to the Shareholder Minister for the acquisition of 95 electric locomotives”.*

**Section 54 Application:**

*Section 54(2) of the PFMA provides that - “Before a public entity concludes any of the following transactions, the accounting authority for a public entity must promptly and in writing inform the relevant treasury of the transaction and submit relevant particulars of the transaction to its executive authority for approval of the transaction:*

- (d) *acquisition or disposal of a significant asset” (Annexure A7)*

- 5.5.9.20. We determined that a request for approval of the transaction in terms of section 54(2), signed by the Board Chairperson, ME Mkhwanazi on 24 October 2011 was lodged with the Shareholder. Transnet therefore applied for the section 54 approval before the tender was advertised on 6 December 2011 (**Annexure 8**).
- 5.5.9.21. We further determined that Transnet indicated that the procurement of the 95 locomotives was estimated at a cost of R2.6 billion
- 5.5.9.22. The application was approved by the Shareholder Minister, Gigaba on 21 December 2011. (**Annexure A9**)
- 5.5.9.23. We were however not provided with any documentation indicating that National Treasury was notified of the proposed acquisition of the 95 locomotives as required by section 54 of the PFMA.
- 5.5.10. **Advertisement of Tender RFP: HOAC- HO-7801**
- 5.5.10.1. We determined that on 6 December 2011, Transnet advertised tender number HOAC-HO-7801, for the supply and delivery of 95 electric locomotives for the GFB to be delivered by March 2014 (**Annexure A10**).
- 5.5.10.2. According to the advertisement, tender documents were obtainable from 6 December 2011 at the reception, Tender Advice Centre, Inyanda House 1, Ground Floor, 21 Wellington Road, Parktown, Johannesburg during office hours 09h00 to 15h00 at a non-refundable cost of R20 000 (including VAT).
- 5.5.10.3. The advertisement further stated that the deposit slip must reflect the Request for Proposal (“RFP”) number and the company name and that the receipts should be submitted on collection of the RFP documents.
- 5.5.10.4. We determined that part and not all of the RFP content could be viewed and downloaded from the Transnet website <http://www.transnetfreightrail.co.za/Website/tenders.html>).
- 5.5.10.5. During our consultations with Mdletshe, she indicated that the tender document obtainable from the website had a watermark stating that it was only for review purposes and should tenderers require a valid tender document, a fee of R20 0000 was required to obtain the document.
- 5.5.10.6. According to the advertisement, the closing date for collection of tender documents was 30 January 2012 at 15h00 and no tenders would be issued after the said date.
- 5.5.10.7. We determined that the advertisement indicated that: *“tenderers without a valid tender document in their possession will not be allowed to attend the compulsory clarification meeting”*.

- 5.5.10.8. The closing time and date for the submission of the tender was 10h00 on Tuesday, 28 February 2012.
- 5.5.10.9. We determined that the advertisement reflected Mdletshe as the contact person at e-mail address [Lindiwe.Mdletshe2@transnet.net](mailto:Lindiwe.Mdletshe2@transnet.net). A second e-mail address [Sarah.Assegai@transnet.net](mailto:Sarah.Assegai@transnet.net) was also listed on the advertisement.
- 5.5.10.10. According to the advertisement, a formal compulsory clarification/site meeting was scheduled for 31 January 2012 at 10.00 at Transnet's Umjantshi A-C Boardroom, Inyanda House 2, Ground Floor, 13-15 Girton Road, Parktown, Johannesburg.
- 5.5.10.11. The advertisement further indicated that *"preference would be given to Broad-Based Black Economic Empowerment ("BBBEE") companies in terms of Transnet's BBBEE policy"*. This statement was in bold letters.

#### **Collection of tender document by CSR**

- 5.5.10.12. During an analysis of the tender collection register, we determined that the signature of the individual, who collected the tender document on behalf of CSR on 20 December 2011, was similar to that of Mdletshe.
- 5.5.10.13. We enquired from Mdletshe whether tenderers could request a Transnet employee to collect documentation on their behalf and Mdletshe responded by saying - *"No, I have not seen an employee collecting documents on behalf of a tenderer"*. She further indicated that *"I don't want to say it's right, but I don't think it's right for a Transnet employee to collect documentation on behalf of a client"*.
- 5.5.10.14. We presented Mdletshe with the signed tender collection list and asked her if she could recognise the handwriting and signature completed on behalf of CSR on the tender collection list. Mdletshe confirmed that it was her signature and handwriting that was on the register next to the CSR details. She stated that she needed to recall when and why she signed the tender collection register on behalf of CSR.
- 5.5.10.15. Mdletshe indicated that the tender collection list was managed by the Tender Office and that she would confirm with Londiwe Shabalala (*"Shabalala"*) and Anthonie Erasmus (*"Erasmus"*) as to why she had signed and or took the tender document with her. Mdletshe requested that we afford her an opportunity to go back and check why she signed the collection document.
- 5.5.10.16. At a later stage Mdletshe provided us with a written explanation stating that in terms of Transnet procedures, suppliers were allowed to *"send courier service providers"* to collect or submit tender documents on their behalf. She further stated that in the event

where bidders were unable to collect the tender document; such documents upon request may be e-mailed to the service providers (**Annexures 18**). Mdletshe indicated that this was the case with the CSR documents she emailed to the entity. Mdletshe provided us with correspondence between CSR and herself confirming the latter.

5.5.10.17. In their response to our second draft report, CSR indicated that they “*experienced challenges in collecting the Bid documents on time because of the following factors (Annexure 19)*”:

5.5.10.17.1. *At the time CRRC did not have an office or representative in South Africa;*

5.5.10.17.2. *At the time the Visa application process was more than one month, which implied that it was practically impossible to get one of the officials to come to South Africa to collect the RFP documents within the timelines stated on the RFP advert;*

5.5.10.17.3. *“It was therefore decided after clarifying the process during our correspondences with the contact person as stated in the RFP advert, Ms Mdletshe on the 14 and 15 December 2011 to source the RFP documents electronically by -*

- *Paying the required R20 000.00 RFP fee electronically through the Bank of China on the 20/12/2011 and emailing the proof of payment to Ms Mdletshe. The proof of payment was sent on the 20/12/2011 at 04h28am (South African Time);*
- *Requesting for the documents to be emailed to CRRC as soon as possible so that preparation can be made to send the delegation to attend the briefing session in South Africa and comply with the tight RFP timelines. The documents were emailed by Ms Mdletshe on the 20/12/2011 at 14h27 (SA Time) after receiving our request with proof of payment at 04h28 (SA Time) as stated above”.*

5.5.10.18. As indicated above, Mdletshe stated that bidders had an option to send courier service providers to collect tender documents on their behalf. The courier service option was also available to CSR and the issue of VISA application, as raised by CSR in their response to our second draft report would not have been a factor in this case.

5.5.10.19. CNR did not request Mdletshe or any Transnet official to send the tender document even though they are also based in China.

5.5.10.20. Mdletshe acknowledged that it was not standard practice for a Transnet employee to collect tender documentation on behalf of a supplier.

5.5.10.21. Mdletshe indicated that TFR did not issue hard copy documentation for tender HOAC-HO-7801. According to Mdletshe, only electronic PDF documents and CD's were issued to bidders and excel spreadsheets were password protected. (**Annexure A18**)

5.5.10.22. We determined that the RFP and the advertisement did not provide that tender documents could be e-mailed to potential bidders. (**Annexure A20**).

5.5.10.23. We determined further that CSR was the only bidder that requested a Transnet official to collect a tender document on their behalf.

**5.5.11. Tender collection list for all bidders**

5.5.11.1. We determined that the tender collection list dated 30 January 2012 indicates that 22 entities paid and collected tender documents in respect of the tender RFP: HOAC-HQ-7801. The table below reflects the list of 22 entities who paid and collected tender documents: (**Annexure A17**).

No	Entity Name	Date collected
1	Mitsui and Co African Railway Solutions (Pty) Ltd ("Mitsui")	6 December 2011
2	Siemens	6 December 2011
3	Bombardier Transportation South Africa (Pty) Ltd ("Bombardier")	7 December 2011
4	Wabtec South Africa	7 December 2011
5	RSD	7 December 2011
6	TRE - Transnet Engineering	8 December 2011
7	Siyaya DB	8 December 2011
8	Imbani Projects	12 December 2011
9	Alstom S&E Africa (Pty) Ltd ("Alstom")	14 December 2011
10	Surtees Rail Group ("Surtees")	15 December 2011

No	Entity Name	Date collected
11	China South Rail Zhuzhou ("CSR")	20 December 2011
12	Kesmok (Pty) Ltd	20 December 2011
13	Shezi Part & CNR JV	22 December 2011
14	Guma Group (Pty) Ltd	22 December 2011
15	Ngolovan CC	22 December 2011
16	Muki Trading Projects ("Muki")	29 December 2011
17	Steel Industries International / Nelesco 85 (Pty) Ltd ("Nelesco")	4 January 2012
18	Patentes Talgo S.L.	13 January 2012
19	Daewoo Corporation	18 January 2012
20	Elgin Group	26 January 2012
21	China North Rail & CRCC ("CRCC")	27 January 2012
22	Saturn Railways / Solutions (Pty) Ltd ("Saturn")	30 January 2012 (Date not clear)

5.5.11.2. According to the tender collection list, Mdletshe was listed as a Buyer.

#### 5.5.12. Extension of tender closing date.

5.5.12.1. As indicated above, the closing date and time for the submission of the tender was 28 February 2012 at 10h00. We determined that on 24 January 2012, Thamsanqa Jiyane ("Jiyane") sent a memorandum to Gama requesting an extension of the tender closing date from 28 February 2012 to 1 May 2012 in respect of the tender (**Annexure A11**). As well known internationally the date of 1 May each year is a public holiday known as workers day. According to the memorandum, the reasons for the request for an extension of the closing date were *inter alia* the following:

- 5.5.12.1.1. Three suppliers, Alstom Transport S&E (Pty) Ltd (**Annexure A12**), Siemens (**Annexure A13**) and CSR (**Annexure A14**) requested extension of the closing date;
- 5.5.12.1.2. The release of the tender in late December 2011 and the festive holiday season had limited tenderers their intent to accelerate progress on their design concept for locomotives; and
- 5.5.12.1.3. In order to maximise local content, a high level of knowledge transfer and product localisation was required. This knowledge was difficult to obtain during the festive period as most of the suppliers would only be back at work from mid-January.
- 5.5.12.2. As indicated above, the tender was advertised on 6 December 2011 and not late December as indicated in Jiyane's memorandum. This was also confirmed by Gama in writing in the above-mentioned memorandum.
- 5.5.12.3. In his response to the assertion of misleading Gama as reflected above, Jiyane (through his attorneys Nicqui Galaktiou Inc.) indicated the following:
- "8. According to the draft report, our client misled Mr Siyabonga Gama ("Mr Gama") in his memorandum of 24 January 2012 requesting an extension to the tender submission date for the supply and delivery of 95 electric locomotives. FFS asserts that such misleading information emanated from paragraph 4 of the memorandum that the tender was advertised in "late December 2011" as opposed to its actual date of advertisement, being 6 December 2011.*
- 9. The same memorandum which FFS attempts to utilize to discredit our client, clearly identifies the aforementioned statement under the heading "Reasons Provided by Supplier's Extension Request". It is inconceivable how FFS would have missed this bold and highlighted heading in the memorandum in question and instead opted to attribute the sentence "...late December..." to our client in order to perpetuate the idea that our client misled Mr Gama. The written submissions of the relevant suppliers were provided to FFS which is conceded in the draft report at paragraph 5.5.12.3. "*
- 5.5.12.4. From paragraph 4 of the memorandum of 24 January 2012, Gama went to the extent of deleting the word late and inserting in his own handwriting the following words *"was it not early December 6/7??"*. We therefore do not understand why Jiyane did not correct the assertion by the bidders that the tender was advertised in late December 2011, as one of the reasons to request for the extension.
- 5.5.12.5. If Jiyane believed that the first reason for the request for extension was incorrect then he should have corrected it and not use it as one of the reasons provided by the bidders for



extension request. We however concede that the extension granted by both Jiyane and Gama was justified in line with National Treasury directives discouraging institutions from issuing tenders between 15 December and 15 January

5.5.12.6. If the reason on paragraph 4 and all the other reasons reflected on the memorandum are reasons provided by the bidders as we also concur that they were, then a question that Jiyane needed to answer was what were his reasons to request that Gama authorise the extension.

5.5.12.7. As reflected above we determined that the request for the extension and the granting thereof was justified. We were provided with proof that the tenderers referred to above submitted requests an extension of closing date.

5.5.12.8. We noted that in his memorandum, Jiyane elected to only refer to the reasons provided by Alstom and Siemens in requesting for the extension. We further noted that Jiyane did not refer to reasons provided by CSR for the extension.

5.5.12.9. We determined that on the 26 January 2012, Gama approved the extension of the closing date from 28 February 2012 to 17 April 2012. There was no written delegation of authority from Molefe delegating Gama to approve the extension. There was an SCM team that was appointed to handle the procurement process relating to the purchase of the 95 locomotives. The extension of the tender should have therefore been given by the Molefe and not by Gama, as there is no written confirmation that he was delegated to do so.

5.5.12.10. During our consultation with Mdletshe, she indicated that the approval of an extension of the closing date should be obtained from the person who obtained the delegation of authority from the Board. In this instance, it would have been Molefe.

5.5.12.11. In both Jiyane and Gama's responses, they did not address the issue of the lack of delegation for Gama to grant the extension of the tender closing date.

5.5.12.12. There was no indication that other potential bidders were prejudiced by the extension of the closing date.

5.5.12.13. Paragraph 3.15.1 of the PPM states that –

*“Transnet is entitled to amend any tender condition, validity period, specification or plan, or extend the closing date before the closing date, or in the case of a compulsory tender briefing session, before the scheduled session”. “However, a minimum of three working days before the schedule date, such amendments or extension must be advertised and/or all tenderers who obtained tender documents must be advised in writing per fax or e-mail of such amendments or*

*extension. The new closing date and time must be clearly reflected. For this reason, employees issuing tenders shall keep a record of the names and contact particulars of the persons or enterprises to which tender documents have been issued". (Annexure A15)*

5.5.12.14. We determined that the extension of the closing date was included in the notes of the compulsory briefing session which was held on 31 January 2012 and also e-mailed to the tenderers, therefore the requirements of the PPM were met. (Annexure A16)

#### **E-mail communication of 14 December 2011**

5.5.12.15. On 11 June 2018 at 02:50 PM, Mdletshe provided us with a copy of an e-mail dated 14 December 2011 from She Yongjun with e-mail address [sheyongjun@126.com](mailto:sheyongjun@126.com) (Annexure 21). The e-mail reflects that it was sent to Lindiwe Mdletshe at 05:21PM and copied [alton@mail.gofront.com](mailto:alton@mail.gofront.com) and [332464066@qq.com](mailto:332464066@qq.com). The subject matter of the e-mail was "about the tender document for the supply and delivery of 95 new electric locomotives". The e-mail *inter alia* read as follows:

*"Now, we have following two questions:*

*1. We know that we can download the RFP documents from the above-mentioned website at first. Are the RFP documents downloaded in the website same with the tender documents will be bought by us?*

*2. If we buy the tender documents in future, whether we should buy it in person in the at the RECEPTION, TENDER ADVICE CENTRE, INYANDA HOUSE 1, GROUND FLOOR, 21 WELLINGTON ROAD, PARKTOWN, JOHANNESBURG, or we can transfer the money to the Account number: 203158598, and then you will send the formal tender documents to us?"*

5.5.12.16. Mdletshe indicated that She Yongjun represented CSR. According to the advertisement, enquiries were directed to Mdletshe on e-mail address [Lindiwe.Mdletshe2@transnet.net](mailto:Lindiwe.Mdletshe2@transnet.net) and [Sarah.Assegai@transnet.net](mailto:Sarah.Assegai@transnet.net).

5.5.12.17. We determined that the e-mail from CSR sought clarity on how they could obtain or buy tender documents from Transnet. The e-mail from CSR further sought clarity on whether the tender document could be sent to them upon transfer of money to TFR's account number listed on the advertisement. We could not find any e-mail attaching the tender document from Mdletshe's emails. However based on supporting documentation provided to us by CSR, we determined that there was an e-mail reflecting that Mdletshe sent the tender document to CSR on 20 December 2011.

## **E-mail communication of 15 December 2011**

- 5.5.12.18. We determined that Mdletshe replied to She Yongjun's e-mail of 14 December 2011 on 15 December 2011 and indicated the following:
- 5.5.12.18.1. Tender document for RFP HOAC-HO-7801 was not available on the website for download;
  - 5.5.12.18.2. In order to obtain the RFP document CSR would be required to make a deposit of R20 000 into the Transnet bank account as per the advertisement; and
  - 5.5.12.18.3. Proof of payment should be submitted on collection of the tender document.
- 5.5.12.19. As reflected in Mdletshe's e-mail, she referred to a telephone discussion between herself and CSR on the same day. Mdletshe highlighted in the e-mail that CSR did not have representatives in South Africa to collect the tender document.
- 5.5.12.20. Mdletshe requested that CSR send proof to "sarah.assegai@transnet.net or Lindiwe.mdletshe2@transnet.net". According to the e-mail, Mdletshe indicated that the document would be e-mailed to CSR upon receipt of proof of payment. (Annexure A17). We determined that Transnet was incorrectly spelled as "Transnet" on Assegai's e-mail address provided by Mdletshe to CSR, which would have meant that any emails sent to that address would not be delivered.
- 5.5.12.21. Mdletshe indicated that CSR's request was discussed with Assegai and Erasmus and the agreement was that there was no risk in e-mailing the document as long as the payment was received.
- 5.5.12.22. Mdletshe further indicated that Assegai and Erasmus allowed her to sign the tender collection register on behalf of CSR. Mdletshe however did not provide us with any documentation to support her allegation that she had obtained approval from Assegai and Erasmus to send CSR the tender documents.
- 5.5.12.23. We consulted with Assegai (**Annexure 22**) and Erasmus (**Annexure 23**) who both provided us with sworn affidavits, signed on 25 June 2018 denying that Mdletshe discussed the CSR request with them. Assegai and Erasmus indicated that they therefore did not allow Mdletshe to sign the tender document collection list on behalf of CSR. Furthermore, according to Assegai and Erasmus, they never agreed that there was no risk in e-mailing the document as long as payment was received.

- 5.5.12.24. Mdletshe misled the investigation team by stating that she discussed the CSR request with Assegai and Erasmus who both confirmed under oath that it was never discussed with them. During our consultation with Mdletshe, she indicated that she would provide us with written response relating to the information she completed in the tender collection list. As at date of this report, Mdletshe had not provided the said information to us.
- 5.5.12.25. We noted that the copy of e-mail dated 15 December 2011 provided to us by Mdletshe had a hand written note i.e. RFP: HOAC-HO-7801. As part of their response to our second draft report issued on 27 July 2017, CSR provided us with a copy of the e-mail dated 15 December 2011. We noted that the e-mail provided to us by CSR had the same handwritten note-RFP HOAC-HO-7801, a copy of the same e-mail provided to us by Mdletshe. CSR clearly obtained the said copy from Mdletshe as she is the one who provided it to us.
- 5.5.12.26. We consulted with Edward Thomas (“Thomas”), Group SCS Officer who stated that no staff member is permitted to sign on behalf of a tenderer.

**Non – refundable payment for tender document**

- 5.5.12.27. As reflected above, the advertisement required a non-refundable payment of R20 000.00 in order to obtain the tender document. The tender advertisement stated the following:
- 5.5.12.27.1. Deposit slip must reflect the RFP number and the company name;
  - 5.5.12.27.2. Receipt/s to be presented prior to collection of the tender document; and
  - 5.5.12.27.3. Receipt/s were to be collected when collecting the tender document.
- 5.5.12.28. Mdletshe indicated that the tender documents could only be obtained after a non-refundable payment of R20 000.00. Mdletshe provided us with a copy of proof of payment from CSR dated 20 December 2011 reflecting a payment of US\$2380 (**Annexure A24**). The said proof of payment reflected Transnet Freight Rail as the beneficiary with account number 203158598. We confirmed that the account number reflected on the proof of payment is the same as the one provided on the advertisement.
- 5.5.12.29. In their response to our second draft report, CSR provided us with the proof of payment similar to the one they submitted to Mdletshe on 20 December 2011. During the analysis of the proof of payment provided to us by CSR, we determined that it was

the exact copy of the of the one provided to us by Mdletshe, as both documents contained the following similarities:

- 5.5.12.29.1. The information at the end of both documents *i.e.* 288, pro is cut off; and
  - 5.5.12.29.2. The top edge of both documents contained a black border line that appears to have been caused by photocopying.
- 5.5.12.30. From a CSR email to Mdletshe dated 20 December 2011, we found a document titled "*Debit confirmation of the outward.pdf*" confirming payment made to the Bank of China for the tender document. Based on the above it is therefore possible that Mdletshe received the said proof of payment on 20 December 2011 reflecting a payment from CSR to Bank of China. We determined during the investigations that CSR's payments to and from Transnet are made through the Bank of China's account held at Standard Bank. Mdletshe stated that she only received the proof of payment from CSR (or Bank of China) to TFR on 21 December 2011.
- 5.5.12.31. Mdletshe provided us with a document bearing the date of 21 December 2011 with the time reflected as 13:38:46 (**Annexure A25**). The title of the document is reflected as Notification (Transmission). According to the document, the sender is reflected as Bank of China Johannesburg with reference number BKCHZAJJXXX. The receiver is reflected as Standard Bank of South Africa Limited (Head office and all South African Offices) with reference number SBZAZAJJXXX.
- 5.5.12.32. According to the Notification Transmission, an amount of R20 000.00 was settled on 21 December 2011 in favor of beneficiary account number 203158598 which is the same account number reflected on the advertisement. Based on the review of the Notification Transmission, we determined that the amount of R20 000.00 reflected in TFR's account on 21 December 2011.
- 5.5.12.33. Mdletshe indicated that CSR sent the proof of payment to her on 20 December 2011 in respect of the purchase of the tender document. As indicted above, the amount of R20 000.00 only reflected in TFR's account on 21 December 2011.
- 5.5.12.34. Mdletshe indicated that she e-mailed the tender documents to CSR on 20 December 2011, which we determined was a day before CSR's payment reflected in Transnet's bank account. From documentation provided to us by CSR we confirmed that they received an email from Mdletshe on 20 December 2011 with the tender document. Mdletshe failed to confirm that the funds had been cleared prior to emailing the tender document to CSR.

- 5.5.12.35. We determined that CSR was the only tenderer on the tender collection list whose documents were e-mailed to them. All other tenderers collected their documents.
- 5.5.12.36. Mdletshe's actions and failure to ensure payment before issuing the tender documents to CSR was negligent and exposed Transnet to a financial risk.
- 5.5.12.37. We obtained a copy of Gama's response dated 17 August 2018 relating to our second draft report of 27 July 2018 (**Annexure A26**). In the said response Gama indicated that the above allegations have no basis and are inaccurate in that - *"The tender documentation was emailed to CSR following the latter's enquiries to receive the said documentation electronically."* Mdletshe's conduct was not in line with the requirements of the RFP relating to collection of tender documents by the bidders. The RFP required the bidders to collect the tender documents upon payment of the prescribed fee of R20 000.00. The fact that CSR requested Mdletshe to email them the tender documents does not make Mdletshe's conduct acceptable.
- 5.5.12.38. We could not find any email from either Mdletshe or Assegai attaching the tender document to CSR. CSR however provided us with an e-mail from Mdletshe which appears to have attached the said tender document. Neither Transnet nor CSR provided us with the actual e-mail (pst file) from Mdletshe to CSR attaching the tender document. We however could not find any documents to disprove that Mdletshe indeed emailed the said tender document to CSR.
- 5.5.12.38.1. In his response Gama further indicated that *"CSR's request to obtain the documentation electronically was attended to by both Mdletshe and Assegai by means of electronic communication"*.
- 5.5.12.39. Assegai disputed that she had any communication with CSR before, during or after the tender award. This is despite the fact that there are emails that appear to have originated from her to CSR during December 2011. We were not provided with Assegai's Mimecast emails to confirm any email communication between CSR and Assegai.
- 5.5.12.39.1. In his response Gama further indicated that *"CSR had provided Mdletshe with its proof of payment of the amount of R 20 000 dated 20 December 2018 [typo], thereafter the documentation was emailed to it by Mdletshe. (CSR collected the tender documents through email which was recorded as such on the list by Mdletshe and later collected the compact disc)"*.
- 5.5.12.40. The proof of payment Gama is referring to above was from CSR to Bank of China and not to TFR's bank account. The said proof of payment alone was in fact not sufficient as

there was no confirmation that the R20 000.00 deposited by CSR was in TFR's bank account.

5.5.12.40.1. *The proof of the electronic communication exchanged between the above-mentioned parties is enclosed hereto as Annexures A1 and A2 respectively"*

5.5.12.41. Section 1 of the RFP indicates *inter alia* the following: "documents may be inspected, and are obtainable from the office of the Secretariat, Room Iyanda 1, Ground Floor, 21 Wellington Road Parktown, Johannesburg on payment of an amount of R20,000.00 (inclusive of VAT)". Therefore, there is no section in the RFP indicating that staff can e-mail the documentation on receipt of payment or the collection of the RFP through e-mail.

5.5.12.42. During our consultations with Assegai and Erasmus prior to the issuing of our second draft report, they disputed that they communicated with CSR with regard to issuing, emailing or collection of the tender document.

5.5.12.43. Subsequent to Gama's comments as reflected above, we obtained a further affidavit from Assegai wherein she denied having sent and/or received the emails attached to Gama's comments. Assegai pointed out various inconsistencies and/or anomalies in the emails provided with Gama's comments. The said inconsistencies and/or anomalies are discussed below.

5.5.12.44. CSR provided us with their response to our second draft forensic report. CSR indicated that they were experiencing challenges in collecting the bid documents timeously due to the following:

5.5.12.44.1. They did not have an office or representative in South Africa; and

5.5.12.44.2. The visa application process took more than one month, which made it practically impossible for their representatives to come to South Africa.

5.5.12.45. As indicated above, the tender documents were available for collection from 6 December 2011. The closing date for the collection of tender documents was 30 January 2012. The RFP provided bidders reasonable time for the collection of tender documents. CSR's reasons for requesting a Transnet official to collect the tender documents on their behalf are therefore unfounded and the request itself is in breach of the requirements of the RFP.

5.5.12.46. Gama stated in his response to our second draft report that Assegai was communicating with CSR and was aware that Mdletshe emailed the tender document to CSR.

5.5.12.47. We presented Annexure A1 to Assegai and obtained a sworn affidavit from her in which she *inter alia* confirmed the following:

- 5.5.12.47.1. She never sent the e-mail dated 15 December 2011 or any other e-mails to CSR (**Annexure A22**);
- 5.5.12.47.2. The first time she saw the e-mail was when it was presented to her by Fundudzi Forensic Service on 21 August 2018;
- 5.5.12.47.3. She has never communicated with CSR prior, during or after the tender evaluation of the 95 locomotives;
- 5.5.12.47.4. She leaves in Pretoria and by the time that the e-mail was sent at 17:50 she had already left the office;
- 5.5.12.47.5. During December 2011, she did not have internet access at home and therefore she could not have sent the e-mail from home;
- 5.5.12.47.6. She never addresses her correspondence to third parties with the word "Dear" and sign off with the word "Regards". She always addresses third parties by saying "Good day, Good afternoon or Good morning" and sign off with "Kind regards";
- 5.5.12.47.7. The font used in the email is not the same font she normally uses on a daily basis. She either uses Century Gothic or Tahoma;
- 5.5.12.47.8. She spell-checks her messages before sending e-mails and ensures at all times that the third party's name and surname is spelled correctly. In the e-mail dated 15 December 2011, Yongjun is spelled incorrectly as "Yogin"; and
- 5.5.12.47.9. It is her standard practice to read her correspondence before she sends it. In the email allegedly sent by her, the words "with South" was repeated.
- 5.5.12.47.10. Her surname is Assegai and not Assegaai as reflected in the email. She would never write her own surname incorrectly. Third parties would write her surname as Assegaai because that is how it is written on the e-mail address, Sarah.Assegaai@transnet.net. This is evident on page 1 of Annexure A1 in the e-mail from She Yongjun, which was sent on 15 December 2011 at 12:01 PM.
- 5.5.12.47.11. We were not able to perform an analysis on Mimecast of the validity of Assegai and Lindiwe Mdletshe2 e-mail addresses used to communicate



with CSR. The relevant e-mail information was not provided to us as at time of submission of our final report.

**5.5.13. Correspondence between CSR and the GCE after the advertisement of Tender RFP: HOAC-HQ-7801**

5.5.13.1. During an analysis of Molefe's Transnet e-mails as found on Mimecast, we came across a letter which was addressed to Molefe from Wang Pan ("Pan") of CSR dated 19 January 2011. The subject of the e-mail is reflected as "*Visit in SA for 95 New Electric Locomotives*". We determined that the year 2011 could be a typing error which should have read 2012 as the tender had not commenced on 19 January 2011. **(Annexure A27)**

5.5.13.2. According to the said letter, Pan:

5.5.13.2.1. Thanked Molefe for providing CSR the opportunity to participate in the tender for the supply of the 95 electric locomotives. It is unclear why Pan would specifically thanked Molefe "*for providing CRS with an opportunity to participate...*", when the tender was open to the public

5.5.13.2.2. Indicated that CSR is reputed as the world's largest locomotive manufacturer in volume and are serious to bid and cooperate with Transnet with regards to their quality and competitive products;

5.5.13.2.3. Confirmed that CSR would be represented at the briefing session to be held on 31 January 2012; and

5.5.13.2.4. Requested meetings between CSR and the following Transnet individuals, Departments and third parties:

5.5.13.2.4.1. Molefe, to discuss cooperation between the two entities;

5.5.13.2.4.2. TE, to discuss and optimize the technical specifications;

5.5.13.2.4.3. A site visit on some locomotive depot or engineering factory to study existing electric locomotives and investigate the operational conditions; and

5.5.13.2.4.4. Visits and discussion with some potential or preferred companies who are capable of cooperating with them for localisation work.

5.5.13.3. From Mimecast searches we determined that on 19 January 2012 at 05:05 PM Pan sent an e-mail from email address (alton@csrzec.com) to Molefe (brian.molefe@transnet.net) and copied [zhangminyu54642@qq.com](mailto:zhangminyu54642@qq.com) stating that "*Please*

*be kind to check attached letter, which has already been sent by fax to you. Your attention and support is highly appreciated". We determined that Alton's other e-mail address [alton@mail.gofront.com](mailto:alton@mail.gofront.com) was copied in the communication between CSR and Mdlletshe during the period 14 December 2011 and 9 February 2012 discussed above. From available communication we determined that Wang Pan and Alton are referred to as one and the same person.*

- 5.5.13.4. We determined that Molefe responded to Pan's e-mail on the same day *i.e.* 19 January 2012 at 18:26 and copied [zhangminyu54642@qq.com](mailto:zhangminyu54642@qq.com) and Gama stating: *"Dear Mr Wang Pan Thank you for your letter. I have forwarded it to our Mr Siyabonga Gama who will process and respond to your request. Thank you for the interest shown in the tender. Regards"*
- 5.5.13.5. The response forwarded to Pan by Molefe is different from that contained in the letter provided to us by CSR as discussed below. The e-mail response sent by Molefe to Pan reflected that he had requested Gama to attend to their request whereas in the written letter to CSR, Molefe indicated that he could not meet with the entity due to the tender that was out at the time. Molefe's letter to Pan is dated 8 February 2012 whereas he sent the e-mail to Gama to attend to CSR's request on 19 January 2012.
- 5.5.13.6. In their response to our second draft report, CSR provided us with a letter dated 8 February 2012 which they indicated was sent to Pan by Molefe. We however could not find a copy of the said letter from Molefe's e-mails.
- 5.5.13.7. CSR's responses relating to Pan's letter to Molefe were as follows:
- 5.5.13.7.1. *"The request for a meeting was rejected by the GCEO's office. See attached letter in a form of Annexure D from Mr Wang Pan to Mr. Brian Molefe and his response letter as well.*
- 5.5.13.7.2. *CRRC understanding was that the restriction in communication with Transnet officials was between the closing date of the submission (28/02/2012 as per original RFP documents) and the date of the award of business. Mr Wang Pan's letter was sent on 19 January 2012, which was before the closing date of the submission.*
- 5.5.13.7.3. *During the briefing session that was held on 31 January 2012 the issue of communication with Transnet officials was further clarified to all potential bidders and thereafter CRRC fully complied with all the instructions as clarified during the briefing session."*
- 5.5.13.8. Gama provided responses relating to the request for a meeting as reflected in Pan's letter to Molefe dated 19 January 2012. As reflected below, Gama saw nothing wrong

with Pan's request to meet with Transnet officials during the tender process. The following are Gama's responses relating to Pan's request for a meeting:

5.5.13.8.1. *"..... clause 3.1.8 of the PPM clearly indicates that communication between a tenderer or any party who has an interest in a tender with any employee of Transnet is only a disqualifying factor if such communication takes place after the closing date of the tender/quotation, i.e. the closing date for responding to a Request for Proposals.*

5.5.13.8.2. *In this specific instance, the communication by CSR to Molefe took place on 19 January 2012 whereas the closing date for RFP: HOAC-HO-7801 was initially on 28 February 2012 and was subsequently extended to 17 April 2012. We noted that this comment by Gama is similar to the comment made by CSR as reflected in paragraph 5.5.14.7 above.*

5.5.13.8.3. *Self-evidently, there is nothing improper or disqualifying concerning the aforementioned communication between CSR and Molefe.*

5.5.13.9. From Gama's responses we determined that he failed to disclose that he was in fact requested by Molefe to process and respond to Pan's request. The said request is contained in Molefe's e-mail to CSR dated 19 January 2012 in which Gama was copied.

5.5.13.10. In contrast to Gama and CSR's responses, Molefe's letter to Pan indicated that *"Your letter requesting a meeting is noted, however, the meeting will not be possible due to the tender that is out"*. Molefe's response was however different from the e-mail he sent Pan and copied Gama and [zhangminyu54642@qq.com](mailto:zhangminyu54642@qq.com) as stated above.

5.5.13.11. From the wording of the paragraphs in the e-mail from Pan to Molefe requesting for a meeting it is apparent that the said request could be interpreted as CSR attempting to influence Transnet officials prior to the adjudication of the tender. This can be deduced from wordings such as the following:

5.5.13.11.1. *"To discuss cooperation between the two entities"*. There could not be discussion of cooperation between CSR and Transnet if CSR was not going to be awarded the tender. Clearly, there can be no discussion of cooperation between Transnet and CSR during a tender process.

5.5.13.11.2. *"TE, to discuss and optimize the technical specifications"*. We fail to understand why CSR would want to engage TE to discuss and optimise the technical specifications when the tender RFP had already been issued and CSR had already requested Mdletshe to e-mail them the tender documents in their email dated 15 December 2011.

5.5.13.11.3. *“A site visit on some locomotive depot or engineering factory to study existing electric locomotives and investigate the operational conditions”.* We fail to understand why CSR would want to visit the locomotive depots or engineering factories outside of a tender process. It is our view that should there have been a requirement for tenderers to visit the said facilities, such a request should have emanated from Transnet and communicated to all tenderers.

5.5.13.12. Section 7 of the RFP titled *“Communication”* provides for communication between the bidders and Transnet officials prior to the closing of the tender. Section 14 of the RFP provides that:

*“7.1 Respondents are warned that a Proposal will be liable to disqualification should any attempt be made by a Respondent either directly or indirectly to canvass any officer or employee of Transnet SOC Ltd in respect of this RFP between the closing date and the date of the award of the business.*

*7.2 For specific queries relating to this RFP, a Bid Clarification Request Form should be submitted two weeks before the tender closing date (Tuesday 28 February 2012), substantially in the form set out in Section 14 hereto.*

*7.3 After the closing date of the RFP, a Respondent may communicate with the Secretary of the Transnet Freight Rail Acquisition Council, at telephone number 011 584 9486 or facsimile number 011-774-9760 on any matter relating to its RFP Proposal.” (Annexure A33)*

5.5.13.12.1. Regardless of the fact that the request by CSR was made prior to the closing date of the tender, the request by CSR cannot be said to have been made in the spirit of fairness, transparency as it clearly demonstrated that CSR had already concluded that they would work with Transnet after the tender evaluation.

5.5.13.13. We found a similar e-mail on the # Gupta leaks, both emails are dated 19 January 2012. The said e-mail has the same information except for the time of the e-mail which is reflected as 23:04 (**Annexure A28**). When taking the time difference between China and South Africa into consideration (6 hours difference) we determined that the e-mail falls within the time zone between South Africa and China and corresponds with the e-mail as received by Molefe in South Africa *i.e.* 05:05 PM.

5.5.13.14. From the # Gupta leaks’ thread of the Molefe and Pan emails relating to the latter’s request for a meeting, we determined the following:

- 5.5.13.14.1. On 19 January 2012 at 23:06, two minutes after he had sent the e-mail to Molefe, Alton (Pan) forwarded the said e-mail to Rupesh Bansal (rupeshbansal@hotmail.com) and [replyrb@gmail.com](mailto:replyrb@gmail.com). The contents of the e-mail reflected *"Dear Mr Rupesh, please before your reference"*.
- 5.5.13.14.2. On 20 January 2012 at 10:35 Rupesh Bansal forwarded the e-mail to [replyrb@gmail.com](mailto:replyrb@gmail.com). We determined that there was no content to the said e-mail. As reflected above, Alton (Pan) had already forwarded the e-mail to [replyrb@gmail.com](mailto:replyrb@gmail.com) on 19 January 2012.
- 5.5.13.14.3. On 20 January 2012 at 16:21 Rupesh Bansal forwarded the e-mail to Shuchi and [ca.shuchibansal@gmail.com](mailto:ca.shuchibansal@gmail.com). The content of the e-mail reflected - *"Dear Shuchi Please provide this letter copy along with update on previous e-mail as required by Piyooshji. Please suggest him that this is the letter is sent and the points mentioned in letter are practical and to be pursued by CSR Regards Rupesh"* (sic). We determined that the only reference to the letter in the emails to this stage was for the one sent to Molefe by Pan on 19 January 2012. From searches conducted we found information indicating that Piyoosh Goyal is alleged to be the founder/promoter of Worlds Window.
- 5.5.13.14.4. On 20 January 2012 at 18:08:11 Shuchi ([shuchi@worldswindow.cc](mailto:shuchi@worldswindow.cc)) forwarded the e-mail to Lina ([ea@worldswindow.cc](mailto:ea@worldswindow.cc)). We determined that there was no content to the said e-mail. The media searches conducted indicated that Worlds Window is an entity in India allegedly linked to Oakbay Investments, a company publicly known to be owned by the Guptas. .
- 5.5.13.14.5. On 20 January 2012 at 4:23 PM [ea@worldswindow.cc](mailto:ea@worldswindow.cc) sent the e-mail to Ashu (SES) and Ashu. The content of the e-mail reflected *"Regards Lina"*. We determined therefore that there was no real content to the said e-mail.
- 5.5.13.14.6. On 20 January 2012 at 4:29 Ashu forwarded the e-mail to [kamal.singhala@hotmail.co.za](mailto:kamal.singhala@hotmail.co.za). We determined that the email refers to an attachment titled *"Fax\_ to \_ Transnet \_ 2012-1-19 pdf."* The title of the document attached to Ashu's e-mail corresponds to the title of the document emailed to Molefe by Pan on 19 January 2012.

5.5.13.15. We conducted media searches on the individuals and entities reflected on the e-mail thread above and the results appear below.

#### **Searches conducted on Ashu (SES)**

5.5.13.16. We conducted searches on Ashu (SES) and determined that the Ashu (SES) is the Ashu Chawla linked to an entity styled SES Technologies Limited (“SES Technologies”) an entity registered in Mumbai India. Ashu Chawla is further linked to Sahara Computers and Electronics (“Sahara”), an entity owned by the Gupta brothers. We determined from background searches conducted that as of August 2005, SES Technologies operated as a subsidiary of Sahara. From the said link and the related searches, it is apparent that the acquisition of the 95 locomotives through CSR, had the involvement and possible influence by individuals linked to the Guptas even before the tender closed. We sent an email to Chawla in order to obtain his comments; however at the time of issuing this final report, we had not received any responses from Chawla (**Annexure A29**).

#### **Searches conducted on Kamal Singhala**

5.5.13.17. We conducted searches on Kamal Singhala and could obtain only one result which reflected that there is a Kamal Singhala who is Ajay Gupta’s son. Our results further reflected that Kamal Singhala is a former director of VR Laser, together with Salim Issa. Kamal Singhala is also well known for the Gupta Sun City wedding (**Annexure A30**).

#### **Searches conducted on Rupesh Bansal**

5.5.13.18. From the Gupta leaks as reflected on [www.gupta-leaks.com/tony-gupta/guptaleaks-guptas-and-associates-score-r5-3bn-in-locomotives-kickbacks](http://www.gupta-leaks.com/tony-gupta/guptaleaks-guptas-and-associates-score-r5-3bn-in-locomotives-kickbacks) we determined that Rupesh Bansal’s other email address is reflected as [replyrb@gmail.com](mailto:replyrb@gmail.com). In the said e-mail threads as reflected on the above link, we determined that on 6 January 2015 Rupesh Bansal sent an e-mail to Zhang Minyu on e-mail address [zhangminyu54642@qq.com](mailto:zhangminyu54642@qq.com). Zhang Minyu forwarded the e-mail to Business Man on e-mail address [infoportal1@zoho.com](mailto:infoportal1@zoho.com) on 7 January 2015. On 22 March 2015 Business Man sent an e-mail to Ashu with an attachment titled “*Final CSR 2015 workings*”. Relevant to our investigation relating to the 95 locomotives, we determined that the said attachment reflected *inter alia* the 95 locomotives project estimated at R28 million per locomotive and contract value of R2.6 billion. It should be noted that we did not authenticate the said document but have determined that the contents reflected therein in relation to the price per locomotive and contract value, are as per our findings and are further supported by Transnet documents (**Annexure A31**).

**Searches conducted on e-mail address zhangminyu54642@qq.com**

- 5.5.13.19. As discussed earlier in the report, we determined that in their communication relating to the 95 locomotives tender, Mdletshe and She Yongjun copied an e-mail address reflected as zhangminyu54642@qq.com. We further determined that in his response to Pan, Molefe copied the said e-mail address.
- 5.5.13.20. According to CSR, the email address [Zhangminyu54642@qq.com](mailto:Zhangminyu54642@qq.com) belongs to one of their colleagues, Mr. Zhang Minyu, who is based at their office in China.
- 5.5.13.21. We conducted media searches on the e-mail address zhangminyu54642@qq.com and determined that it belongs to an individual reflected as Minyu Zhang. We further determined that the said e-mail address is reflected as the official e-mail address and website of CSR Zelc India Private Limited (**Annexure A32**). In their response, CSR indicated that the said email address belongs to Minyu Zhang, their colleague based in their office in China. The following individuals are reflected as directors of CSR Zelc India Private Limited as of 2 February 2015:
- 5.5.13.21.1. Degang Yuan;
  - 5.5.13.21.2. Leiming Shao; and
  - 5.5.13.21.3. Minyu Zhang.
- 5.5.13.22. In CSR's response to our second draft report of 27 July 2018, CSR included Molefe's response of 8 February 2012 wherein Molefe indicated that a meeting would not be possible due to the tender process having not closed yet.
- 5.5.13.23. In his response to our second draft report, Gama indicated that the above-mentioned allegations are incorrect and that the communication took place on 19 January 2012, prior to the closing date which was extended to 17 April 2012. Molefe did not respond to our questions posed to him, nor did he comment on our second draft report.
- 5.5.13.24. We determined that the RFP did not provide Molefe's contact details as one of the contact persons for the bidders, it is therefore unclear where CSR obtained Molefe's contact details. The tender document provided Mdletshe as the Transnet individual to be communicated with regarding the tender. We further determined that the tender advertisement provided Mdletshe and Assegai as the Transnet individuals to be communicated with on any enquiries regarding the tender. CSR therefore contravened the RFP requirements by passing Mdletshe and Assegai and approaching Molefe directly during the bidding process to discuss how they could work with Transnet. Furthermore, contacting the most senior official of the company, despite the RFP

clearly indicating the responsible officials, creates an impression of a special relationship between Molefe and the CSR officials.

5.5.13.25. It is not clear why Molefe’s email was shared with Gupta associates.

5.5.13.26. In their written response dated 12 October 2018, CSR indicated that *“CRRC E-LoCo did not do any business or discuss any business with any of he Gupta family members or their business associates, except a short interaction with Mr. Salim Essa when his VR Laser approached us with a proposal to work together in the manufacturing of locomotive components in South Africa. The proposal was unsuccessful for business reasons.”* (**Annexure A32a**)

5.5.13.27. CSR further stated that:

5.5.13.27.1. *“CRRC E-LoCo did not cede any of their Transnet Locomotive Contracts to any third party including CRRC Hong Kong;*

5.5.13.27.2. *CRRC E-LoCo did not sign or do they know of any agreement entered between CRRC Hong Kong and JJ Trading or/and Tequesta;*

5.5.13.27.3. *CRRC E-LoCo did not make any payment or do not know about any payment made to JJ Trading or/and Tequesta;*

5.5.13.27.4. *CRRC E-LoCo do not know, never met or never had correspondences with any of the individuals indicated in your list of questions, except for Mr. Salim Essa;*

5.5.13.27.5. *All correspondences between CRRC E-LoCo and any of Transnet officials have been above board and done in the course of their business relationships.”*

**5.5.14. Briefing session**

5.5.14.1. As indicated above, a formal compulsory clarification site meeting was scheduled for 31 January 2012 at 10:00 at Transnet Inyanda House 2.

5.5.14.2. We determined from a review of the briefing session attendance register that 55 representatives from 26 entities attended the briefing session on 31 January 2012. The entities who attended the briefing session were reflected as: (**Annexure A34**)

No	Entity Name	Comments
1	Alstom	3 representatives attended and signed a receipt of CD.
2	Bombardier	5 representatives attended and signed a receipt of CD.
3	CRCC	2 representatives attended and didn’t sign receipt of a CD.



No	Entity Name	Comments
4	China Railway Construction Corporation	2 representatives attended and didn't sign receipt of CD.
5	CSR	4 representatives attended and didn't sign receipt of a CD.
6	Daewoo Corporation	1 representative attended and signed a receipt of CD.
7	Elgin Group	2 representatives attended and signed a receipt of CD.
8	Global Railway Africa	1 representative attended and signed a receipt of CD.
9	Guma Group (Pty) Ltd	1 representative attended, didn't sign a receipt of a CD.
10	Hlamalane Railways Korail Hyundai Rotem	1 representative attended and signed a receipt of CD.
11	Imbani Projects	1 representative attended and signed a receipt of CD.
12	Kesmok (Pty) Ltd	2 representatives attended, 1 didn't sign a receipt of a CD.
13	Mitsui	1 representative attended and signed receipt of CD.
14	Muki	2 representatives attended and signed receipt of CD.
15	PDNA & Associates	1 representative attended and signed receipt of CD.
16	Saturn	2 representatives attended and signed receipt of CD.
17	Shezi Part & CNR JV	4 representatives attended and didn't sign receipt of a CD.

No	Entity Name	Comments
18	Siemens	5 representatives attended and signed a receipt of CD.
19	Siyazi (Pty) Ltd	1 representative attended and signed a receipt of CD.
20	Nelesco	3 representatives attended and signed a receipt of CD.
21	Surtees	1 representative attended and signed a receipt of CD.
22	Swifambo / Siyaya	4 representatives attended and signed a receipt of CD.
23	Patentes Talgo S.L	3 representatives attended and signed a receipt of CD.
24	TRE - Transnet Engineering	1 representative attended and signed a receipt of CD.
25	UCW	1 representative attended and didn't sign a receipt of CD.
26	Vidistep	1 representative attended and signed a receipt of CD.

- 5.5.14.3. According to the notes for compulsory briefing session, various TFR representatives from the SCS, Finance, Internal Audit and Capital Programs departments. Attended the briefing session. **(Annexure A35)**
- 5.5.14.4. We determined that the RFP, Procurement Policy (“PP”) and the PPM is not prescriptive on the completion and signing of an attendance register at the compulsory briefing session. The PP and the PPM further do not outline the role of Transnet Internal Audit (“TIA”) and when the briefing session certificate must be stamped and by whom.
- 5.5.14.5. We reviewed and compared the briefing attendance register with the tender document collection list and found that an additional six entities attended the briefing session. The said entities were not listed on the tender document collection list which required a non-refundable fee of R20 000.00. The advertisement clearly stated that *“Tenderers without a valid tender document in their possession will not be allowed to attend the compulsory clarification meeting”* The said entities were:

- 5.5.14.5.1. Global Railway Africa;
  - 5.5.14.5.2. Hlamalane Railways Korail Hyundai Rotem;
  - 5.5.14.5.3. PDNA & Associates;
  - 5.5.14.5.4. Siyazi (Pty) Ltd;
  - 5.5.14.5.5. UCW; and
  - 5.5.14.5.6. Vidistep.
- 5.5.14.6. It is not clear how the said entities gained entry into the briefing session as the advertisement and RFP clearly stated that only tenderers with receipts as proof of payment could attend the briefing session. Upon enquiring on the attendance of the tenderers reflected above, Mdletshe's response was that at the time of the tender, there were no effective controls in place to monitor the tenderers who attended the sessions without purchasing the tender documents. Mdletshe further indicated that the controls were improved during the 1064 tender, wherein the attendance list was prepared in advance based on confirmation of payment; having learnt lessons from this tender process.
- 5.5.14.7. In his response to our second draft report, Gama questioned the extent the above-mentioned non-paying six attendees had on the impact on the integrity of the tender process in that none of the bidders, successful or otherwise, were affected by their supposed attendance of the briefing session. Gama stated the following *"The Interim Report does not state to what extent, if any, the aforesaid has had a bearing or impact on the integrity of the tender process in that none of the bidders, successful or otherwise, were affected by the supposed attendance of the six further entities that have been noted to have attended the briefing session"*.
- 5.5.14.8. Gama fails to appreciate that the integrity of the process is always affected if conditions of the bid are not complied with. Gama further failed to appreciate that it was not about the impact on the integrity of the tender process only, but included compliance with Transnet's own procurement processes which cannot be said to be fair, reasonable, transparent, efficient and cost effective if they are not complied with.

#### **Submission by the bidders**

- 5.5.14.9. According to paragraph 3.3.3 of the 2009 PPM, divisions and/or ACs are responsible for the opening and receipt of all tenders issued by the Division. Depending on the structure and locations of Regional Offices and/or Regional Acquisition Councils, the CEO/AC may decide to delegate the closing of lower value tenders and quotations to

Regional Offices /Local Tender Committees provided that it complies with the minimum requirements as laid down in the Procedure Manual. (**Annexure A36**)

- 5.5.14.10. According to the RFP, proposals had to be submitted in duplicate including a copy on a compact disc.
- 5.5.14.11. We determined from the review of the tender submission register that all nine bidders submitted their tenders timeously on 17 April 2012 by 10:00 and complied with the submission requirements. (**Annexure A37**):
- 5.5.14.12. We determined that the 9 tenders complied with the submission requirements which required that they submit tenders in duplicate including a copy on a compact disc.
- 5.5.14.13. According to the TFR Tender Opening Form, the tenders were opened by Prudence Nkabinde (“Nkabinde”), Thuli Mathebula (“Mathebula”) Lolo Skhela (“Skhela”), Abdool Lutchka (“Lutchka”) from the Legal and Secretariat Department. We determined that Nkabinde, Assegai and Lutchka declared that they followed Transnet’s Tender Opening Process and further that the above information was true and correct.
- 5.5.14.14. We determined that during the opening of the tender documents, Assegai and Lutchka represented Governance and SCS within TFR respectively.
- 5.5.14.15. We further determined that the process followed in the opening of tenders in respect of tender HOAC-HO-7801 was in line with paragraph 3.3.3 of the 2009 PPM.

#### 5.5.15. **The responsiveness tests**

- 5.5.15.1. We determined from the High-Level SD/B-BBEE evaluation overview report that whilst conducting the administration responsiveness test, the CFET team determined that some tenderers did not submit returnable documents.
- 5.5.15.2. According to the High-Level SD/B-BBEE evaluation overview report, permission was obtained from the secretariat to issue clarification letters.
- 5.5.15.3. We determined that two tenderers did not submit returnable documents for technical (Annexures C) as hard or soft copies as required by the tender. (**Annexure A38**)

#### **CSR’s submission**

- 5.5.15.4. As reflected earlier in the report, CSR is one of the tenderers that submitted a bid in respect of tender HOAC-HO-7801.
- 5.5.15.5. We determined that during the submission of their tender in April 2012, CSR was an entity based in China and not registered in South Africa in terms of the South African

laws. As per annexure H of CSR's submission titled vendor application form, CSR indicated that if they become the preferred bidder they would set up a company in South Africa. (**Annexure 39**).

- 5.5.15.6. According to the RFP, all respondents including foreign companies were required to comply with the B-BBEE requirements. According to the RFP, failure to comply with the said B-BBEE requirements would result in a score of zero being allocated for B-BBEE.
- 5.5.15.7. In their response to our second draft report, CSR stated that *"As CRRC is a state owned enterprise, the process for getting an approval to register a foreign based company takes long time especially if the SOE is still going through a tendering phase (not yet awarded the tender). Therefore it was not practically possible to register a company before the closing date for the submission"*. In their request for extension of closing date for the tender, CSR did not raise the challenges experienced in respect of obtaining approval to register a foreign based company in South Africa.
- 5.5.15.8. The only reason provided by CSR for the request to extend the closing date was the New Year's holiday and the traditional Chinese spring festival holiday. Furthermore, CSR requested an extension of the closing date by at least one month and it would have been expected of them to have requested a longer period if they felt they needed an extended time to register a company in order to comply with the BEE requirements of the tender.

#### **E-LoCo Supply (Pty) Ltd**

- 5.5.15.9. Based on background searches conducted, we determined that on 18 July 2012, CSR registered a company in South Africa styled E-LoCo Supply (Pty) Ltd with registration number 2012/128051/07 ("E-LoCo"). It should be noted that CSR registered the entity after the closing date and before the award of the tender, despite having committed to registering a South African entity upon becoming the preferred bidder (**Annexure A40**).
- 5.5.15.10. On the closing date of the submissions i.e. 17 April 2012, CSR was not registered as a company in South Africa and therefore, could not submit the following required documentation:
- a. South African valid VAT and company registration certificates;
  - b. B-BBEE Accreditation Certificate and;
  - c. South African valid tax clearance certificate.

- 5.5.15.11. We noted that where the BEE and tax clearance certificate information was required in the vendor application form, CSR indicated that *“If CSR ZELC becomes the preferred bidder, it will set up company in South Africa”* (**Annexure A39**)
- 5.5.15.12. We requested the signed administration control sheet from Mdletshe in order to determine what was recorded thereon. The administration control sheet indicated that all the returnable documents were received from all the tenderers. We requested Mdletshe to provide us with copies of the returnable documents submitted by CSR. Mdletshe was unable to provide us with the said documentation. Mdletshe indicated that she requested the documents from Metrofile (where they were archived) but did not receive the relevant documents.
- 5.5.15.13. Upon us requesting Mdletshe to provide CSR’s B-BBEE certificate submitted for tender for the acquisition of 95 locomotives, she provided us with a BEE certificate submitted by CSR for the 1064 locomotives tender, a process which took place much later than the tender of the 95 locomotives under discussion. The said B-BBEE certificate was issued on 11 December 2012 with an expiry date of 21 August 2013. From the information on the B-BBEE certificate it is therefore apparent that even though it was valid for the period of the 1064 locomotives tender procurement, it was not submitted in support of the acquisition of the 95 locomotives (**Annexure A41**).
- 5.5.15.14. Without any evidence from Transnet or CSR to the contrary, it is clear that CSR failed to submit a B-BBEE certificate which was a returnable document. The impact of CSR’s failure to submit the B-BBEE certificate is discussed below.
- 5.5.15.15. We determined that on 18 October 2012 E-Loco changed its name to CRRC E-LoCo Supply (Pty) Ltd (*“CRRC E-LoCo”*). .
- 5.5.15.16. The RFP indicated the following *“CONTINUED VALIDITY OF RETURNABLE DOCUMENTS”* (**Annexure A42**):
- 5.5.15.16.1. *“The successful Respondents will be required to ensure that all returnable documents, including but not limited to its Tax Clearance Certificate and B-BBEE Accreditation Certificate, for the duration of any contract emanating from this RFP are valid.*
- 5.5.15.16.2. *A failure by the Respondent to present Transnet SOC Ltd with renewals of such documents/certificates as and when they become due, may, in addition to any other rights and remedies of Transnet SOC Ltd, result in the termination of the Supply Agreements.*

- 5.5.15.16.3. *Failure to furnish ALL returnable documents may lead to the disqualification.”*  
**(Annexure A30)**

### **The Evaluation Team**

- 5.5.15.17. Gama submitted a memorandum dated 20 April 2012, to Molefe requesting powers to:  
**(Annexure A43)**

- 5.5.15.17.1. Appoint the Cross Functional Team (“CFET”) from TFR, Group Corporate office and TIA;
- 5.5.15.17.2. Provide a periodic report to Molefe on each phase of the process and requested that Molefe approve the delegation which would allow Gama to oversee the process; and
- 5.5.15.17.3. Request the GCE to approve the attached delegation which would allow TFR CE to oversee the process.

- 5.5.15.18. From the said document it was indicated that:

- 5.5.15.18.1. The tender closed on 17 April 2012 and the team was to commence with evaluations on 23 April 2012;
- 5.5.15.18.2. The procurement team was busy with the responsiveness test and should be completed by 24 April 2012; and
- 5.5.15.18.3. The evaluations were scheduled to take place from 25 April 2012 to 31 May 2012, should no clarifications be required.

- 5.5.15.19. Molefe approved the following recommendations on 22 May 2012 in his capacity as GCE:

- 5.5.15.19.1. Delegate the power to Gama to appoint a CFET from TFR, Group Corporate Office and TIA:
- 5.5.15.19.2. Gama provides a periodic report to the GCE on each phase of the process; and
- 5.5.15.19.3. The GCE approves the delegation which will allow Gama to oversee the process.

- 5.5.15.20. We determined that on 30 May 2012, Gama issued appointment letters to the following CFET members: **(Annexure A44)**

Name	Department	Date appointed	Date accepted
Abdool Lutchka	SCS	30 May 2012	6 June 2012
Benny Steyn	Technical	30 May 2012	Not signed
Dave Hansen	Technology Management	30 May 2012	30 May 2012
Devendran Govender	Traction Technology	30 May 2012	20 June 2012
Edith Mufamadi	Capital Projects	30 May 2012	20 June 2012
Elvis Tshivhilinge	Technology Management	30 May 2012	20 June 2012
Frikkie Harris	Capital Projects	30 May 2012	15 June 2012
Gerhard Breedt (name written in ink Devendran Govender scratched)	Technology Management	30 May 2012	25 June 2012
Graham Paverd	Technology Management	30 May 2012	Not signed
Hendrik Fourie (name written in ink. Trevor Downward scratched)	Technology Management	30 May 2012	30 May 2012
Henk Kruger	TRE	30 May 2012	Not signed
Itumeleng Fanampe	Traction Technology	30 May 2012	30 May 2012
Jan van Tonder	Configuration Management	30 May 2012	20 June 2012



Name	Department	Date appointed	Date accepted
Joel Mathonsi (name written in ink. Vincent Malale scratched)	Capital Program	30 May 2012	20 June 2012
John Kannemeyer	Technology Management	30 May 2012	Not signed
Keith de Vos (name written in ink. Shaun Taylor scratched)	Technology Management	30 May 2012	30 May 2012, 20 June 2012 scratched and initialled.
Kenneth Diedricks	Legal	30 May 2012	6 June 2012, May scratched
Lassen Govender	Group Strategic Sourcing	30 May 2012	Not signed
Lindiwe Mdletshe	SCS	30 May 2012	30 May 2012
Londiwe Shabalala	SCS	30 May 2012	6 June 2012
Luwig Borchard	Technical	30 May 2012	Not signed
Mesham Sivnaraim	Technology Management	30 May 2012	Not signed
Nick Breytenbach	Capital Program	30 May 2012	30 May 2012
Nkululeko Gobhozi	Information, Communication & Technology Management	30 May 2012	Not signed
Nomusa Kumalo	Capital Projects	30 May 2012	20 June 2012
Phil du Plessis	Traction Technology	30 May 2012	20 June 2012

Name	Department	Date appointed	Date accepted
(Name written in ink, Eugene Rossouw scratched)			
Robert Frohling	Technology Management	30 May 2012	20 June 2012
Sanjiv Sewpaul	TRE	30 May 2012	Not signed
Sara Assegai	SCS	30 May 2012	30 May 2012
Seloke Fabiao	Traction Technology	30 May 2012	30 June 2012
Shawn Phillips	Risk Finance, Insurance & Risk information Services	30 May 2012	Not signed
Thabiso Motsamai (Name written in ink, Shawn Phillips scratched)	Capital Programme, Operational Readiness	30 May 2012	20 June 2012
Thato Morake	Capital Program	30 May 2012	20 June 2012
Trevor Downward	Capital Program	30 May 2012	20 June 2012
Vilvalingum Nair	Capital Program	30 May 2012	Not signed
Vincent Malale	Technology Management	30 May 2012	20 June 2012
Wesley van Heerden	SCS	30 May 2012	8 June 2012
Wiehen le Roux (Name written in ink, Thato Morake scratched)	Technology Management	30 May 2012	25 June 2012

Name	Department	Date appointed	Date accepted
Willem Kuys	Capital Program	30 May 2012	Not signed
Willie Coetzee	Technology Management	30 May 2012	Not signed
Winfried Mors	Traction Technology	30 May 2012	20 June 2012

- 5.5.15.21. The appointment letters of the CFET team members were issued on 30 May 2012, which was the date after the team commenced with the evaluation process on 9 May 2012. This is evident from copies of SD evaluations minutes dated 9, 10 and 24 May 2012. (**Annexure A45**)
- 5.5.15.22. According to Gama’s response to our second draft report, he indicated that the appointment letters of the CFET team were issued to members as early as 8 September 2011. We were not provided with the appointment letters of the CFET team dated 8 September 2011. We find this strange as the RFP was only advertised on 6 December 2012 and his motivation for the appointment of the CFET team was dates 20 September 2012. The appointment letters provided to us by Mdletshe were the ones issued by Gama on 30 May 2012 , after approval of the appointment.
- 5.5.15.23. We determined that 13 of the 45 CFET members did not sign the appointment letters which were issued by Gama on 30 May 2012. We further determined that of the 13 CFET members that did not sign their acceptance letters, Nair and Bochard did not participate in any of the three stages of the CFET evaluation processes for the acquisition of the 95 locomotives.
- 5.5.15.24. During our interview with Gama after the submission of second draft report, he indicated that Molefe only approved the appointment of the CFET team on 22 May 2012 and that he could not have acted prior to approval.
- 5.5.15.25. We determined from Gama’s response to the draft report that he did not mention Molefe’s late approval of the appointment of the CFET on 22 May 2012, but rather referred to appointment letters issued by Yogen Naidoo on 8 September 2011, prior to the advertisement of this tender. It is unclear to us why Gama requested Molefe to approve the appointment of the CEFT team, if the letters were already issued by Yogen Naidoo and the CEFT had already commenced with the evaluation.
- 5.5.15.26. The Transnet 2009 PPM and 2009 Procurement policies are silent on the late appointment of the evaluation team. Good governance practise would dictate that the

CFET should not have commenced with evaluation until appointed to do so. The said formal appointment would also assist Transnet Management in taking action against any CFET member where their conduct is not consistent with the requirements of the company’s procurement processes.

5.5.15.27. The CFET members whose appointment letters were issued after commencement of the evaluation process did not include the CFET finance members. We requested the CFET (Finance) members’ appointment letters, however the said appointment letters were not provided to us as at date of this report.

**5.5.16. Stage 1 - SD and B-BBEE Evaluation of RFP: HOAC-HO-7801-**

5.5.16.1. Based on documentation reviewed, we determined that the Supplier Development (“SD”) and Broad-Based Black Economic Empowerment (“B-BBEE”) was evaluated and scored during stage one of the evaluation process. The evaluation team comprised of SCS members referred to as the CFET (SCS) (**Annexure A46**).

5.5.16.2. According to the RFP, it was envisaged that an overall minimum threshold of 60% for stage one evaluation criteria had to be achieved or exceeded for a Respondent’s proposal to progress to stage 2 (Technical Capabilities).

5.5.16.3. The main purpose of the SD requirement as per the RFP was to build local suppliers who are competitive through building capability and capacity.

5.5.16.4. As indicated earlier in the report, we determined that nine tenderers submitted tenders in respect of tender RPF: HOAC- HO-7801.

5.5.16.5. We requested the final evaluation reports of all three stages of the evaluation process and were provided with the B-BBEE evaluation report only for stage one and the final evaluation reports for stages two and three.

5.5.16.6. We determined that on 3 May 2012, the CFET (SCS) team reported on the B-BBEE evaluations which were conducted on nine (9) tenderers. (**Annexure A47**)

5.5.16.7. According to the BBBEE evaluation report, points were allocated as follows:

No	Name of Bidder	Points scored (SD/BBBEE)
1	Alstom	7
2	Bombardier	8
3	CRCC-CNR-Global	0

No	Name of Bidder	Points scored (SD/BBBEE)
4	CSR	0
5	Muki	0
6	Nelesco	0
7	Saturn	7
8	Siemens	7
9	Surtees	2

- 5.5.16.8. We determined that CRCC-CNR-Global, CSR, Muki and Nelesco scored 0 points for B-BBEE.
- 5.5.16.9. According to the 2009 PP, *“respondents must furnish proof of their B-BBEE status to Transnet. Failure to do so will result in a score of zero being allocated for B-BBEE”*. (**Annexure A48**)
- 5.5.16.10. We further determined that CRCC-CNR-Global and CSR were the only two international entities which scored 0 points for B-BBEE.
- 5.5.16.11. Mdletshe did not provide us with the final stage one evaluation report despite our numerous occasions. Mdletshe however provided us with a document titled *“High-Level SD/B-BBEE evaluation overview report”*. We determined that Mdletshe forwarded the said report to Charles Sadone of Ernst & Young (“EY”), (Internal Audit) on 18 September 2012 as an attachment. The said documentation is reflected as a final report of stage one of the evaluation process.
- 5.5.16.12. According to this High-level report, the first scoring which included BBBEE and (FRC, referred to as Option 1, the nine suppliers’ scores were as follows: (**Annexure A49**)

Name	BBBEE Effective Weight 6%	FRC Effective Weight 10%	Specific to 3.1. to 3.9 Effective Weight 48%	Total SD Weight 60%	Total score
Siemens	4.20%	0.30%	33.50%	38.00%	63%

<b>Name</b>	<b>BBBEE Effective Weight 6%</b>	<b>FRC Effective Weight 10%</b>	<b>Specific to 3.1. to 3.9 Effective Weight 48%</b>	<b>Total SD Weight 60%</b>	<b>Total score</b>
Bombardier	4.80%	0.27%	36.76%	<b>41.83%</b>	<b>70%</b>
Saturn	4.2%	.27%	26.17%	<b>30.64%</b>	<b>51%</b>
CRCC-CNR-Global	0.00%	0.06%	23.89%	<b>23.95%</b>	<b>40%</b>
CSR	0.00%	0.78%	33.11%	<b>33.89%</b>	<b>56%</b>
Nelesco	0.00%	1.11%	33.66%	<b>34.77%</b>	<b>58%</b>
Alstom	4.20%	0.54%	27.07%	<b>31.81%</b>	<b>53%</b>
SSMM	3.00%	1.02%	33.15%	<b>37.17%</b>	<b>62%</b>
Surtees	1.20%	0.27%	2.40%	<b>3.87%</b>	<b>6%</b>

- 5.5.16.13. According to the results above, Siemens (63%), Bombardier (70%) and the SSMM Consortium (62%) were the only entities that scored the required minimum threshold of 60%.
- 5.5.16.14. We noted that Muki was not reflected in the high level report above. According to the B-BBEE report, Muki was one of the entities that scored 0 points for B-BBEE. We further noted that SSMM was not reflected in the B-BBEE evaluation; report however according to the high level report, SSMM was the only entity that scored the required minimum threshold of 60%.
- 5.5.16.15. We determined that Nelesco, a local entity, submitted a B-BBEE certificate that was not SANAS/IRBA accredited, therefore scoring zero.
- 5.5.16.16. We further determined that as at submission of their tender, CSR was a foreign registered company. CSR committed to a joint venture with a yet to be determined local B-BBEE company whose details were not submitted as at time of submission of their bid.

5.5.16.17. We determined that instead of proceeding to stage 2 of the evaluation process, Transnet introduced what they called Option 2 which subsequently removed B-BBEE requirement as one of the conditions for stage 1.

5.5.16.18. We discuss below, the process followed in the in the amendment of the conditions of the bid.

#### **Request for amendment of the conditions of the bid**

5.5.16.19. We determined that on 8 June 2012, Gama and Jiyane signed a memorandum dated 6 June 2012 on recommendation by the CFET (SD) members (**Annexure A50**). The purpose of this memorandum was to:

5.5.16.19.1. Provide an update to the GCE on the progress on the tender evaluation process, as indicated in the memorandum to the GCE dated 20 April 2012;

5.5.16.19.2. Request the GCE to approve the short listing on the tenderers that have met the SD threshold of 60%; and

5.5.16.19.3. Approve the issuing of letters to the unsuccessful tenderers that did not meet the SD threshold for stag 1 of the evaluation process.

5.5.16.20. According to the memorandum, during the stage 1 evaluation process, it emerged that there was a local supplier with an invalid B-BBEE certificate (not rated by SANAS accredited verification agency or an IRBA registered auditor) and foreign supplier who did not have a local office, it then followed that this methodology (if it included the B-BBEE certificate and FRC) would have been unfair to both the local supplier and the foreign suppliers. In light the above the CFET (SD) proposed two options for stage 1 evaluation

5.5.16.21. According to the memorandum referred to above, Option 1 entailed the process originally envisaged in the RFP, i.e. evaluating SD, B-BBEE, and FRC altogether. This would have resulted in CSR and Nelesco being eliminated from the stage 1 process.

5.5.16.22. Option 2 entailed evaluating only SD and excluding B-BBEE and FRC in stage 1 and evaluating B-BBEE and FRC only in stage 3.

5.5.16.23. We determined that the CFET (SD) members recommended Option 2 as an alternative; however the CFET (SD) members also indicated that this recommendation entailed the following risks:

- 5.5.16.23.1. Should any of the tenderers challenge the process and request a review, Transnet may be perceived to have evaluated differently from the RFP, thereby allowing two (2) more tenderers to stage 2 & 3; and
- 5.5.16.23.2. Should TFR exercises Option 1, the other tenderers could claim that a literal interpretation of the RFP criteria is contrary to the stated spirit of SD
- 5.5.16.24. The CFET (SCS) team however was off the opinion that this risk (Option 2) risk is would be mitigated by the fact that all the tenderers were subjected to the evaluation criteria.
- 5.5.16.25. The CFET (SD) team was of the opinion that the criteria was applied consistently and no tenderers were prejudiced based on their location as all the tenderers were evaluated based on what they could deliver in line with the SD evaluation.
- 5.5.16.26. In their recommendation to Molefe, Gama and Jiyane recommended option 2 on the basis that option 1 would mean that foreign tenderers who did not have local representation were prejudiced and scored zero on B-BBEE. They further indicated that option 1 *"...did not support the B-BBEE code of good practise clause which allows for such foreign companies, if registered locally as (start-up enterprises) to be deemed to have B-BBEE contributor status of level four (4) contributor in the first year of operation."*
- 5.5.16.27. The notion that foreign companies were prejudiced cannot be substantiated in that Nelesco, a South African company, scored 0 points on B-BBEE. We determined that the recommendation by Gama and Jiyane to Molefe to amend the evaluation criteria to exclude BBBEE, the request was approved by Molefe on 8 June 2012.
- 5.5.16.28. We determined that after the conditions were changed to remove B-BBEE requirement, CSR scored overall 69% percentage (after removal of B-BBEE and FRC), above the minimum threshold of 60%, and thus proceeded to the stage 2 of the evaluation process.
- 5.5.16.29. The amendment resulted in CSR and Nelesco proceeding to stage 2 of the evaluation process.
- 5.5.16.30. Based on the reasons advanced for the decision to exclude the B-BBEE condition from the stage 1 process, as reflected above, we determined that CSR was the only foreign entity that benefited from the said decision.
- 5.5.16.31. We determined from available documentation and Gama's response to our second draft report that the amendment to exclude B-BBEE and FRC in stage 1 of the



evaluation process and to include this criteria in stage 3 was approved by the BADC on 21 August 2012 (**Annexure A51**) and the Transnet Board on 29 August 2012 (**Annexure 52**).

5.5.16.32. The removal of the B BEE condition shows that Transnet did not do proper market analysis before the tender was advertised, because such a condition would not have been prescribed in the first place.

5.5.16.33. Molefe, Gama and Jiyane, by excluding B-BBEE from stage 1 of the evaluation process, did not comply with the B-BBEE statement which was reflected in bold in the advertisement and read as follows: *“preference would be given to B-BBEE companies in terms of Transnet’s B-BBEE policy”*.

#### 5.5.17. **Stage 2 - Technical Evaluation of RFP: HOAC-HO-7801**

5.5.17.1. According to the Technical Report dated 10 July 2012, we determined that stage 2 (technical evaluation) was conducted (**Annexure A53**). The following entities were assessed in Stage 2:

5.5.17.1.1. Siemens;

5.5.17.1.2. Bombardier;

5.5.17.1.3. CSR Zhuozhou;

5.5.17.1.4. Nelesco 85; and

5.5.17.1.5. SSMM Consortium (“SSMM”).

5.5.17.2. We determined that Nelesco and SSMM were not evaluated, as the CFET (SCS) was of the view that it was not possible to evaluate the two bidders as there were no documents submitted. The committee therefore agreed to disqualify Nelesco and SSMM.

5.5.17.3. We determined that Annexure C contained the technical specifications and drawings required as part of the submission.

5.5.17.4. We determined that Nelesco indicated in their list of returnable documents that the technical specification drawings (Annexure C) were submitted as a soft copy in their bid document; but were however disqualified for not submitting the said document (**Annexure A54**). We however could not determine if Nelesco indeed submitted Annexure C as the said annexure was not provided to us during the course of investigation.

- 5.5.17.5. From available documentation, we determined that Saturn completed Section 10, Technical Specifications & Drawings in their submissions. We further determined that Saturn did not indicate in their responsiveness page whether they included the drawings in their submission. (**Annexure A55**)
- 5.5.17.6. We determined that Saturn objected to being disqualified and their objection is discussed below.
- 5.5.17.7. We determined that CSR completed Section 10, Technical Specifications & Drawings with their submissions and commented on the responsiveness page as to whether they have included the drawings. (**Annexure A56**)
- 5.5.17.8. Based on the memorandum dated 12 July 2012, we determined that prior to conducting technical evaluation, the SCS team conducted the “responsiveness test” on the respondents’ technical submission (**Annexure A57**).
- 5.5.17.9. We further determined that Nelesco and SSMM Consortium were disqualified based on “non-responsive” technical submission. The SCS team proceeded with the technical evaluation of the three remaining respondents, Siemens, Bombardier and CSR.
- 5.5.17.10. We determined that the CFET(T) conducted technical evaluation on the shortlisted service providers as follows: (**Annexure A53**)
- 5.5.17.11. The following table reflects the tenderers’ level of compliance in terms of the electrical sections of the technical evaluation:

Section Description	Sections Weight	Max Score	SIEMENS		BOMBARDIER		CSR ZHUZHOU	
			Score	%	Score	%	Score	%
Electrical Sections	33.0%	7600	6145	84.4 %	6972	91.7%	7148	94.1%

- 5.5.17.12. The following table reflects the tenderers’ level of compliance in terms of the mechanical and performance sections of the technical evaluation:

Section Description	Sections Weight	Max Score	SIEMENS		BOMBAR DIER		CSR ZHUZHOU	
			Score	%	Score	%	Score	%
Mechanical and Performance Sections	67.0%	15424	14740	95.6%	15247	98.9%	15304	99.2%

5.5.17.13. According to the evaluation report reviewed, the following is the CFET’s general impression of the tenderers.

- 5.5.17.13.1. Siemens offered a locomotive that complied with the minimum tractive effort specification, but the braking effort offered was the weakest offer of the three tenderers. There were risks identified with the electrical clearance compliance requirements which required roof and machine room equipment modification.
- 5.5.17.13.2. Bombardier offered a locomotive that was slightly stronger than the Siemens locomotive and the supporting documentation provided were well detailed information that improved Transnet’s ability to perform the technical evaluation.
- 5.5.17.13.3. CSR offered a slightly more powerful electric rated locomotive and compliance with most provisions – some corrections to information submitted were received during clarification requests.
- 5.5.17.13.4. According to the evaluation report, the following risks were identified:
- 5.5.17.13.5. Siemens locomotives did not comply with the electrical clearance specifications. The redesign of the roof and machine room equipment does not comply with the technical requirements;
- 5.5.17.13.6. Bombardier locomotives: No risks were identified with respect to their locomotives; and
- 5.5.17.13.7. CSR locomotives: Potential challenges with long development period for control system software were identified.
- 5.5.17.13.8. The final score as per the CFET (T) was as follows:

	Max Score	SIEMENS		BOMBARDIER		CSR ZHUZHOU	
		Score	%	Score	%	Score	%
Total	23024	21155	91.9%	22219	96.5%	22452	97.5%

5.5.17.14. According to paragraph 29.2 of the RFP, “an overall minimum threshold of 80% for Stage Two (Technical Capabilities) evaluation criteria must be met or exceeded for a Respondent’s proposal to progress to Stage Three (Price)”. We determined that all three tenderers met the minimum threshold of 80%.

5.5.17.15. We determined that on 10 July 2012, CFET (T) team recommended Bombardier as the preferred bidder even though CSR scored marginally higher (**Annexure A53**). According to the evaluation report, CFET (T) was of the opinion that Bombardier offered the lowest risk to Transnet based on its detailed supporting evidence.

5.5.17.16. The technical evaluations report was signed off by Frikkie Harris (“Harris”) and a second unknown person on 10 July 2012. We could only identify Harris’s name from the signature as they did not provide names. We were not presented with the list of members who represented the CFET (T) team.

**5.5.18. Stage 3 - B\_BBEE and FRC Evaluation**

5.5.18.1. We determined that Jiyane sent a memorandum to Gama dated 12 July 2012 requesting that Gama approves the shortlisting of tenderers that had met the technical threshold of 80%. Jiyane further requested Gama to approve the issuing of the letters to tenderers who did not meet the technical threshold for stage 2 of the evaluation process (**Annexure A57**).

5.5.18.2. According to the memorandum, the following entities had been shortlisted to proceed to stage 3 of the evaluation process:

5.5.18.2.1. Siemens;

5.5.18.2.2. Bombardier; and

5.5.18.2.3. CSR.

5.5.18.3. We further determined that Gama approved Jiyane’s memorandum on 13 July 2012.

5.5.18.4. We were not provided with the report for the stage 3 evaluation process; however we were presented with the memorandum dated 8 August 2012, with a summary of the results of the stage 3 evaluation process, as follows (**Annexure A58**):

Final Evaluation	Weighted target	Siemens	Bombardier	CSR
B-BBEE Scorecard	20%	14%	16%	16%
SD Scorecard	20%	13.96%	15.32%	13.8%
Price	60%	26.20%	28.38%	46.60%
<b>Total Score</b>	<b>100%</b>	<b>54.16%</b>	<b>59.70%</b>	<b>76.40%</b>

- 5.5.18.5. As reflected in the table above, the FRC evaluation was not conducted during the stage 3 process.
- 5.5.18.6. According to table above, CSR scored 16 per cent for B-BBEE in stage 3 of the evaluation process. As indicated earlier in the report, CSR had initially scored zero for B-BBEE in stage of the evaluation process as they did not possess a B-BBEE certificate. This initial score of zero allocated to CSR, resulted in the amendment of the evaluation process, as recommended by Jiyane and Gama.
- 5.5.18.7. In a memorandum dated 8 June 2012, Jiyane and Gama stated that according to the B-BBEE Codes of Practice, foreign companies, if registered locally as (start-up enterprises) would be deemed to have B-BBEE contributor status of level four (4) in the first year of operation.
- 5.5.18.8. Based on background searches conducted, we determined that CRRC E-Loco (CSR) was registered on 18 July 2012 and is currently listed as in business (**Annexure A59**).
- 5.5.18.9. The entity had eight (8) registered directors (as per the databases used for the purposes of this investigation). As pointed out in the table below, three (3) directors have since left the company / resigned:

Name	Status	Appointment date	Resignation date
Polisa, Matseliso Hyacinth	Active	09 June 2016	Still Active
Seabi, Suzan Mapineng	Active	09 June 2016	Still Active
She, Yongjun	Active	18 July 2012	Still Active

Name	Status	Appointment date	Resignation date
Wang, Pan	Active	18 July 2012	Still Active
Zhang, Liqiang	Active	19 January 2016	Still Active
Malebye, Morongwe	Resigned	18 November 2014	09 June 2016
Mohapelo, Lietsiso	Resigned	18 July 2012	09 June 2016
Zhang, Minyu	Resigned	18 November 2014	19 January 2016

5.5.18.10. At the time of CSR’s registration the tender evaluation had commenced and not concluded. The registration of CSR resulted in the entity being allocated 16% for B-BBEE scorecard.

5.5.18.11. The amendment of the evaluation of the evaluation to move B-BBEE from stage 1 to stage 3 provided CSR an opportunity to register a South African company which was subsequently awarded points for B-BBEE.

5.5.18.12. In their response to our second draft report, CSR indicated that **(Annexure A19)** – *“Before the submission date, CRRC had already identified, evaluated and selected the BBBEE partners. The ownership and management structures were already finalized with shareholders agreements and terms and conditions agreed on; Due to CRRC not yet registered a company in South Africa for reasons stated above, BBBEE certificate could not be issued; Therefore CRRC could only submit information related to the ownership and management structures and made a commitment to register the company and submit all relevant documents (including BBBEE certificate) if they become preferred bidders; The non-availability of the documents as listed above was not categorically stated as a disqualifying criteria. It was clearly stated as a scoring item; Immediately after CRRC was informed about their status as a preferred bidder, CRRC E-LoCo Supply (Pty) Ltd was registered and all relevant documents, not limited to Valid VAT and Company Registration Certificates, B-BBEE Certificate and Tax Clearance Certificate, were submitted [our emphasis] and have since been kept up to date and submitted as and when required.”;*

5.5.18.13. Contrary to CSR’s response above, we determined that CRRC E-LoCo (CSR) was registered on 18 July 2012, before the conclusion of the evaluation process and

confirmation of their status as the preferred bidder, which was only announced on 18 September 2012. If their version of the events above is correct, that would mean that CSR was informed of their status as the preferred bidder before the evaluation process was concluded.

5.5.18.14. We further determined that on 8 August 2012, Transnet conducted the financial evaluation. It is apparent that when CSR registered their South African entity (CRRC E-Loco), the evaluation process was not concluded.

### **Financial Evaluation of the tender –Stage 3**

5.5.18.15. We determined that the CFET (F) conducted the financial evaluation of the tender, based on the report dated 8 August 2012 (**Annexure A60**)

5.5.18.16. We determined that all the CFET (F) members signed their declaration of interest as required by CFET (SCS) before the commencement of the evaluations. We further determined that no CFET (F) member declared any interest in the short-listed bidders or declared any conflict of interest.

5.5.18.17. According to the evaluation report, the TIA was present at evaluation sessions as requested by SCS to ensure good corporate governance. In this instance, Ernst and Young (SA) (“EY”) was the outsourced service provider of the Internal Audit function at Transnet, for the acquisition of the 95 locomotives.

### **Methodology of scoring**

5.5.18.18. We determined that the scoring of points was completed using the set predetermined criteria and weightings for each section of the financial evaluation.

5.5.18.19. Based on documentation reviewed, the process for scoring and evaluating the short-listed bidders was done jointly by all members of the CFET (F) in the presence of SCS and TIA represented by EY.

5.5.18.20. All results submitted were based on consensus agreement amongst all the CFET (F) team members.

### **Pricing Methodology**

5.5.18.21. We determined from documentation reviewed that Laher, the Executive Manager: Finance was the key official in the development of the evaluation model and the RFP requirements, in conjunction with SCS. We further determined that Laher outlined certain key elements, processes, procedures and methodology of scoring to the CFET (F) team....

5.5.18.22. According to the RFP, bidders were requested to submit a price including hedging and a price excluding hedging

5.5.18.23. According to the evaluation report, the tenderers submitted the following pricing schedules:

5.5.18.23.1. Bombardier provided detailed prices including and excluding hedging costs in their bid submission;

5.5.18.23.2. Siemens provided a price including hedging costs; and

5.5.18.23.3. CSR provided only an estimate of possible hedging costs that may be incurred.

5.5.18.24. We determined that Siemens and CSR failed to submit the pricing schedule as required by the RFP.

5.5.18.25. We further determined from the evaluation report that the committed dates for the completion of the 95 locomotives by the three shortlisted bidders were as follows:

Supplier	Completion date
CSR	October 2014
Bombardier	September 2015
Siemens	March 2017

5.5.18.26. The overall Financial Evaluation Summary as per Scenario 1 was as follows:

	Financial	Siemens	Bombardier	CSR
1	Price	7.20%	7.20%	18.00%
2	Total Cost of Ownership	3.60%	18.00%	7.2%
3	Delivery schedule	0.00%	0.00%	3.60%
4	Payment terms	3.60%	4.80%	6.00%



	<b>Financial</b>	<b>Siemens</b>	<b>Bombardier</b>	<b>CSR</b>
5	RFP & Contractual Compliance	2.40%	3.60%	6.00%
6	Warrantees & Guarantees	2.20%	2.20%	2.20%
7	Financial stability	1.80%	1.58%	1.80%
8	Other	0.00	0.00%	0.00%
	<b>TOTAL SCORE</b>	<b>20.80%</b>	<b>37.38%</b>	<b>44.80%</b>

**Scenario two**

5.5.18.27. The reason for this assumption was due to the following:

- 5.5.18.27.1. Maintenance and intervention costs;
- 5.5.18.27.2. Variations in cost estimates; and
- 5.5.18.27.3. Energy costs.

5.5.18.28. The overall results were as follows:

	<b>Financial</b>	<b>Siemens</b>	<b>Bombardier</b>	<b>CSR</b>
1	Price	7.20%	7.20%	18.00%
2	Total Cost of Ownership	9.00%	9.00%	9.00%
3	Delivery schedule	0.00%	0.00%	3.60%
4	Payment terms	3.60%	4.80%	6.00%
5	RFP & Contractual	2.40%	3.60%	6.00%

	Financial	Siemens	Bombardier	CSR
	Compliance			
6	Warrantees & Guarantees	2.20%	2.20%	2.20%
7	Financial stability	1.80%	1.58%	1.80%
8	Other	0.00	0.00%	0.00%
	<b>TOTAL SCORE</b>	<b>26.20%</b>	<b>28.38%</b>	<b>46.60%</b>

**Pricing Evaluation**

- 5.5.18.29. According to the CFET (F) report, we determined that Siemens’ set up costs were the lowest. We further determined that Siemens submitted detailed escalation clauses. Siemens did not include any capital spares cost into their total acquisition cost.
- 5.5.18.30. According to CFET (F), CSR did not provide an accurate estimate of possible hedging costs. CSR estimated that the hedging costs could be 2% of the contract value which was significantly lower than the other short-listed bidders.
- 5.5.18.31. The CFET (F) report did not comment on the pricing schedule submitted by Bombardier.
- 5.5.18.32. As per the two scenarios outlined above, the CFET (F) team awarded CSR the highest score.

**Submission to BADC in respect of request for approval to negotiate an award, tender, for 95 electric locomotives**

- 5.5.18.33. We determined that on 8 August 2012, Singh, wrote to the Chairperson of the BADC, on the following: (**Annexure A58**)
  - 5.5.18.33.1. Updating the BADC on the progress of the tender evaluation process;
  - 5.5.18.33.2. Requesting the BADC to support the recommendation to negotiate with the highest scoring tenderer, CSR, with an option to negotiate with the second highest tenderer, Bombardier if negotiations with CSR are not successful and to award the business for the supply of 95 locomotives;

- 5.5.18.33.3. Approve the submission of the recommendation for award of business to the BOD;
  - 5.5.18.33.4. Support the delegation of authority to the GCE for the award of business against this tender; and
  - 5.5.18.33.5. Request the BADC to ratify the changes made to stage 1 (BBBEE and FRC) and stage 3 (FRC) in the evaluation methodology.
- 5.5.18.34. We determined that Singh signed the recommendation on 8 August 2012 but the section where the BADC Chairman had to sign supporting the recommendation was not signed.
- 5.5.18.35. According to the Procurement Policy, the Acquisition Committee (BADC) is responsible for the approval of the shortlist for post-tender negotiation as well as approval of the final award of business.
- 5.5.18.36. We were not presented with the changes made to stage 3 (FRC) of the evaluation methodology and thus could not determine what changes were effected and the impact thereof. During our consultation with Mdletshe, she indicated that Transnet did not inform the tenderers of these changes, as it was not necessary to inform the tenderers or consult with them, since the requirements did not change from what was stated in the RFP.
- 5.5.18.37. As indicated earlier in the report, on 8 June 2012, Molefe approved a recommendation by Gama and Jiyane to amend stage 1 of the evaluation process to exclude BBBEE and FRC. The approval of the amendment by Molefe resulted in CSR and Nelesco proceeding to stage 2 of the evaluation process, despite failing to score the minimum threshold of 60%.

#### **Approval and awarding the business to CSR**

- 5.5.18.38. We determined that on 4 September 2012, Gama requested approval from Molefe to award the tender to CSR for the supply of 95 electric locomotives. The recommended price for the tender was a fixed contract price of R2.7 billion excluding VAT and including hedging and escalation costs. (**Annexure A61**)
- 5.5.18.39. We further determined that Gama informed Molefe that on 29 August 2012, the Board had delegated Molefe with its authority to award business against the tender on behalf of Transnet, with a maximum tender value of R2.5 billion excluding hedging costs.

- 5.5.18.40. We reviewed the approved fixed cost price awarded to CSR and determined that the average quoted cost price per locomotive, was R28 860 000 excluding VAT for the 95 locomotives.
- 5.5.18.41. We determined that Harris recommended the removal of the Vacuum Brake System (VOP01) on each locomotive. (**Annexure A62**)
- 5.5.18.42. We further determined that the recommendation by Harris reduced the locomotive price from R28 860 000.00 to R28 282 000.00 excluding VAT. (**Annexure A63**) This translated to a total of about R2.6 billion, which was above the maximum tender value.
- 5.5.18.43. During our consultation with Callard, he indicated that the price negotiated for the acquisition of the 95 locomotives with CSR was a good price.
- 5.5.18.44. According to a letter dated 5 September 2012 from Molefe to Pan, Transnet notified CSR of its appointment as the preferred bidder. In the letter, CSR was requested to sign the agreement by no later than close of business on 6 September 2012 (**Annexure A64**).
- 5.5.18.45. We determined that the letter referred to above was signed by Pan on 6 September 2012 as CSR's acceptance of the appointment. The letter outlined the following salient points:
- 5.5.18.45.1. CSR agrees in full with all of the terms and conditions which are set out in the draft Supply Agreement which was issued with the RFP;
  - 5.5.18.45.2. Transnet will revise and update the execution versions of the Transaction Agreements on the information provided by CSR in its tender response, as this will provide the basis on which CSR will supply the locomotives and perform its related obligations;
  - 5.5.18.45.3. The purchase price is fixed at a firm price in Rand (ZAR) and that it will not increase due to hedging costs or for any other reason.
  - 5.5.18.45.4. CSR takes the sole risk and responsibility (including the costs) for all foreign exchange risk and movements in foreign exchange rates, both prior and after the signing of the Transaction Agreement. Transnet will have no liability (financial or other) to CSR or any other person under this Transaction Agreement.
  - 5.5.18.45.5. CSR agrees to appoint TRE as its sub-contractor to manufacture the locomotives and to use the production line and manufacturing facilities of TRE;

- 5.5.18.45.6. CSR will use and contract through its South African incorporated joint venture company.
- 5.5.18.45.7. With regards to CSR's manufacturer warranties, CSR agrees:
  - 5.5.18.45.7.1. To extend the warranty period of 24 months to 30 months (or 400 000kms) whichever occurs first;
  - 5.5.18.45.7.2. To grant an option to Transnet to extend the warranty period by a further year or two at a cost of 3% of the locomotive purchase price for each year of extension.
  - 5.5.18.45.7.3. The commitments made by CSR in relation to Supplier Development and the Enhanced Recognition Indicators were to be annexures to and form part of the Transaction Agreements.
- 5.5.18.46. CSR was also informed that should they fail to act in accordance with the requirements set out above at any time, Transnet reserves the right to revoke their appointment as the preferred bidder.
- 5.5.18.47. The appointment of CSR as Preferred Bidder and the conclusion of the Transaction Agreement with CSR was subject to the following:
  - 5.5.18.47.1. CSR must provide Transnet with its CSR South African entity shareholders agreement and other constitutional documents of the contract, including its BBBEE accreditation;
  - 5.5.18.47.2. A letter from CSR confirming its decision not to appoint external legal counsel to assist with contract negotiations;
  - 5.5.18.47.3. Transnet must receive each of the documents and the fulfilment of each of the conditions listed in clause 2 of the Supply Agreement;
  - 5.5.18.47.4. Transnet must receive a provisional master spares list in accordance with the requirements of the Supply Agreement; and
  - 5.5.18.47.5. The execution of the Transaction Agreements.
- 5.5.18.48. CSR, after execution of the Transaction Agreement, must prepare, in consultation with Transnet, a detailed SD Plan, a Climate Change Strategy Plan and an Enhanced Recognition Development Document. This must be done in accordance with and within the time period specified in the Supply Agreement.

- 5.5.18.49. During our consultation with Mdletshe, she stated to us that CSR was an international entity and that the RFP did make provision for international entities to register their South African entities once they have been informed that they are to be awarded the tender.
- 5.5.18.50. We could not find this clause in the RFP and requested Mdletshe to refer us to the said clause. We also requested that Mdletshe provide us with the Administration Capturing Responsive list (the signed spreadsheet which notes all the documentation received from tenderers) for CSR on the 95 locomotives. . We were not provided with the requested documents.
- 5.5.18.51. CSR unduly benefitted from the amendment of the evaluation criteria in that they were initially scored zero from the evaluation process and later reinstated following a recommendation by Gama and Jiyane and approval by Molefe.
- 5.5.18.52. The undue benefit resulted in CSR being awarded the tender for the supply of 95 electric locomotives for a contract price of R2.7 billion.

#### **CFET team visit to CSR Site in China**

- 5.5.18.53. We determined that Gama submitted a memorandum dated 17 September 2012 to Molefe requesting approval for the CFET team to visit the CSR China plant from 14 to 19 October 2012. **(Annexure A65)**
- 5.5.18.54. According to the memorandum, the travel request was submitted at short notice due to the high priority of the 95 electric locomotives tender. The memorandum indicated that during the contract negotiations which were completed on 31 August 2012, the cross functional evaluation concluded that a visit to CSR (preferred bidder) facilities and discussion with their specialist engineers was critical to ensuring that a “fit for purpose” locomotive is procured.
- 5.5.18.55. It is our understanding that the CFET could not adhere to the 30 day notice period for International travel. According to the memorandum, the purpose of the proposed business trip travel was to visit CSR’s manufacturing and maintenance facilities to engage in discussions with CSR Engineers to clarify Transnet’s specification requirements, to view the suitability of locomotives already produced for China Railways and evaluate the manufacturing/ maintenance facilities.

5.5.18.56. According to the memorandum, Gama requested the trip for the following reasons:

5.5.18.56.1. *“In order to mitigate this risk, the CFET team believes that a clarification session with all CSR Engineers in China will prevent a misunderstanding which could jeopardise the project build and delivery.*

5.5.18.56.2. *It is important that this trip takes place before the contract is effective with CSR as at that time the upfront payment will be due”.*

5.5.18.57. The TFR delegation to China included the following individuals:

Name	Position
Jiyane	General Manager SCS
Diedricks	Legal
Mdletshe	SCS
Frohling	Technology Management
Mulder	Technology Management
Mors	Technology Management
Harris	Capital Program
Nair	Capital program
Govender	Technology Management
Downward	Capital Program
Tshivhilinge	Technology Management
Rossouw	Capital Program
Pita	Group Chief SCS

5.5.18.58. We determined that the financial implications were quoted as follows by TFR’s travel agent.

	Per Person	Group
Airfare	R69 380	R832 560
Airport tax	R3 523	R 42 276
Allowance - USD129x4=USD516	R4 430	R 53 160
Hotel	R5 357	R 64 284
Visa	R500	R 6 000
Transport	R2 580	R 30 960
<b>Total</b>	<b>R85 770</b>	<b>R1 029 240</b>

- 5.5.18.59. According to the memorandum, the costs would be borne by the loco warrant R1Q2 and capitalised to the project.
- 5.5.18.60. Section 11 of the RFP titled additional notes indicates that Transnet reserves the right to undertake post-tender negotiations with selected Respondents or any number of short-listed Respondents and may wish to visit the Respondent’s place of manufacture (works) during this process.
- 5.5.18.61. CFET should have conducted the site visit for clarification with CSR Engineers prior to the award of the tender to CSR, as the assessment of suitability of the locomotives and the manufacturing /maintenance facilities was the main objective. Conducting this assessment after the award seems to defeat the purposes thereof.

**Locomotive Supply Agreement - 95 locomotives**

- 5.5.18.62. We determined that on 22 October 2012, Transnet and CSR entered into a Locomotive Supply Agreement (“LSA”) relating to the design, manufacture, testing and supply of up to 95 new class 20E locomotives (**Annexure A66**).

**Delivery of the 95 locomotives**

- 5.5.18.63. We determined that there was a delivery schedule as per the LSA for the delivery of the 95 locomotives. The said delivery schedule was to commence from April 2014 and continue over a period of 11 months.
- 5.5.18.64. The delivery schedule reflected that the first locomotive was scheduled for delivery in April 2014 and the last locomotives were scheduled for delivery in February 2015.



5.5.18.65. We determined that Harris issued Acceptance Certificates for each of the locomotives delivered. (**Annexures A67**)

5.5.18.66. According to the content of the Acceptance Certificates,

5.5.18.66.1. The engineer is satisfied that the requirements under the LSA for the issuing of an Acceptance Certificate in relation to the Locomotive, referred to, being Class 20E, has been complied with;

5.5.18.66.2. The certificate does not denote, nor is it evidence of, fitness for service and operation of the locomotive at any time following the issuing of this certificate; and

5.5.18.66.3. CSR commits to attend to the class 20E Issues List currently at version 1.8.3 dated 8 April 2014 and that CSR's After Sales must attend to all outstanding locomotive technical issues including shortages, inspection of locomotive equipment etc.

5.5.18.67. We determined that the first few acceptance certificates had the following note added to the certificate (**Annexure A67**):

*"7. Note that although Transnet has issued the acceptance certificate for the above locomotive, the locomotive can only be released for active service once the RSR has submitted a "No Objection" notification to Transnet. The RSR date of No Objection will be considered the actual "In-Service" date and then the warranty period will start as per the supply agreement.*

*As discussed with CSR E-Loco on various occasions, the cost to delete the Vacuum System (VOP01) per locomotive must be reduced from the locomotive price and depicted on each invoice. The costs to delete the vacuum system must still be submitted to TFR for approval"*

5.5.18.68. We further determined as indicated earlier in the report that the above-mentioned note reduced the unit price of the locomotives from R28 860 000 to R28 282 000 (excluding VAT).

5.5.18.69. The 95 locomotives were delivered as follows: (**Annexure A68**)

5.5.18.70. We determined that the first locomotive was delivered on 16 April 2014 and the last on 19 June 2015.

5.5.18.71. We further determined according to the submission titled, *"Approval for Transnet Freight Rail to proceed with the acquisition of 95 electric locomotives (43 diesel and 95 electric*

*locomotives*)”, dated 21 August 2011 that the proposed project commencement date was February / March 2012 and the project completion date was March 2014.

- 5.5.18.72. When we compared the delivery of the locomotives to the approval plan above, we determined that the first locomotive was delivered two years and one month later on 16 April 2014 and the final locomotive was delivered on 19 June 2015, one year and two months later.
- 5.5.18.73. According to the contract, the handover of the first locomotives were scheduled for March 2014 and the final delivery scheduled for January 2015. (Annexure A60).
- 5.5.18.74. We determined that the first locomotives were handed over on 16 April 2014 a month after schedule and the final handover on 19 June 2015, five months later. We were provided with the GPS sprint reports in respect of the 95 Locomotives delivered by CSR (**Annexure A69**).
- 5.5.18.75. We determined that 91 locomotives appear on the GPS sprint report. During our consultation with TFR’s Cliffy Ramages (“Ramage”), he indicated that three locomotives, namely locomotives 18, 22 and 26 were taken for repairs on 30 December 2017 at Koedoespoort.
- 5.5.18.76. According to Ramages, the repair process meant that the locomotives would not appear on the GPS sprint report. Ramages informed us that one locomotive was wrecked when it was involved in an accident in Flonker, Eastern Cape.

#### **Objection to the evaluation process**

- 5.5.18.77. We determined from documentation reviewed that the Managing Director of Saturn, Hideyuki Uchiyama (“Uchiyama”) sent a letter dated 27 June 2012 to Gama and Jiyane expressing his dissatisfaction with the way in which the “Weighted Maximum Score”, “Effective Weight” and “Your Bid” percentages were defined and calculated. (**Annexure A70**)
- 5.5.18.78. As indicated above SSMM (“Joint Venture between Saturn and Mitsui”) was one of the nine tenderers that submitted a tender in respect of Tender HOAC-HO-7801. SSMM proceeded to stage 2 of the evaluation process; however, we determined from the memorandum dated 12 July 2012 that SSMM was disqualified based on non-responsive technical submission.
- 5.5.18.79. Based on documentation reviewed, Uchiyama referred to a letter dated 19 June 2012 titled (“the Decision”) which Saturn received on 21 June 2012 from TFR communicating their disqualification.

- 5.5.18.80. We determined that Uchiyama requested a complete written answer on Saturn's queries by 29 June 2012 and an urgent meeting to discuss Saturn's matters by 2 July 2012. We were informed by Jiyane that Transnet responded to Saturn in writing and met with them on 2 July 2012.
- 5.5.18.81. Saturn's letter to Transnet stated the following: *"We have already established a rolling stock manufacturing capability in South Africa for the execution of 19E and 15 E Locomotives supply contracts with technology transfer, skills development, local procurement, job creation and so on. We have planned to utilize such already established capacity for GFB locomotive manufacturing to achieve early delivery and price competitiveness and to retain the employment of the skilled labour with good moral from local community and even to improve the efficiency and the skill levels of each labour. We expect you to evaluate such aspects appropriately and fairly as we believe our SD plan for GFB tender is compliant to your request"*
- 5.5.18.82. We sent questions to Mitsui to establish whether Transnet responded to their queries relation to the evaluation process. At the time of submission of our final report, the responses from Mitsui had not been received.

#### **CSR BEE Partner**

- 5.5.18.83. As indicated earlier in the report, it was a requirement of tender RFP HOAC-HO-7801 that each bidder should have a BEE partner. We determined that CSR appointed a company styled Matsete Basadi Consortium (Pty) Ltd ("Matsete Basadi") as their BEE partner (**Annexure A71**). Matsete Basadi is a 30% shareholder in CSR's South African entity, E-Loco, with CSR ZELC (SA) holding the balance of 70% of the issued share capital.
- 5.5.18.84. We determined that at some point during the tendering process, CSR's South African subsidiary, E-Loco, changed its name to CRRC E-Loco Supply (Pty) Ltd ("CRRC E-Logo"). CRRC had director representatives from both CSR and Matsete Industrial Services, the latter being CSR's BEE partner.
- 5.5.18.85. We determined that Matsete Basadi comprises of the following shareholders) -
- 5.5.18.85.1. Basadi Dirang;
  - 5.5.18.85.2. Matsete Industrial Services
  - 5.5.18.85.3. Matla A Sechaba Community Trust ("Matla A Sechaba"); and
  - 5.5.18.85.4. Adoword.
- 5.5.18.86. Based on background searches conducted, we determined that Matsete Consortium with registration number 2012/139552/07 was registered on 2 August 2012 and is

currently listed as in business. (**Annexure A71**). The company was registered after the tender was closed and before the tender was awarded. We further determined that at the time that CSR submitted the tender, Matsete Consortium had not been registered.

5.5.18.87. We further determined that upon incorporation Matsete Consortium had nine (9) directors (*as per the databases used for the purposes of this investigation*). As reflected in the table below, five (5) directors have since resigned from the company:

Name	Status	Appointment date	Resignation date
Nkodima, Khibi Noel	Active	07 October 2015	Still Active
Polisa, Matseliso Hyacinth	Active	07 October 2015	Still Active
Seabi, Suzan Mapineng	Active	07 October 2015	Still Active
Tladi, Harry Rapodi	Active	07 October 2015	Still Active
Letlape, Mokuti Isaac	Resigned	02 August 2012	15 October 2012
Malebye, Morongwe	Resigned	02 August 2012	28 October 2015
Mohapeloa, Lietsiso	Resigned	02 August 2012	28 September 2015
Moraka, Mmatlou Elizabeth	Resigned	02 August 2012	15 October 2012
Mxhakaza, Juliet Noxolo	Resigned	07 October 2015	27 August 2017

5.5.18.88. A search on the directors reflected common links relating to some of the directors as follows:

Director	Other business interests / Links
Matseliso Hyacinth Polisa	<ul style="list-style-type: none"> <li>• Basadi Dirang Systems Development (Pty) Ltd (“Basadi”).</li> <li>• CRRC E-Loco.</li> </ul>
Suzan Mapineng Seabi	<ul style="list-style-type: none"> <li>• Basadi and</li> <li>• CRRC E-Loco</li> </ul>
Sehapa Moeletsi	<ul style="list-style-type: none"> <li>• CRRC E-Loco</li> </ul>

Director	Other business interests / Links
	<ul style="list-style-type: none"> <li>• Matsete Industrial</li> </ul>
Mokuti Isaac Letlape	<ul style="list-style-type: none"> <li>• Matsete Industrial</li> </ul>
Morongwe Malebye	<ul style="list-style-type: none"> <li>• Basadi</li> </ul>
Lietsiso Mohapelo	<ul style="list-style-type: none"> <li>• CRRC E-Loco</li> <li>• Matsete Industrial.</li> </ul>
Mmatlou Elizabeth Moraka	<ul style="list-style-type: none"> <li>• Matsete Industrial</li> </ul>
Juliet Noxolo Mxhakaza	<ul style="list-style-type: none"> <li>• Basadi</li> </ul>

### CRRC

5.5.18.89. Based on background searches conducted, we determined that CRRC had eight (8) registered directors (*as per the databases used for the purposes of this investigation*). As pointed out in the table below, three (3) directors have since left the company / resigned (**Annexure A59**).

Name	Status	Appointment date	Resignation date
Polisa, Matseliso Hyacinth	Active	09 June 2016	Still Active
Seabi, Suzan Mapineng	Active	09 June 2016	Still Active
She, Yongjun	Active	18 July 2012	Still Active
Wang, Pan	Active	18 July 2012	Still Active
Zhang, Liqiang	Active	19 January 2016	Still Active
Malebye, Morongwe	Resigned	18 November 2014	09 June 2016
Mohapelo, Lietsiso	Resigned	18 July 2012	09 June 2016
Zhang, Minyu	Resigned	18 November 2014	19 January 2016

5.5.18.90. We determined that at the time of submission of this final report, Matsete Basadi had 3 director representatives in CRRC E-Loco.

## **The conclusion and signing of the LSA between Transnet and CSR – 22 October 2012**

- 5.5.18.91. We understand that in 22 October 2012, Transnet and CSR held a signing ceremony where the contract for Transnet's acquisition of the 95 locomotives was concluded.
- 5.5.18.92. From documentation available as well as media coverage of the said event, we determined that inter alia the following individuals were present:
- 5.5.18.92.1. Malusi Gigaba as Minister of DPE and representing the Shareholder;
  - 5.5.18.92.2. Brian Molefe as GCE Transnet;
  - 5.5.18.92.3. Li Zhixhuan as president of China South Railways
- 5.5.18.93. The then DPE Minister, Gigaba was quoted by the media as having stated that *"Transnet was to implement a locomotive fleet procurement "of unprecedented scale in South Africa's history" worth about R35 billion for 1 064 locomotives in the next quarter"*
- 5.5.18.94. We noted that Molefe and Li Zhixhuan signed the contract on 22 October 2012 on behalf of Transnet and CSR respectively.
- 5.5.18.95. We determined that Minister Gigaba signed the contract as a witness on behalf of Transnet.
- 5.5.18.96. It is our understanding that the conclusion of the contract is an operational function and Transnet's responsibility. It is therefore not clear in what capacity Minister Gigaba witnessed the LSA between Transnet and CSR.
- 5.5.18.97. On 4 October 2018, we learnt that Minister Gigaba had approached the offices of the State Attorney and they subsequently sent us a letter requesting various documents. Subsequent to the provision of the said documents, we eventually received Minister Gigaba's responses on 31 October 2018.
- 5.5.18.98. In his written response to our questions relating to the witnessing of the contract referred to above, Minister Gigaba stated that *"I do not specifically recall signing the LSA in question, but having perused the signature page of the document I confirm that it contains my signature as a witness. I recall having attended a signing ceremony at Summer Place, Johannesburg, if my memory serves me well, this could have been when I signed as a witness the document in question."* (**Annexure A66a**)
- 5.5.18.99. Minister Gigaba further indicated that *"a perusal of the signature page of the LSA indicates that it does not contain reference to "the Minister of DPE". It simply contains my name (which is not in my hand writing) and my signature"*.

5.5.18.100.As reflected above, Minister attended the said signing ceremony in his capacity as the Minister of Public Enterprises. It is therefore worrying that the Minister would proclaim that he signed the LSA in his personal capacity and not as Minister of Public Enterprises when he had just given a speech relating to the Transnet’s acquisition of the 1064 locomotives. He surely did not give the said speech of the 1064 locomotive as an ordinary citizen.

5.5.18.101.Minister Gigaba’s pronouncement of the R35 billion investment compromised the procurement process and reduced competition by potential bidders

5.5.18.102.By signing the LSA as a witness, Minister Gigaba compromised himself and the DPE in that should there have been legal issues relating to the said LSA, he would have been cited as one of the responsible parties to the agreement.

**Payments made to CSR in respect of the 95 locomotives acquisition**

5.5.18.103.As indicated above, subsequent to the award of tender HOAC-HO-7801, Transnet entered into a LSA with CSR E-LoCo on 22 October 2012, for the design, manufacture, test and supply of 95 new Class 20E locomotives.

5.5.18.104.CSR E-LoCo was required to design, manufacture, test and supply of all 95 new Class 20E locomotives at a fixed and firm contract price of R28,282,000.00 (VAT exclusive) per locomotive.

5.5.18.105.The contract price for the locomotives was expressed in South African Rand (ZAR) in accordance with the signed LSA. The contract price was to be paid in stage payments once certain milestone had been reached. The contract payment terms were as follows (**Annexure A66**):

Date / Stage	Payment %
The effective date	10% of the contract price of such locomotive (“the advance payment”)
The date of issue of an acceptance certificate for a locomotive	80% of the contract price of such locomotive
The mission reliability retention release date	5% of the contract price of such locomotive
The fleet availability retention release date	5% of the contract price of such locomotive

5.5.18.106. In terms of paragraph 3.1 of Schedule 1 to the LSA, Transnet was to make payments to CSR for the tools and test equipment on the date and in the amount set in the invoice, once the delivery of such tools and test equipment had been accepted by Transnet and confirmed by signature on acceptance certificate.

### **Advance payments**

5.5.18.107. There was advance payment of R268 679 000 (VAT exclusive) made to CSR on 21 December 2012 in relation to this contract as per the payment terms outlined in point 5.2 as per the table above. (**Annexure A72**)

5.5.18.108. According to paragraph 1.2.1 of Schedule 1 to the LSA, Transnet agreed to pay CSR 10% of the contract price in advance. This means Transnet agreed to pay CSR prior to delivery of any locomotives.

5.5.18.109. We determined that the advance payment of R268 679 000.00 (VAT exclusive) was correctly calculated as it constitute 10% of the contract price of R2 686 790 000.00.

5.5.18.110. CSR provided us with responses to our second draft report relating to *inter alia* advance payments. According to CSR's response "*Advance Payment Risk: All advance payments made to CRRC were protected by Advance Payment Bonds taken by CRRC in favour of Transnet and equal to the advance payment made to CRRC by Transnet. Therefore there was no risk associated with non-delivery of locomotives. This arrangement is commonly used in projects of this nature*". We however noted that CSR did not attach the said bonds to their response.

5.5.18.111. The advance payment made to CSR was in accordance with the agreement between the entity and Transnet and as such we did not find any irregularity with the said advance payment. This was envisaged in the Bid document, albeit not the specific rates.

### **Delay Penalties for late deliveries**

5.5.18.112. Clause 9.1.1 of the LSA states that "*if the Acceptance of a Locomotive occurs after its Scheduled Acceptance Date (a Delay), the Contractor shall (subject to Clause 9.2 (Delay Penalty Cap), pay a Delay Penalty to the Company in respect of that Delayed Locomotive at the Applicable Rate*".

5.5.18.113. According to clause 9.1.2 "*Delay Penalties shall be calculated and accrue at the Applicable Rate of the Contract Price per Delayed Locomotive per month (with proportional adjustment for any partial month), on a day-to-day basis from the applicable Delayed Locomotive Penalty Date until (and inclusive of):*

d. *The Acceptance Date of that Delayed Locomotive; or if earlier*



e. *This Agreement being terminated pursuant to clause 21.1.5 (Contractor Default)”*

5.5.18.114. Clause 9.4 of the LSA provides that the Delay Penalties or Delay Penalty Credit (as applicable) shall accrue at the following Applicable Rates:

5.5.18.114.1. For the first 30 (thirty) days of any Delay or Advance Delivery, a rate of 0.5 (one half) per cent in accordance with clause 9.1.2

5.5.18.114.2. For any period of Delay or Advance Delivery greater than 30 days but less than or equal to 60 days, a rate of 1 (one) per cent in accordance with Clause 9.1.2;

5.5.18.114.3. For any period of Delay or Advance Delivery greater than 60 days but less than or equal to 90 days, a rate of 1.5 (one and half) per cent in accordance with Clause 9.1.2; and

5.5.18.114.4. For any period of Delay of Advance Delivery greater than 90 days, a rate of 2 (two) per cent in accordance with Clause 9.1.2.

5.5.18.115. As per the Schedule of delivery attached to the LSA, CSR was supposed to deliver 95 Locomotives (**Annexure A66**) as follows:

5.5.18.116. We determined that the last day of delivery of Locomotives was 31 January 2018 in accordance with Schedule 2 to the LSA.

5.5.18.117. We further determined, based on the review of the Locomotive Acceptance Certificates, that CSR did not meet the deadline of February 2015 for the delivery of all 95 locomotives. In February 2015, CSR had only delivered 10 locomotives on time. This meant that Transnet was entitled to levy non-compliance penalty on 85 remaining Locomotives that were not delivered on time as per LSA.

5.5.18.118. We determined that CSR made late deliveries of 85 locomotives compared to delivery schedule as per LSA (**Annexure A68**).

5.5.18.119. We determined that there was a delivery schedule as per the contract for the delivery of the 95 locomotives. The said delivery schedule was to take place from April 2014 over a period of 11 months. The delivery schedule reflected that CSR was to deliver the first locomotive in March 2014 and the last locomotive was scheduled for delivery in January 2015.

5.5.18.120. We determined from a letter dated 19 June 2015 that the last locomotive for the 95 locomotives tender was accepted by Transnet on 17 June 2015.

- 5.5.18.121. Based on the analysis of schedule 2 of the LSA, we determined that there is a period of one month between the handover and acceptance dates. We therefore conclude that the handover of the last locomotive should have been in May 2015 as the said last locomotive was accepted in June 2015.
- 5.5.18.122. In his responses to our second draft report, Gama indicated that *“the final delivery date of 19 June 2015 that has been cited in paragraph 5.5.31.5 is also incorrect as the final locomotive was delivered on 19 March 2015 at the Transnet Engineering Plant and the acceptance ceremony by the Presidency of South Africa was widely reported in the media.”* As indicated above the date of 19 June 2015 was the acceptance letter date for the last locomotive. In the said letter it is clearly indicated that the last locomotive was accepted on 17 June 2015.
- 5.5.18.123. We determined from CSR’s responses that they referred to the delivery and acceptance dates as the same dates. We therefore stand by our finding that the last locomotive was accepted on 17 June 2015 and as such, should be considered as a late delivery.
- 5.5.18.124. Gama further pointed out that final delivery of 19 March 2015 was reasonably in line with what was anticipated by the schedule of delivery noted in the LSA which envisaged a final delivery date of January 2015. The said statement by Gama even though inaccurate can be viewed as acceptance that the delivery of some of the 95 locomotives was not as per the delivery schedule.
- 5.5.18.125. We determined that 85 locomotives were not delivered according to the delivery schedule. Transnet should have levied penalties to CSR for the said late deliveries in terms of clause 9 of the LSA. We conducted our own calculations in respect of penalties that should be levied on CSR for the late deliveries, however Transnet should appoint an independent expert to calculate actual penalties payable by CSR. **(Annexure 73)**
- 5.5.18.126. In their response to our second draft report, CSR admitted that there were late deliveries of some of the locomotives as per our findings. CSR however ascribed such late deliveries to *inter alia* challenges experienced in converting TE facility from maintenance into a manufacturing facility. CSR further explained that the contract signed with TE clearly states that *“should CSR incur penalties due to the sub-contractor’s inability to perform, the sub-contractor shall be liable for the penalties levied to CRRC”*.
- 5.5.18.127. CSR further indicated that it was their view that TE was liable to pay all the penalties related to the 2nd and 3rd batches of locomotives. CSR provided us with a Letter of Penalty from Jiyane dated 3 November 2014 as well as an Extract of Subcontract

Agreement between CSR and TE (**Annexure 73**). According to the letter, CSR was liable to pay Transnet delay penalty cost of R4 199 902.00.

5.5.18.128.CSR further indicated that based on the above explanation, all parties agreed with the proposal to address TE production challenges and catch-up plan as proposed in the steering committee meeting. CSR however did not attach the steering committee minutes to their response.

### TE Scope

5.5.18.129.We determined that on 13 June 2013, TE and CSR concluded a Subcontracting and sub-licensing agreement in respect of the TE Scope for the 95 locomotives. We further determined that TE was represented by F.J Potgieter.

5.5.18.130.According to paragraph 6.1 of the Subcontracting and sub-licensing agreement the scope of work for TE would be detailed in Schedule 1 (Programme Work Breakdown Schedule) of the agreement. We however noted that the scope of work was not included in schedule 1 as indicated in paragraph 6.1 of the Subcontracting and sub-licensing agreement.

### Invoices relating to TE scope

5.5.18.131.We were provided with the summary spreadsheet in respect of all the invoices issued by TE to CSR for the assembly of the 95 locomotives. We determined that TE invoiced CSR R313 100 00.00 for the assembly of the 95 locomotives. We further determined that TE invoiced CSR in three phases which are reflected in the table below:

Phase No	TE Scope per locomotive	No locomotives	Amount
Phase 1	R10 000.00	10 locomotives	R100 000.00
Phase 2	R2 200 000.00	15 locomotives	R33 000 000.00
Phase 3	R4 000 000.00	70 locomotives	R280 000 000.00
<b>TOTAL</b>			<b>R313 100 000.00</b>

## **CONCLUSIONS – 95 LOCOMOTIVES**

Based on our findings as contained in our report above, we conclude as follows:

### **Collection of tender documents by CSR**

5.5.18.132. Mdletshe emailed the tender documents to CSR before Transnet received the R20 000 in its bank account;

5.5.18.133. The RFP and the advertisement did not provide for tender documents to be e-mailed to bidders;

5.5.18.134. Mdletshe failed to comply with Transnet's procurement processes which required physical collection of the tender document;

5.5.18.135. Mdletshe misled the investigation team stating that she discussed CSR's request to sign the tender collection list on their behalf with Assegai and Erasmus, who both confirmed under oath that it was never discussed with them.

5.5.18.136. Mdletshe's conduct contravened paragraph 13, of the Code of ethics and conflict of interest, of the Transnet Procurement Policy which states that "Transnet insists on honesty, and integrity beyond reproach at all times.

### **Extension of the tender closing date**

5.5.18.137. Jiyane misrepresented facts by stating that CSR requested a two months extension when in truth and in fact, the company requested at least one month extension;

### **Compulsory briefing session**

5.5.18.138. Transnet officials who allowed six entities to attend the briefing session without paying the non-refundable fee of R20 000.00 compromised the integrity of the supply chain management process and undermined the terms of the tender which clearly stated that "*Tenderers without a valid tender document in their possession will not be allowed to attend the compulsory clarification meeting*".

### **Communication between Pan and Molefe**

5.5.18.139. CSR compromised the integrity of the procurement processes by communicating with Molefe during the bidding process;

5.5.18.140. Molefe's communication with Pan was sent to individuals who have links with the Guptas and companies associated with the Gupta family.

### **Appointment of CFET Team**

5.5.18.141. CFET commenced with the evaluation of the tender for the acquisition of the 95 locomotives prior to receiving appointment letters.

5.5.18.142. Declarations forms were signed by the finance members of the CEFT. We were not provided with information on the declarations by the other members of the CFET, i.e. supply chain and technical departments.

### **Amendment of the conditions of the bid**

5.5.18.143. CSR scored zero on B-BBEE evaluation and failed to score the minimum threshold of 60% in stage 1 of the evaluation process, when utilising the prescribed conditions in the bid document;

5.5.18.144. CSR scored 16% on B-BBEE evaluation and exceeded the minimum threshold of 60% in stage 1 of the evaluation process after the bid conditions were changed;

5.5.18.145. Gama, Jiyane, Molefe, BADC and Board members compromised the integrity of the procurement process and benefited CSR by changing the prescribed conditions after the bid closed.

5.5.18.146. The amendment of the prescribed conditions after the bid closed prejudiced other potential bidders who bought the bid documents and never submitted the bids

5.5.18.147. Molefe, Gama, Jiyane and the Board member's actions exposed Transnet to potential litigation and reputational risk, should other tenderers become aware of the irregular amendment of the evaluation criteria. This was also confirmed by Transnet in the memorandum dated 6 June 2012.

5.5.18.148. CSR and Nelesco unduly benefited from the amendment of the conditions prescribed in the bid document.

5.5.18.149. Gama, Jiyane, Molefe, the BADC and the Transnet Board members failed to act in the best interest of Transnet when they amended the conditions prescribed in the bid document.

5.5.18.150. Gama, Jiyane and Molefe contravened section 57(c) of the PFMA in that they failed to take effective and appropriate steps to prevent irregular expenditure and fruitless and wasteful expenditure.

5.5.18.151. Gama, Jiyane and Molefe may have received gratification from CSR or its associates for the role they played in the appointment of the entity for the supply of 95 locomotives.

5.5.18.152. The Board members contravened section 51(1)(a)(iii) of the PFMA in respect of its general responsibilities relating to ensuring appropriate procurement and provisioning systems that are fair, equitable; transparent, competitive, and cost effective.

5.5.18.153. Gama, Jiyane, Molefe, the BADC and the Transnet Board members contravened section 217(1) of the Constitution in that they failed to ensure that the procurement process was fair, equitable, transparent, competitive and cost effective.

5.5.18.154. The Board failed to comply with the provisions of section 76(3) of the Companies Act relating to the standard of conduct expected of them.

5.5.18.155. CSR was irregularly appointed in that it should have been disqualified for receiving bid documents unlawfully, communicating with Molefe, failing B-BBEE requirement and not submitting all returnable documents.

5.5.18.156. Company Registration Certificates, B-BBEE Certificate and Tax Clearance Certificate and other relevant documents were submitted after the tender closed.

#### **Witnessing of the LSA by Gigaba**

5.5.18.157. Minister Gigaba compromised the procurement process by signing the LSA between Transnet and CSR as a witness.

#### **Deliveries of the 95 locomotives**

5.5.18.158. TFR imposed a penalty of R4.1 million for the late delivery of locomotives as at September 2014.

5.5.18.159. CSR failed to deliver the locomotives on the specified timelines in line with the schedule contained in the LSA, as 85 locomotives were delivered outside of the agreed delivery schedule.

### **RECOMMENDATIONS**

Based on the conclusions as reflected above we recommend that Transnet Board consider the following against Transnet officials

#### **Institute disciplinary action against Mdletshe for the following:**

5.5.18.160. Failure to perform her duties diligently, and to the best of her ability in that she failed to advise CSR that they were required to physically collect the tender document as indicated in the advertisement.

5.5.18.161. Emailing the tender document to CSR without approval or authorisation.

5.5.18.162. Failure to ensure that the non-refundable amount of R20 000 was reflecting in TFR's bank account prior to sending the tender document.

5.5.18.163. Misleading the investigation team by stating that she discussed CSR's request to sign the tender collection list with Assegai and Erasmus, who both confirmed under oath that that was not the case.

5.5.18.164. For contravening paragraph 13, of the Code of ethics and conflict of interest, of the Transnet Procurement Policy by emailing the tender document to CSR without authorization and generally failing to act honestly, and with integrity beyond.

### **Other Officials**

5.5.18.165. Institute disciplinary actions against Jiyane for implementation of improper procurement process thereby compromising the integrity of the procurement process which resulted in CSR being appointed for the supply of 95 locomotives.

### **Transnet Board**

5.5.18.166. Consider civil recovery of penalties that should have been imposed on CSR for the late delivery of locomotives.

5.5.18.167. Report be provided to the DPCI to institute criminal investigations for possible receipt of gratification and contravention of section 34(1) of the Prevention and Combating of Corrupt Activities Act against the following:

5.5.18.167.1. Jiyane;

5.5.18.167.2. Mdletshe;

5.5.18.167.3. Gama;

5.5.18.167.4. Molefe;

5.5.18.167.5. Board members;

5.5.18.167.6. Gupta associates (individuals and companies); and

5.5.18.167.7. Pan.

5.5.18.168. Report be provided to the DPCI to institute criminal investigations against Transnet Board members for possible dereliction of their duties in terms section 76(3) of the Companies Act and section 86 of the PFMA for failing to act in the best interest of Transnet by ratifying and approving the amendment of the bid conditions resulting in the irregular appointment of CSR for the supply of 95 locomotives at a tender amount of R2.6 billion; and

## **Shareholder Minister**

5.5.18.169. Monitor the implementation of the recommendations and all the criminal cases opened with DPCI with the intention to hand any case file to Asset of Forfeiture Unit for recovery of any proceeds of crime.

5.5.18.170. Recommend that Cabinet restrict the officials who resigned before being disciplined from employment by an organ of state for a period of five years.

5.5.18.171. Recommend that Cabinet restrict the officials who resigned or dismissed for SCM related misconduct from doing business with any organ of state for a period of five years.

## **5.6. ACQUISITION OF 100 LOCOMOTIVES**

### **5.6.1. Background**

5.6.1.1. In April 2013 TFR embarked on a process to acquire 100 locomotives for use on Transnet's coal line. It is our understanding that the said process was to acquire the 100 locomotives through confinement.

5.6.1.2. We determined that a business case was prepared by the TFR locomotive team in respect of the procurement of 100 new 19E equivalent dual voltage locomotives for the coal export line. The author of the business case was Callard. (**Annexure B1**)

5.6.1.3. According to the business case, the acquisition of the 100 locomotives was based on the Transnet Replacement Programme.

5.6.1.4. We further determined that the purpose of the business case was reflected as follows:

5.6.1.4.1. Identifying the risk to TFR Market Demand Strategy volumes through insufficient traction power resulting from delay in the procurement of the 1064 locomotives;

5.6.1.4.2. The investment in, and procurement of 100 class 19E equivalent locomotives required for the coal export line in the amount of R3.8 billion excluding borrowing cost; and

5.6.1.4.3. The confinement and award of procurement for the 100 class 19E equivalent electric locomotives to Mitsui.

5.6.1.5. Pillay indicated that the following were reasons TFR wanted to confine to Mitsui for the 19E locomotives:

5.6.1.5.1. Mitsui already had a production line in South Africa;



- 5.6.1.5.2. Compatibility with the locomotives that were in operation;
- 5.6.1.5.3. Maintainability of the locomotives;
- 5.6.1.5.4. Maintenance practice plan was already in place for the existing 19E locomotives; and
- 5.6.1.5.5. There would be no training for the drivers as they were already trained on the 19E locomotives.
- 5.6.1.6. We determined that some of the reasons provided by Pillay were mentioned in the business case prepared by Callard.
- 5.6.1.7. According to the business case, in 2009 TFR entered into a contract with Mitsui for the procurement of 110 new 19E locomotives for the coal export line.
- 5.6.1.8. We determined that the acquisition of 110 locomotives from Mitsui was acquired through an open tender process. During our consultations with Matona, he stated that one of the reasons Sharma opposed the confinement of the 100 class 19E locomotives for the use on the coal line was that Transnet had already awarded various locomotives contracts to Mitsui, all through a confinement process. The assertion by Sharma was clearly not the case as the previous locomotives tender awarded to Mitsui for the 110 class 19E locomotives was through an open tender.
- 5.6.1.9. We further determined that TFR took delivery of the last of the 110 locomotives from Mitsui in August 2012.
- 5.6.1.10. According to the business case for the 100 class 19E locomotives, Mitsui's base price per locomotive was R 34.34 million (2013/2014-Yen 385m at Rand/Yen 0,09823). Furthermore, the business case indicated that the base price was based on 40% imported content subject to the Rand/Yen exchange rate and 60% local content for electric locomotives.
- 5.6.1.11. As discussed below, we determined that Mitsui's base price was in fact R31.88 million per locomotive and not R34.34 million. We further determined that the R34.34 million was Mitsui's price after Callard included other escalation costs.
- 5.6.1.12. Documentation reviewed reflected that Transnet previously purchased class 15E locomotives from Mitsui for use on the Iron Ore export line.
- 5.6.1.13. From Transnet's motivation for the procurement of the 200 19E locomotives, we determined the state owned entity was satisfied with the performance of both 19E and 15E locomotives previously purchased from Mitsui.

- 5.6.1.14. The 100 locomotives business case further reflected that TE indicated that the 19E and 15E locomotives procured through Mitsui performed well and proved to be both efficient and reliable.
- 5.6.1.15. In one of the communications we obtained from Molefe's emails, there was a letter from Mitsui dated March 2014. In the said letter, Mitsui enquired from Transnet about a proposal they submitted on 15 July 2013 for the provision of the 100 class 19E locomotives.
- 5.6.1.16. Flowing from Mitsui's submitted proposal, and on or about 30 August 2013, Transnet management proposed a confinement to BADC to award the acquisition of 100 locomotives to Mitsui at an ETC of R3, 8 billion. The said proposal was recommended by Gama, Pita, Mahomed, Singh and Molefe. We further determined that the proposal for the said confinement was rejected by the BADC on 21 October 2013. **(Annexure B2).**
- 5.6.1.17. The confinement process of 100 locomotives was motivated as urgent due to the delay in the procurement of the 1 064 locomotives.
- 5.6.1.18. On 21 January 2014, a new confinement was proposed to award the acquisition of 100 locomotives to CSR at an ETC of R3.8 billion. The R3.8 billion was the same amount proposed for the Mitsui confinement. Our findings are that the amount of R3.8 billion was based on a total of 112 locomotives at a cost of R34.34 million per locomotive. The said proposal was recommended by Singh and Molefe and submitted to BADC **(Annexure B3)** and the Transnet Board **(Annexure B4)** for approval on 24 January 2014.
- 5.6.1.19. The details in respect of the Mitsui and CSR proposals will be discussed below.
- 5.6.1.20. According to the PPM dated August 2012 **(Annexure B5)** and October 2013 **(Annexure B6)**, confinement is a procurement process restricted to one or a limited number of bidders.
- 5.6.2. **High Value Tenders ("HVT")**
- 5.6.2.1. According to paragraph 15.3 of the PPM 2013, *"the HVT process subjects all transactions falling within the high value tender thresholds to independent scrutiny and validation of all commercial, contractual, process and governance aspects of the bid process"*. We requested the HVT report in respect of the 100 locomotives confinement, however as at the date of the report, we were not provided with the said report.

5.6.3. **Motivation and approval of the acquisition of 100 locomotives**

5.6.3.1. **Initial proposal to CAPIC to confine to Mitsui**

5.6.3.2. We determined that the motivation for acquisition of the 100 locomotives started as far back as July 2013. We further determined that when the first motivation was submitted to CAPIC, it was stated that 112 electric locomotives were required for the coal line. The stated 112 electric locomotives were later reduced to 100 locomotives. (**Annexure B7**)

5.6.3.3. As stated above, the number of locomotives was reduced to 100 even though the total cost was left unchanged at a total of R3.8 billion for 112 locomotives.

5.6.3.4. During our consultation with Callard, he indicated that he was the co-author of the memorandum for the 112 electric locomotives mentioned above.

5.6.4. **Mitsui's proposal for additional 19E locomotives dated 15 July 2013**

5.6.4.1. After obtaining an email from Mitsui to Mkwanazi enquiring about their proposal for the provision of the 100 class 19E locomotives, we requested Transnet officials to provide us with the Mitsui proposal. After all Transnet officials failed to provide us with the Mitsui proposal, we contacted Mitsui and requested that they provide us with the proposal submitted to Transnet. From the said proposal we determined that Mitsui submitted their proposal dated 15 July 2013 for the supply 112 19E locomotives addressed to Rita Roper ("Roper") (**Annexure B8**). According to the proposal the unit price per locomotive was R31.88 million and the offer was valid until 31 October 2013.

5.6.4.2. The proposal indicated that the following jobs would be created and sustained through the procurement of the 100 class 19E locomotives tender:

5.6.4.2.1. 15 Skilled engineers; and

5.6.4.2.2. 391 Black employees.

5.6.4.3. We determined that the number of jobs envisaged by Mitsui (406 jobs) was similar to the number of jobs reflected in the memorandum recommending confinement to CSR (400 jobs). This is another indication of the cut and paste exercise done by Transnet officials in preparation for the confinement of the 100 class 19E locomotives through CSR.

5.6.4.4. We further determined that Mitsui sent a delivery schedule of 100 19E locomotives to Gama dated 27 November 2013 (**Annexure B9**). The proposed delivery schedule was for 100 19E locomotives in accordance with TFR's requirements.

- 5.6.4.5. According to their delivery schedule, the contract would be effective and enforced in December 2013. Mitsui would deliver the first locomotives in May 2014 and final delivery would be in March 2015.
- 5.6.4.6. The submission of the delivery schedule in November 2013 is an indication that Mitsui and TFR had negotiations which reduced the number of locomotives required from 112 to 100.
- 5.6.4.7. As indicated below, at the time that Mitsui submitted the delivery schedule Transnet had already taken a decision not to award the confinement to Mitsui. This is based on the fact that Molefe did not sign the memorandum dated 15 October 2013 seeking a confinement through Mitsui. Did Transnet request Mitsui to provide the proposal, designs and delivery schedule to later hand over to CSR? We did not find any evidence to this effect but wonder why Transnet requested the relevant information and documentation when the State Owned Company had already taken a decision not to confine through Mitsui.
- 5.6.4.8. From the Mitsui's July 2013 proposal, we determined that their ETC of the 100 19E locomotives was R3.188 billion (at R31.88 million per locomotive.) the said ETC included all costs. Mitsui indicated that there was not going to be any escalation costs except for material steel portion.
- 5.6.4.9. In their comments to our second draft report, CSR indicated that their base price was R28 million per locomotive, which equates to R2.8 billion for the 100 class 21E locomotives. Even though CSR contended that they were cheaper than Mitsui's base price, which CSR indicated was R34.34 million, their (CSR) final price per locomotive was R44 million all inclusive, compared to Mitsui's total of R38 million per Locomotive as presented to the Transnet BADC in July and September 2013.

**Memorandum dated 24 July 2013**

- 5.6.4.10. We determined that on 24 July 2013 an unsigned memorandum from Singh was addressed to the Transnet Executive Committee requesting CAPIC to recommend to Transnet Executive Committee, the following:
- (a) *Support the procurement of 112 electric locomotives required for the coal line for delivery by end 2016/17 in the amount of R3.8 billion (Excluding borrowing costs and exchange rate fluctuations ) with an option to increase to 160.*
  - (b) *Support confinement of the procurement to Mitsui & Co African Railway Solutions (Pty) Ltd ("MARS")*

- 5.6.4.11. Based on our calculations we determined that the total ETC of R3.8 billion was based on 112 locomotives at an estimated cost of R34.34 million per locomotive.
- 5.6.4.12. As discussed below, we noted that the number of locomotives was reduced to 100 without reducing the ETC of R3.8 billion which should have been reduced to R3.4 billion. (R34.34 X 100 locomotives = R3.4 billion)

**CAPIC of August 2013 and Memorandum confining to Mitsui**

- 5.6.4.13. During our consultation with Callard, he indicated that he presented the memorandum reflected above to CAPIC for the acquisition of 112 locomotives from Mitsui. According to Callard, CAPIC chaired by Molefe, requested that the motivation to confine to Mitsui be refined. Callard indicated that after the CAPIC of August 2013 and after the revised business case, CAPIC took a decision to confine to Mitsui.
- 5.6.4.14. We determined from a memorandum dated 30 August 2013 that, Gama, Pita, Mahomed, Singh and Molefe requested the BADC to recommend to the Board the following (**Annexure B2**):
- (a) *the investment in and procurement of 100 class 19E equivalent electric locomotives required for the coal export line in the amount of R3,8 billion; and*
  - (b) *the confinement and award of the procurement for the 100 class 19E equivalent electric locomotives to Mitsui.*
- 5.6.4.15. According to the memorandum, the governance processes were followed in developing and approving the business case, and in each case the queries and amendments were dealt with, as follows:
- (c) *The matter was tabled and recommended by Transnet Freight Rail Investment committee on 15 July 2013;*
  - (d) *The matter was tabled and recommended by Transnet Capital Investment Committee (CAPIC) on 19 August 2013; and*
  - (e) *The matter was tabled and recommended by Transnet EXCO on 21 August 2013.*
- 5.6.4.16. During our consultation with Callard, he indicated that he was the author of the memorandum dated 30 August 2013 for the acquisition of 100 locomotives through a confinement process to Mitsui.
- 5.6.4.17. Callard further indicated that the 100 locomotives were not part of the 1064 acquisition, but a separate acquisition intended to be deployed on the coal line. He

indicated that the reason the memorandum quoted the delay on the procurement of 1064 was that the procurement of 100 locomotives would assist in cascading certain locomotives to the General Freight Business (“GFB”) where the 1064 would be deployed.

- 5.6.4.18. Based on documentation, CAPIC should have reduced the ETC from R3.8 billion to R3.4 billion in line with the reduced number of locomotives from 112 to 100. This is based on the price per locomotive estimated at R34.34 million.

### **BADC of 27 September 2013**

- 5.6.4.19. We determined that a BADC meeting was held on 27 September 2013 (**Annexure B10**), The BADC of 27 September 2013 was intended to deliberate on the recommendation by CAPIC as signed by Molefe on 20 September 2013 to confine the purchase of the 100 locomotives from Mitsui. BADC of 27 September 2013 recommended that the Board should:

- 5.6.4.19.1. approve investment in and procurement of 100 electric locomotives required for the Coal Export Line estimated at R3.8 billion (excluding borrowing costs);
- 5.6.4.19.2. approve confinement and award of the procurement for the 100 electric locomotives to Mitsui; and
- 5.6.4.19.3. delegate authority to the GCE to sign and conclude all relevant documentation to give effect to the resolution on behalf of the company.

- 5.6.4.20. We determined that the following matters were raised during the BADC meeting:

- 5.6.4.20.1. Ms DLJ Tshepe (“Tshepe”) noted that the rules of confinement were not adhered to;
- 5.6.4.20.2. The submission did not indicate that there was compliance with all the company’s procurement policies;
- 5.6.4.20.3. Sharma, the Chairperson of the BACD was comfortable with the business case; however, he requested consideration of other alternatives to the proposed confinement;
- 5.6.4.20.4. Management conceded that the delays were foreseen as early as July 2012; however the magnitude of the challenges was unknown;
- 5.6.4.20.5. Tshepe recommended that management should focus on stating one rule that it complies with in terms of confinement and add supporting facts ;

- 5.6.4.20.6. The committee suggested amendments to the submission;
- 5.6.4.20.7. After a lengthy debate on the request for confinement, Sharma registered his dissent on the view of confinement being the only option for the company in light of prevailing circumstances and the submission tabled. He stated that the reasons were too subjective and the motivation was not convincing. According to Sharma management should have had an independent view on its reasons.
- 5.6.4.20.8. Furthermore, Sharma indicated that a subjective reason for confinement would affect competition.
- 5.6.4.20.9. Sharma later supported the confinement through CSR and did not raise that the confinement would affect competition.
- 5.6.4.20.10. The BADC agreed that the submission would be revised and resubmitted to the committee prior to it being tabled at the Board meeting of October 2013;
- 5.6.4.20.11. Sharma recorded his discomfort with the proposed confinement process as stated in the submission. Management was requested to effect the following:
- i. *“Reasons for 1064 to remain sacrosanct;*
  - ii. *State the bare minimum on the class 19E; and*
  - iii. *Confinement should state the suppliers that the company intends to confine to”.*
- 5.6.4.20.12. The BADC minutes of 27 September 2013 *inter alia* clearly reflect that the entity/supplier Management recommended Transnet to, confine to for the 100 class 19E locomotives was Mitsui. It therefore begs a question as to why Sharma in his submission requested Management to effect *inter alia* *“Confinement should state the suppliers that the company intends to confine to”* unless if Sharma was referring to a different document than the minutes of 27 September 2013.

5.6.5. **The revised memorandum dated 11 October 2013 to confine to Mitsui**

- 5.6.5.1. We determined that after the recommendation by CAPIC to BADC of 27 September 2013 to confine to Mitsui, BADC referred the matter back to CAPIC to be revised. The reasons for the BADC to request a revised submission are discussed above.

- 5.6.5.2. We determined that on 11 October 2013, Singh, Mahomedy, Pita and Gama signed a memorandum for submission to BADC for the approval of acquisition of 100 locomotives through a confinement to Mitsui (**Annexure B11**). We noted that the memorandum was dated 15 October 2013 although it was signed on 11 October 2013. We determined that Molefe did not sign the said memorandum.
- 5.6.5.3. We sent various questions to Molefe which included *inter alia* an enquiry as to his reasons for not signing the memorandum dated 15 October 2013. As at date of this report, we had not received Molefe's responses to our questions or his comments on our second draft report.
- 5.6.6. **Communication between Sharma and Tshediso Matona**
- 5.6.6.1. During the course of our investigation, we conducted media searches and determined that on 14 October 2013 just three days after Singh, Pita and Mohamedy signed a memorandum to confine the 100 19E locomotives through Mitsui, Sharma wrote a letter to Tshediso Matona ("Matona"), then DPE Director-General, titled "*Re procurement of 160 locomotives by way of confinement*" stating his dissatisfaction with the confinement of 160 locomotives (**Annexure B12**).
- 5.6.6.1.1. Sharma's letter to Matona *inter alia* sought the DG's intervention as Sharma felt that confinement through Mitsui should not be allowed.
- 5.6.6.1.2. Sharma further confirmed, in his response to our questions (**Annexure B13**) that he wrote the letter as a BADC Chairman, and further that he felt it prudent to get a perspective, i.e. a sounding board (**Annexure B14**).
- 5.6.6.1.3. Sharma further indicated that the reason he did not discuss the matter with the Chairman (Mkwanazi) was because he did not trust the Chairman to act in the best interest of Transnet, as he, Sharma, was aware of the Chairman's failure to protect the company on a number of issues, specifically in relation to the preferential treatment given to the Chairman's relative, Don Mkwanazi's company SA Shipyard. Sharma further alleged that a forensic report on such matter was concluded in June 2013, but Mkwanazi did not act on it.
- 5.6.6.1.4. It is not clear why Sharma did not report the allegations against Mkwanazi to DPCI in terms of Section 34(1) of the Prevention and Combating of Corrupt Activities Act.
- 5.6.6.1.5. We did not follow up on the allegations levelled against ME Mkwanazi by Sharma as they did not form part of our mandate.



- 5.6.6.1.6. From the Guptaleaks we determined that there was a letter dated 18 October 2013, the contents of which were purported to be Matona's response to Sharma's letter reflected above. The said letter reflected the same heading as the one Sharma sent to Matona i.e. *"Procurement of 160 locomotives by way of confinement (Annexure B15)"*. The contents of the letter reflected *inter alia* that *"After considering the contents of your letter, I am inclined to support your assessment. As the shareholder, we have appointed you and your colleagues to the Board of Transnet so that you may represent us and provide the necessary oversight and guidance to the SOC"* the letter further reflected that *"we do not readily support the use of confinement as a method of procurement and in this instance we would urge the BADC to not grant approval for this procurement with confinement. I appreciate you bringing this matter to our attention."*
- 5.6.6.1.7. In reply to a question we asked him about the author of the said document, Sharma could only state that Matona did not write the document. Sharma however failed to indicate whether or not he wrote the said letter.
- 5.6.6.1.8. During the course of our consultations with Matona, he admitted to receiving the letter dated 14 October 2013 from Sharma. He indicated that he was not surprised when he received communication from Sharma as he and Sharma worked together at DTI when he, Matona, was the Department's DG.
- 5.6.6.1.9. Matona stated that what surprised him were the contents of the letter as he realised that the Transnet Board was divided. Matona indicated that it was not in his powers to make any recommendations on whether or not Transnet should proceed with the confinement. Matona denied writing the letter dated 18 October 2013.
- 5.6.6.1.10. Matona provided us with his email which he sent to Sharma on email address [Iqbal.sharma@issar.co.za](mailto:Iqbal.sharma@issar.co.za) on 20 October 2013 at 11:24 PM (Annexure B16).
- 5.6.6.1.11. The second paragraph of Matona's response is indicative of the fact that he did not want to side with any faction of the Board. The said paragraph reflected that *"2. Given the issues you raise in your letter, I would expect that if there are differences this is a matter the Board must deal with in its fiduciary duty of due process, consensus-seeking and prudence in its decision-making,*

*including the transparency and/or compliance requirement to involve the Shareholder for approval or notification as the abovementioned statutes and rules would advise."*

- 5.6.6.1.12. We determined that the Guptaleaks reflected that the letter Sharma sent to Matona, as well as Matona's supposedly response, were emailed to email address [wdrsal@gmail.com](mailto:wdrsal@gmail.com) from an email address [Iqbalsharma3@gmail.com](mailto:Iqbalsharma3@gmail.com) on 17 October 2013 at 4:43 PM (**Annexure B17**). Sharma denied having sent the said email to [wdrsal@gmail.com](mailto:wdrsal@gmail.com).
- 5.6.6.1.13. We determined that the email address that we communicated with Sharma during our investigations, [Iqbal.sharma@issar.co.za](mailto:Iqbal.sharma@issar.co.za), was used to send documents to [wdrsal@gmail.com](mailto:wdrsal@gmail.com) on 26 May 2014 at 7:03 PM. We successfully communicated with Sharma on the said email address ([Iqbal.sharma@issar.co.za](mailto:Iqbal.sharma@issar.co.za)) during the course of our investigations (**Annexure B18**).
- 5.6.6.1.14. In his reply to our questions, Sharma denied sending the e-mail dated 17 October 2016 and 26 May 2014 to the e-mail address [wdrsal@gmail.com](mailto:wdrsal@gmail.com).
- 5.6.6.1.15. He however did not deny that the e-mail addresses [iqbalsharma3@gmail.com](mailto:iqbalsharma3@gmail.com) and [Iqbal.sharma@issar.com](mailto:Iqbal.sharma@issar.com) belong to him. He further did not indicate if his emails were hacked and someone sent the said e-mail to [wdrsal@gmail.com](mailto:wdrsal@gmail.com)

#### 5.6.7. **BADC of 21 October 2013**

- 5.6.7.1. From minutes provided to us by Transnet, we determined that there was a BADC meeting held on 21 October 2013(**Annexure B19**). The BADC of 21 October 2013 was a day after Matona sent his e-mail to Sharma in response to the latter's letter of 14 October 2013 to Matona.
- 5.6.7.2. We determined that the memorandum dated 15 October 2013 (**Annexure B11**), as reflected above, was discussed at the BADC meeting of 21 October 2013.
  - 5.6.7.2.1. We determined that during the deliberation of the confinement to Mitsui the following concerns were raised):
  - 5.6.7.2.2. Tshepe sought clarity on the withdrawal of the 100 locomotives submission from the agenda, as the committee had requested that it be tabled due to the urgency of the transaction;

- 5.6.7.2.3. Management represented by Molefe, Singh, Pita, Difeto and Mosia indicated that upon reflection, they opted to withdraw the matter after considering that when the initiatory confinement was made in 2010, there were press reports alleging that the company (Mitsui) had entered into a R1.4 billion locomotive procurement “secret deal” (that was concluded without being put out on tender, which the then special advisor to the former Deputy President Motlanthe was set to benefit from);
- 5.6.7.2.4. Mkwanazi was of the view that the committee should have been provided with the information prior to deliberating on the transaction to allow it to adequately apply its mind to the matter;
- 5.6.7.2.5. The committee noted the update and agreed that the matter would be dealt with as a matter arising from the minutes of the previous meeting and Management was requested to effect the following recommendations:
- 5.6.7.2.5.1. *“Reasons for 1064 to remain sacrosanct,*
- 5.6.7.2.5.2. *State the bare minimum on the class 19E and class 43 diesel locomotives; and*
- 5.6.7.2.5.3. *Confinement should not be on identified incumbent parties.”*
- 5.6.7.2.6. During our consultation with Callard, he indicated that on 21 October 2013, Molefe withdrew the 100 locomotives memorandum.
- 5.6.7.2.7. We determined that the withdrawal of the memorandum by Molefe was on the same date as the BADC meeting discussed above.
- 5.6.7.2.8. During our consultation with Gama, he confirmed that Molefe withdrew the said memorandum. Gama further indicated that the reason why Molefe did not sign the memorandum of 15 October 2013 was because he had changed his mind and did not want Transnet to confine the acquisition of 100 locomotives through Mitsui.
- 5.6.7.2.9. As reflected above, one of the reasons advanced to not confine through Mitsui was the alleged negative publicity relating to allegations of links between Mitsui and the special advisor to the former Deputy President Motlanthe.
- 5.6.7.2.10. During our consultation with Jiyane, he indicated that the allegation against the special advisor to the former Deputy President Motlanthe was

never investigated at the time the motivation to Mitsui was rejected by the BADC in 2013.

5.6.7.2.11. In his response to our question relating to the memorandum of 11 October 2013, Sharma stated that *“your finding that the BADC meeting of October 21, 2013 “deliberated on “ and “rejected” the submission is incorrect as the matter did not serve at the committee meeting. The minutes, which you are in possession of, do not support your findings” (Annexure B20).*

5.6.7.2.12. We however determined from the minutes of the BADC meeting of 21 October 2013 that the item served and was deliberated on. This is reflected in paragraph 8/11 of the minutes which state as follows: *“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”.* Further evidence that confinement of 100 locomotives was discussed in the BADC of 21 October 2013 is reflected as follows: *State the bare minimum on the class 19E and class 43 diesel locomotives; and Confinement should not be on identified incumbent parties.*

5.6.7.2.13. It cannot be a coincidence that the memorandum that Molefe did not sign on 15 October 2013 was the same memorandum that BADC rejected at its meeting of 21 October 2013. It is further not a coincidence that BADC rejected the confinement through Mitsui, the recommendation to which Molefe did not sign prior to the presentation to BADC.

5.6.7.2.14. Sharma did not mention anything about the e-mail from Matona which he received just a day prior to the BADC of 21 October 2013, which may bring his integrity as the BADC Chairman and Director of the Transnet Board to question.

#### 5.6.8. **BADC of 21 November 2013**

5.6.8.1. We determined that the acquisition of 100 class 19E locomotives was again discussed in the BADC meeting held on 21 November 2013. During the said meeting, Management was requested to effect the following recommendations (**Annexure B21**):

5.6.8.1.1. *“Reasons for 1064 to remain sacrosanct;*

5.6.8.1.2. *State the bare minimum on the Class 19E and Class 43 Diesel locomotives;*

5.6.8.1.3. *Confinement should not be on the identified incumbent parties”*

5.6.8.2. We determined that the “*identified incumbent parties*” referred to Mitsui.

#### **The Mitsui confinement memorandum sent to Singh by Gama**

5.6.8.3. During the analysis of Gama’s Mimecast e-mail, we found an unsigned memorandum dated 25 November 2013 for confinement of 100 locomotives to Mitsui. (**Annexure B22**).

5.6.8.4. We compared the said memorandum with the one signed by Gama, Mahomedy, Singh and Pita on 11 October 2013 and determined that they were similar as they both referred to a confinement to Mitsui.

#### **Delivery schedule from Mitsui**

5.6.8.5. As discussed above, we determined that on 27 November 2013 Mitsui submitted a delivery schedule for the 100 class 19E locomotives to Transnet (**Annexure B23**). The delivery schedule addressed to Gama, reflected that the schedules were to commence in May 2014 until March 2014. The delivery schedule was subject to an official “notice to proceed” letter that was to be issued on or before 5 December 2013.

5.6.8.6. The delivery schedule further reflected that the contract “*becomes effective and in force in December 2013*”.

5.6.8.7. The delivery schedule letter signed by Uchiyama is an indication that regardless of the Transnet BADC of 21 October 2013 not approving a confinement of the 100 class 19E locomotives through Mitsui, this decision was not communicated to Mitsui.

#### **Memorandum to confine through CSR dated 21 January 2014**

5.6.8.8. As discussed above, we determined that there was an unsigned memorandum dated 25 November 2013 which Gama sent to Singh

5.6.8.9. On 15 January 2014, Gama emailed the unsigned memorandum dated 25 November 2013 to Singh. .

5.6.8.10. We determined that after Singh received the memorandum from Gama, he either changed it or had it changed from a confinement to Mitsui to a confinement to CSR. This is based on the fact that a copy of the said document, signed by Singh and Molefe on 21 January 2014 and 22 January 2014 respectively had the name of the entity for confinement changed from Mitsui to CSR.

5.6.8.11. Gama indicated that the memorandum presented to BADC by Molefe to confine through CSR did not originate from TFR. He further stated that he made the said

- conclusion based on the fact that none of TFR officials signed it and further that TFR recommended a confinement through Mitsui and not CSR.
- 5.6.8.12. Gama indicated that he found out for the first time that the confinement was changed from Mitsui to CSR when he was at BADC of 24 January 2014.
- 5.6.8.13. Gama's version that he became aware of the proposed confinement to CSR during the BADC of 24 January 2014 is not true in that on 23 January 2014 at 09:22 PM he sent an e-mail to Singh titled *"RE: urgent: signature on the Memo – Acquisition of 100+60 locomotives"*. It is evident that Gama's email was sent before the meeting which was held on the 24 January 2014, it is surprising that he claimed he only knew about the changes of proposal from Mitsui to CSR on the day of the meeting, the 24 January 2014.
- 5.6.8.14. In the said e-mail Gama indicated inter alia that *"Hi Mr Singh, I'm afraid the submission of the 100 locomotives is a mess and will need to be withdrawn. The 20E locomotive is a 22 ton per axle locomotive suitable for the GFB while the 19E locomotive is a 26 ton per axle beast suitable for the coal line. The two locomotive types are not interoperable."*
- 5.6.8.15. We determined that Gama's request was not considered by Singh and the memorandum to confine the 20E locomotives was presented at the BADC and Board meetings of 24 January 2014. By proceeding with the presentation of the memorandum, Singh contravened the provisions of section 50(1)(a) and (b) of the PFMA in that he did not exercise the duty of utmost care when he knew the 20E locomotives were not suitable for the coal line.
- 5.6.8.16. In his written response, Gama indicated that that *"the technical and operational specifications and requirements of the 100 locomotives were carefully and cogently deliberated and agreed upon with the end user"*
- 5.6.8.17. In his written response, Gama further indicated that *"Both Mr. Gama and Mr Jiyane attended in their respective capacities as managers of the end users. After careful and considered deliberation and debate with the cross-section of executives drawn from multi-disciplinary teams, at the aforementioned meetings, no objections or comments of a technical or operational nature were noted in either of the above mentioned meetings by either of the end user representatives who were present."*
- 5.6.8.18. Gama failed to indicate in response that he had objections with the CSR locomotive as it was suitable for GFB and not the Coal line. Contrary to his written response, it is evident that Gama had technical objections relating to the CSR 20E locomotive.

- 5.6.8.19. In his response Gama further indicated that *“the decision to confine the procurement of 100 locomotives to CSR was extensively debated and considered upon, and was arrived at after rational consideration of all the financial, technical, operational, legal and compliance related facts”*.
- 5.6.8.20. Contrary to Gama’s response, the award of the 20E locomotives to CSR was later revised and CSR were requested to supply 21E locomotives. As discussed below, the change from 20E to 21E resulted in an increase in the price of the locomotives and amendments to the technical specifications. There is no evidence that the technical and financial implications resulting from the change in locomotives were discussed in the meeting of 24 January 2014.
- 5.6.8.21. We determined that the scope change from the 20E to 21E locomotive resulted in an increase of R347 million in the ETC. The scope change was a 36% increase in the ETC.
- 5.6.8.22. During our consultation with Callard, he indicated that on 21 January 2014, Mdletshe told him that the memorandum that was submitted to BADC was changed to confine to CSR instead of Mitsui. (**Annexure B24**). Callard indicated that on the 21 January 2014, Lindiwe Mdletshe sent him an e-mail requesting him to make formatting changes as follows.
- (a) *“Procurement had been changed to Confine and award to China South Rail (CSR) for 100 electric locomotives; and*
- (b) *Requirement of 19E Heavy Haul equivalent locomotive had been deleted”*.
- 5.6.8.23. Callard stated that he further received another e-mail from Mdletshe on 22 January 2014 relating to the confinement of a 100 locomotives.
- 5.6.8.24. From Mdletshe’s emails we determined that on 22 January 2014 she sent an e-mail to Callard titled *“procurement 60100 ppt1”* (**Annexure B26**). The e-mail had an attachment titled *“BADC 100 80 revised V15 0120 GP”*. The said attachment is a confinement memorandum from Molefe to BADC. The contents of the said memorandum related to the confinement of the 100 locomotives to CSR.
- 5.6.8.25. From the document’s metadata, we determined that it was created by Marlese van Tonder, a Transnet official, on 21 January 2014 at 04:41 PM and last modified by Windows User on 22 January 2014 at 07:43 AM. We noted that Mdletshe emailed the document to Callard at 07:54 AM about 11 minutes after it was modified.
- 5.6.8.26. Based on analysis of metadata of various documents we determined that Marlese van Tonder was the author of the majority of Transnet templates.

5.6.8.27. There is no evidence that the memorandum dated 25 November 2013 was presented to the BADC and the Board.

5.6.9. **Amended memorandum to confine to CSR**

5.6.9.1. We determined that Molefe and Singh sent a memorandum dated 22 January 2014 to BADC and the Board respectively. The memorandum sought BADC and Board approval for investment and the procurement of the 100 electric locomotives through a confinement process to CSR at an estimated cost of R3.8 billion.

5.6.9.2. We determined that regardless of his name having been included in both memoranda to BADC and Board, Gama did not sign either of them. Gama indicated that he was not aware that the item was going to be discussed at BADC and Board on the same date.

5.6.9.3. According to Jiyane, the confinement of the 100 locomotives to CSR was brought to his attention by Singh on 24 January 2014, before their attendance to BADC meeting of the said date.

5.6.9.4. Jiyane further indicated that he was not provided with the memorandum to confine to CSR before the BADC meeting held on 24 January 2014. According to Jiyane, he had a glimpse of the memorandum confining to CSR after Singh presented it to BADC.

5.6.9.5. Jiyane indicated that he established that the memorandum presented by Singh to BADC was similar to the memorandum prepared by TFR in respect of the confinement of 100 locomotives to Mitsui.

5.6.9.6. Jiyane indicated that, he was not certain that CSR could manufacture the 19E locomotives as required by TFR because they had not supplied the 19E locomotives to TFR before.

5.6.9.7. We determined that Molefe and Singh proposed in the memorandum that the acquisition of the 100 locomotives be confined to CSR and extend the class 43 contract with General Electric South Africa Technologies "GESAT" by 60 locomotives. We however do not have any documentation relating to the extension of the GESAT contract and did not request the relevant documentation as the item did not form part of our mandate.

5.6.9.8. The memorandum signed by Molefe and Singh indicated *inter alia* that "*The confinement to CSR and extension of the GE contract is motivated on the basis of urgency.* Sharma however indicated the confinement was due to poor planning and not



urgency as Management had been well aware of TFR's needs for the 100 locomotives 15 months before the requested confinement. As per our conclusions below, we determined that Sharma's responses in this regard are not correct in so far as they relate to poor planning because of the following:

- 5.6.9.8.1. TFR started negotiations with Mitsui for the acquisition of 100 locomotives as early as April 2013;
- 5.6.9.8.2. TFR obtained a proposal from Mitsui on 15 July 2013; and
- 5.6.9.8.3. TFR prepared a business case and memorandum for the acquisition of 100 locomotives dated 30 August 2013;
- 5.6.9.9. According to Gama, the memorandum dated 21 January 2014 to confine to CSR was changed at Transnet Group and not at TFR.
- 5.6.9.10. We determined that as per the Procurement Procedures Manual, Version 2, October 2013's ("2013 PPM") requirement, the end user in this case, TFR, should be the one motivating the procurement process to be followed i.e. confinement or tender before the memorandum may be taken to Transnet Group for recommendation to BADC. We determined that Gama and Jiyane as the end users did not motivate for the confinement of 100 locomotives to CSR.
- 5.6.9.11. We determined that paragraph 15.1.5 of the 2013 PPM, states that - *"the submission for Confinement must be fully motivated in writing by the end-user and the Operational Division Chief Procurement Officer TFR (OD CPO) to the Operational Division's (OD's) main Acquisition Council (AC) and the Operational Division's Chief Executive Officer (OD's CEO) (TFR) for prior written support of the recommendation to confine. The submission should be submitted on the relevant template under cover of a memo to the GCE"*.

#### **Comparison of the various memoranda relating to the confinement of the 100 locomotives**

- 5.6.9.12. We compared the various memoranda relating to the confinement to both Mitsui and CSR as found from various e-mail communication of the Transnet officials. The said memoranda were the following:
  - 5.6.9.12.1. Memorandum dated 30 August 2013 to confine through Mitsui;
  - 5.6.9.12.2. Memorandum dated 15 October 2013 to confine through Mitsui;
  - 5.6.9.12.3. Memorandum dated 25 November 2013 to confine through Mitsui; and
  - 5.6.9.12.4. Memorandum dated 21 January 2014 to confine through CSR.

- 5.6.9.13. In his written response, Gama indicated that *“The certified extract of the minutes of the BADC meetings of 21 October 2013, 21 November 2013, and 24 January 2014, and the certified extract of the minutes of the Transnet BOD meeting of 24 January 2014, clearly reveal that the decision to confine the acquisition of 100 locomotives to CSR had been extensively debated, and deliberated upon before the BADC for three (3) months prior to the decision being recommended, and ultimately taken.”*
- 5.6.9.14. As indicated above, contrary to Gama’s response the recommendation to confine to CSR was only discussed in the meeting of 24 January 2014 and not in the BADC meetings held in October and November 2013.
- 5.6.9.15. Callard indicated that he realised that the memorandum dated 21 January 2014 by Molefe and the memorandum he wrote dated 30 August 2013 were similar. According to Callard, this was a copy and paste exercise from his memorandum dated 30 August 2013 which was rejected by BADC.
- 5.6.9.16. The memorandum to confine through CSR and Mitsui contained *inter alia* the following similarities:
- (a) *“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);*
  - (b) *To approve the investment in and procurement of 100 Class 19E equivalent electric locomotives required for the Coal Export Line in the estimated amount of R3 871 m (excluding borrowing costs);*
  - (c) *Approximately 186 jobs will be retained at the TE assembly facility and further jobs will be retained in downstream enterprises; and*
  - (d) *Approximately 400 jobs will be created over the period and further jobs will be retained in downstream.*
- 5.6.9.17. We determined that the rates reflected above were in fact calculated in November 2013. We determined that in November 2013, at the time when Gama and Jiyane prepared the memorandum, the exchange rate of the Rand to Japanese Yen was 0.09823. We further determined that Molefe and Singh utilised the same exchange rate in January 2014 when motivating for confinement to CSR. According to X-rate, the Rand to Yen exchange rate in January 2014 was 0.1036. We further determined that Molefe and Singh misrepresented to the Board that the exchange rate was 0.09823. (**Annexure B27**).

- 5.6.9.18. From the above it is clear that Molefe and Singh used the same document that was prepared for Mitsui and used information that was relevant to Mitsui at the time.
- 5.6.9.19. We further determined that both memoranda contained the same ETC of R3.8 billion regardless of the fact the Mitsui memorandum was prepared in August 2013 and the confinement to CSR was concluded in January 2014.
- 5.6.9.20. We determined that the memorandum for confinement dated 30 August 2013, the memorandum for confinement to Mitsui dated 25 November 2013 and the memorandum for confinement to CSR dated 21 January 2014 had the same job retention of 186 at the TE assembly facilities and downstream enterprises. Furthermore, the memorandum confining to Mitsui dated 25 November 2013 and the memorandum confining to CSR dated 21 January 2014 indicated that 400 jobs would be created as a result of the acquisition of the 100 locomotives.
- 5.6.9.21. As per the memorandum dated 30 August 2013, Mitsui would produce all 100 locomotives locally as they had an existing production plant in South Africa.
- 5.6.9.22. We determined that CSR imported 40 locomotives and assembled 60 locomotives locally. It is unclear how CSR could retain and create the same number of jobs as Mitsui whilst they imported 40 locomotives, whilst Mitsui would have manufactured all 100 locomotives locally.
- 5.6.9.23. According to Jiyane, TFR motivated for the confinement to Mitsui for the following reasons:
- 5.6.9.23.1. It was urgent;
  - 5.6.9.23.2. 19E locomotives were previously supplied by Mitsui to TFR;
  - 5.6.9.23.3. Mitsui had an existing production line to manufacture 19E locomotives in South Africa; and
  - 5.6.9.23.4. TFR wanted more of the same locomotives on the coal line.
- 5.6.9.24. During our consultation with Gama, he confirmed the above mentioned reasons by Jiyane for the acquisition of 100 locomotives from Mitsui. Gama indicated that the confinement to Mitsui would reduce the turnaround time as opposed to Transnet acquiring 100 locomotives from a different supplier. Gama further indicated that there was an existing prototype of the 19E locomotives as that was previously supplied by Mitsui to Transnet.
- 5.6.9.25. Based on the review of the memoranda dated 30 August 2013, 25 November 2013 and 21 January 2014 respectively, we determined that the memorandum to confine 100

locomotives to CSR dated 21 January 2014 had the same content as the memoranda dated 30 August 2013 and 25 November 2013 to confine to Mitsui.

- 5.6.9.26. We determined that the information in respect of retention and job creation stated in the memorandum presented by Molefe and Singh to BADC and the Board in respect of the confinement to CSR, was misleading in that CSR imported 40 locomotives and no jobs were locally created for the said 40 locomotives.
- 5.6.9.27. We determined that Molefe and Singh failed to follow a proper confinement process as prescribed by 2013 PPM when they motivated for the acquisition of 100 locomotives to CSR. Paragraph 15.1.5 of the 2013 PPM provides that the submission for confinement must be fully motivated in writing by the end user and the OD CPO to the OD's main AC and the OD's CEO for prior support of the recommendation to confine. The CPO (Jiyane) was not aware of the new motivation dated 21 January 2014, and was only informed by Singh on the morning of the BADC meeting wherein the recommendation for the confinement was to be presented.
- 5.6.9.28. In his written response, Gama indicated that *"In respect to the delegation of authority, only the Group Chief Executive (hereinafter the GCE''), the Board Acquisition and Disposal Committee (hereinafter the "BADC''), and the Transnet Board of Directors (hereinafter the "Transnet BOD',) have the authority to authorise a confinement"*
- 5.6.9.29. The fact that the Board had to authorise the confinement is not in contention however the PPM clearly indicates that the end user must motivate in writing the need for a confinement. As discussed above, the recommendation to confine to CSR was not motivated in writing by the end user however it was motivated by Transnet Group, who were not the end user.
- 5.6.9.30. Failure by Molefe and Singh to follow the confinement process as outlined in the 2013 PPM was in contravention of the above mentioned paragraph 15.1.5 of the 2013 PPM.

#### 5.6.10. **Approval by the BADC to confine to CSR**

- 5.6.10.1. We determined that during the BADC meeting held on 24 January 2014, Molefe and Singh recommended that the Committee should - (**Annexure B28**):
- (a) *"Recommend to the Board to approve investment in and procurement of 100 Electric Locomotives required for the Coal Export Line estimated at R3.8 bn (excluding borrowing costs); and*
  - (b) *Recommend that the Board approve confinement and award of the procurement for the 100 Electric Locomotives to CSR".*

- 5.6.10.2. We determined that the BADC was chaired by Sharma, who stated *inter alia* the following:
- 5.6.10.2.1. CSR has the capacity to produce five locomotives per day, which would result in them producing 100 locomotives in a short space of time;
  - 5.6.10.2.2. Assurance was given to the Committee that the confinement process was audited by TIA;
  - 5.6.10.2.3. The Mitsui confinement of 100 locomotives submission was withdrawn prior to the commencement of the meeting on 27 October 2013, due to concerns that the confinement was proposed for class 19E locomotives from Mitsui, which had won a contract in 2006 and 2010;
  - 5.6.10.2.4. There were also media concerns that Transnet approved two confinements since 2006 to Mitsui;
  - 5.6.10.2.5. Transnet has never confined to CSR, therefore there should be no adverse publicity; and
  - 5.6.10.2.6. The proposed confinement was in compliance to the provisions of the approved 2013 PPM.
- 5.6.10.3. We determined that BADC recommended to the Board:
- 5.6.10.3.1. The approval of investment in and procurement of 100 Electric Locomotives required for the Coal Export Line estimated at R3.8 billion (Excluding borrowing costs); and
  - 5.6.10.3.2. The confinement and award of the procurement for the 100 Locomotives to CSR.
- 5.6.10.4. We further determined that the minutes of the BADC meeting stated that an assurance was given to the committee that the confinement process was audited by TIA. We requested the HVT report relating to the confinement of the acquisition of 100 locomotives through CSR. The said HVT report was never provided to us despite being informed that during the acquisition of 100 locomotives, PWC was an outsourced service provider for the internal audit services. We further requested the report from PWC, but it was never provided to us.
- 5.6.10.5. According to the BADC minutes, the confinement process would go through a PFMA approval process should it exceed R3.9 billion.

- 5.6.10.6. In his written response, Gama indicated that *“The procurement of the 100 locomotives from CSR, as opposed to from Mitsui & Co African Railway Solution (Pty) Ltd (hereinafter “Mitsui”), was warranted in that:*
- 5.6.10.6.1. *CSR was able to meet the urgent delivery schedule required by Transnet;*
  - 5.6.10.6.2. *Mitsui had previously been awarded a tender in 2006, and had subsequently been awarded two (2) further confined procurement contracts. A further confined award to Mitsui presented legislative, regulatory and competitive concerns from a supply chain management perspective; and*
  - 5.6.10.6.3. *Mitsui's projected price of R3.8 Billion was not a fixed price quoted in Rands, but rather a projected price subject to foreign currency fluctuation”.*
- 5.6.10.7. As indicated above, Mitsui had proposed to deliver the 100 locomotives between May 2014 and March 2015. We determined that LSA concluded between Transnet and CSR indicated that CSR was required to deliver 100 locomotives between May 2015 and November 2015. We noted that Mitsui would have completed its delivery before CSR commenced with its proposed delivery schedule.
- 5.6.10.8. Gama indicated that Mitsui’s projected price of R3.8 billion was not a fixed price quoted in Rands but rather a projected price. Gama’s response is contrary to Mitsui’s proposal which indicated ETC of the 100 19E locomotives was R3.188 billion (at R31.88 million per locomotive.).
- 5.6.10.9. In their proposal, Mitsui indicated that there would be no escalations except for the material steel portion in ZAR portion. Based on Mitsui’s proposal it is evident that the proposed price was less than the R3.8 billion projected price and Mitsui’s price was not subject to foreign currency fluctuations as claimed by Gama.

#### **Request for proposal from Molefe to CSR**

- 5.6.10.10. We determined that on 25 February 2014, a letter was written to CSR with the title reflected as *“Request For Proposal (RFP) for a 100 20E Dual Voltage Electric Locomotives”*. The letter which was signed by Molefe on 26 February 2014 was addressed to Pan. The said letter was provided to us by CSR in response to our second draft report (**Annexure B29**).
- 5.6.10.11. We determined that at the time of issuing a request for proposal to CSR, Transnet had not issued an application in terms section 54 of the PFMA.

- 5.6.10.12. We determined that on 24 January 2014 when Transnet Board recommended confinement through CSR, Transnet had not yet obtained a proposal from CSR detailing the specifications, estimated price, job creation and job retention from CSR.
- 5.6.10.13. In contrast we determined that Transnet obtained a proposal from Mitsui detailing specifications, estimated price, job creation and job retention prior to TFR preparing the various memoranda that were eventually presented to various BADC. Proof that Mitsui submitted a proposal prior to the memorandum recommending confinement through the company is contained in a letter dated 19 March 2014 and addressed to Mkwanazi as the Transnet Board Chairman. In the said letter Mitsui indicated that they submitted their proposal on 15 July 2013 and an updated schedule to the proposal on 27 November 2013.
- 5.6.10.14. We determined that the letter to CSR was written a month after the Board meeting of 24 January 2014 wherein it was resolved that confinement should be done through CSR for the acquisition of the 100 locomotives.
- 5.6.10.15. As indicated above, Pan had at least 2 communications with Molefe relating to Transnet's acquisition of the 95 locomotives through an open tender.

#### **Negotiations with CSR for the 100 locomotives**

- 5.6.10.16. During our consultation with Jiyane, he indicated that Molefe and Singh requested him to facilitate the communication with CSR in respect of the main specifications required for the 100 locomotives. According to Jiyane, he declined this request as he was not certain that CSR could manufacture 19E locomotives.
- 5.6.10.17. Jiyane confirmed that he later engaged CSR and determined that CSR could only manufacture 20E and 21E locomotives, which resulted in the specification being changed from 19E to accommodate 20E and 21E locomotives.
- 5.6.10.18. During our review of Jiyane's Mimecast emails, we determined that on 28 January 2014, Jiyane received an email from Willem Kuys titled "*19E Contract and specifications*". Attached to the email was a contract, various technical specifications and schedules relating to the Mitsui 19E coal line locomotives.
- 5.6.10.19. We determined that the email was sent to Jiyane 4 days after the Board approved the confinement to CSR on 24 January 2014.
- 5.6.10.20. We could not determine whether the information was shared with Jiyane for the purposes of his negotiations with CSR or the specifications were provided to CSR to enable them to manufacture a coal line locomotive.

5.6.11. **Approval by the Board of Directors**

5.6.11.1. We determined that the BADC and a special Board meeting were held on 24 January 2014 respectively. (**Annexure B30**).

5.6.11.2. The purpose of the special Board meeting was to *inter alia* approve the confinement of 100 locomotives to CSR.

5.6.11.3. According to minutes of the special Board meeting, Sharma as Chairperson of BADC presented the proposal to confine 100 locomotives to CSR and recommended that the Board approve the confinement to CSR.

5.6.11.4. According to the minutes of the special Board meeting, Sharma indicated that the request for confinement of 100 locomotives to CSR was dealt with in previous BADC meetings.

5.6.11.5. Sharma further indicated that:

*“The request for a confinement had been on the Committee’s agenda for 3 months, and the matter extensively deliberated by the Committee. There were adverse media reports on the previous Mitsui confinement process. To manage the reputational matters, the Company seeks to advance to a new supplier.”*

5.6.11.6. We determined that the Board approved:

- (a) *“the investment and procurement of the 100 electric locomotives required for the coal export line estimated at R3.8 bn (Excluding borrowing costs); and*
- (b) *The confinement and award of the procurement for the 100 electric locomotives to CSR.”*

5.6.11.7. As indicated above, we determined that the adverse media reports Sharma alluded to were never investigated or substantiated to warrant cancellation of a process to confine through Mitsui.

5.6.11.8. The Board approved the acquisition of 100 locomotives from CSR without a business case to support the memorandum submitted.

5.6.11.9. The said Board approval was done without a proposal from CSR, as discussed above, TFR obtained a proposal from Mitsui prior to approaching BADC to seek confinement through Mitsui.

5.6.11.10. We determined that Gama was present in the special Board meeting where the Board recommended confinement of 100 locomotives to CSR. During our consultation with Gama, he indicated that he did not object to the confinement to CSR, even though he



initially recommended the confinement of 100 locomotives to Mitsui. Gama indicated that he was “happy” that he would receive locomotives for his division. He further indicated that it did not matter who the supplier was.

5.6.12. According to Gama, procurement decisions are taken at Board level and he could not object to the appointment of CSR.

### **CSR’s response to issues relating to their appointment**

5.6.13. In their response to our second draft report, CSR indicated the following (**Annexure B31**):

5.6.13.1. They received RFP for 100 20E Dual Voltage Electric Locomotives on 27 February 2014 with the following critical conditions:

5.6.13.1.1. upgrade the locomotive proposed under 95 Locomotive Project (General Freight Business) into a heavy-haul locomotive; and

5.6.13.1.2. deliver all 100 locomotives within six months after the signing of the agreement and meeting all conditions precedent;

5.6.14. According to CSR, it was their understanding that the driving force at the time was speed of delivery as Transnet was losing an opportunity to move more lucrative heavy-haul tonnages.

5.6.15. In their response to our questions, CSR further indicated that their understanding was that the process that was followed in the confinement was similar to processes followed before when appointing one of their competitors on a confinement basis for locomotives. We however do not know how CSR would know what process was followed in confining to their competitor unless they were provided with the said information by Transnet.

5.6.16. We further determined that it is not correct that the process followed in confining to CSR was similar to the previous confinement. For example in the process to confine through Mitsui for the same 100 class 19E locomotives, Transnet requested a proposal from Mitsui prior to Board approval whereas in the CSR case the approval to confine was prior to obtaining a proposal from CSR.

5.6.16.1. CSR indicated that they received an RFP for 100 20E Dual Voltage Electric locomotives on 27 February 2014 with the following critical conditions,

5.6.16.1.1. CRRC to upgrade the locomotive proposed under 95 locomotive Project (General Freight Business) into heavy-haul locomotive;

- 5.6.16.1.2. CSR to be able to deliver all 100 locomotives within six months after the signing of the agreement and meeting all conditions precedent.
- 5.6.16.2. Attached to the CSR response was a letter dated 25 February 2014 signed by Molefe on 26 February 2014 advising CSR that Transnet Board had authorised the acquisition of an additional 100 locomotives from CSR E-LoCo Supply (Pty) Ltd (“CSR E-LoCo”) with certain technical modifications and subject to certain commercial terms and conditions to be agreed-on in negotiations (**Annexure B32**).
- 5.6.16.3. We determined that Molefe initiated this communication before the executive authority was informed about the acquisition of 100 locomotives through confinement.
- 5.6.16.4. It is evident from the information provided by CSR that Transnet requested a proposal for the supply of 100 locomotives from CSR after the approval of acquisition of 100 locomotives by the Board.
- 5.6.16.5. The confinement process for the acquisition of 100 locomotives was initiated prior to Transnet Board informing National Treasury and obtaining approval from the Shareholder Minister in terms of Section 54 of the PFMA.
- 5.6.17. **Shareholder’s Compact Agreement**
- 5.6.17.1. According to the BADC minutes dated 24 January 2014, Management indicated that the confinement process would go through a PFMA approval process should it exceed the R3.9 billion materiality threshold.
- 5.6.17.2. As indicated above, the confinement of 100 locomotives was estimated at R3.8 billion.
- 5.6.17.3. We determined that Transnet and DPE concluded a Shareholder’s Compact Agreement referred to as 2013-2014 which was signed by Minister Gigaba DPE and Mkwanazi, the Chairperson of the Board on 25 June 2013 and valid for one year. We further determined that the Shareholder’s Compact Agreement outlined the significance and materiality framework in terms of Sections 54 of the PFMA as follows (**Annexure 33**):

PFMA	Description	Exemption from Section 54 of PFMA
S54(2)(d)	Acquisition or disposal of a significant asset	If the acquisition does not exceed 2% of the 31 December 2012 audited asset base value (which equates to 3.9 billion), however the Department should receive a detailed notification for all

PFMA	Description	Exemption from Section 54 of PFMA
		<i>acquisition and disposal of assets above 2 billion</i>

- 5.6.17.4. As discussed below, we determined that the total cost of the acquisition of the 100 electric locomotives increased from the ETC of R3.8 billion to R4.8 billion.
- 5.6.17.5. There is no indication that Transnet Board informed the Shareholder of the increase of ETC to R4.8 billion.
- 5.6.17.6. We further determined that the actual spend on the acquisition of 100 locomotives through CSR was R4.38 billion.
- 5.6.17.7. We determined that the Board had a responsibility to notify DPE of the confinement of 100 locomotives as this was above the R2 billion threshold.
- 5.6.18. **Approval of increased ETC after conclusion of contract**
- 5.6.18.1. As indicated above, we determined that the Board approved confinement of 100 locomotives to CSR on 24 January 2014 at an estimated cost of R3.8 billion.
- 5.6.18.2. We determined that Molefe concluded an agreement with CSR on 17 March 2014 for the supply of 100 locomotives at a cost of R4.38 billion (**Annexure B34**). However the Board approved ETC of R3.8 billion. Molefe therefore committed Transnet to an additional cost of R509 million which was not approved by the Board at the time of conclusion of the contract.
- 5.6.18.3. According the minutes of the meeting held on 24 January 2014, the Board delegated authority to Molefe to sign and conclude all relevant documents to give effect to the resolution, including the award and process approval with regard to investment in and procurement of 100 locomotives estimated at R3.8 billion. We determined that Molefe failed to comply with this resolution in that, he concluded a contract with CSR for R4.38 billion. At the time when Molefe concluded the contract, the Board had not yet approved the transaction value of R4.38 billion.
- 5.6.18.4. In his written response, Gama indicated that *“the GCE is delegated and empowered to increase the ETC of existing or approved projects in the amount up to but not exceeding R1 billion.”* According to the Delegation of Authority dated 1 June 2013, the GCE had authority to approve ETC up to but not exceeding R1 billion.
- 5.6.18.5. According to Gama, the Delegation of Authority *“powers may be exercised without further reference to the Transnet BOD, as the approval of the Transnet BOD to increase the*

*ETC of existing or approved projects is only required in respect to amounts exceeding R1.5 Billion."*

- 5.6.18.6. We however determined that when Molefe concluded the contract with CSR at an increased ETC of R4.38, the acquisition of the locomotives exceeded the Materiality and Significance Framework threshold of R3.9 billion. At this stage, Molefe through the Board should have sought approval from the Shareholder in line with section 54 of the PFMA before he concluded the contract with CSR.
- 5.6.18.7. By concluding the contract with CSR at a cost of R4.38 billion, Molefe contravened section 57(c)(e) of the PFMA.
- 5.6.18.8. We determined that Molefe, Singh and Gama issued a memorandum to the Board on 23 May 2014 recommending approval to increase the ETC from R3.8 billion to R4.8 billion. The increase on the ETC of R969 million was attributed to the following (**Annexure B35**)
- |   |      |
|---|------|
| (a) <i>Update of business case for economic implants</i>        | 51%  |
| (b) <i>Scope change</i>   | 36%  |
| (c) <i>Risk mitigation, Forex, Escalation and Contingencies</i> | 39%  |
| (d) <i>Discount Negotiated</i>                                  | -25% |
- 5.6.18.9. We determined that at the time Molefe, Singh and Gama recommended the increase in ETC, Molefe and Singh had already concluded a contract at a cost of R4.38 billion on 17 March 2014 with CSR.
- 5.6.18.10. We further determined that the Transnet Board approved the increase in ETC from R3.8 billion to R4.8 billion on 28 May 2014. (**Annexure B36**)
- 5.6.18.11. The increase in ETC from R3.8 billion to R4.8 billion was despite the fact that the R3.8 billion was for the procurement of the 112 locomotives and not 100 locomotives as stated in the memorandum. Both Molefe and Singh therefore misled the board into believing that the R3.8 billion was for 100 locomotives.
- 5.6.18.12. As indicated above, the ETC proposed by Mitsui for 100 locomotives was R3.188 billion. We noted that Mitsui's ETC was R612 million cheaper than that of CSR.
- 5.6.18.13. As indicated above, on 24 January 2014, the Board approved the acquisition of the 100 locomotives at an ETC of R3.8 billion. There is no evidence to confirm that as at 17 March 2014, Molefe had obtained approval from the Shareholder to conclude a

contract which exceeded the significance and materiality framework threshold of R3.9 billion.

5.6.18.14. There is also no evidence to suggest that the Board was aware of the increase in ETC from R3.8 billion to R4.38 when Molefe concluded the contract on 17 March 2014.

5.6.18.15. In his written response, Gama indicated that *“neither the 2012 Shareholders Compact, nor the 2013 Shareholders Compact, stipulate any required time for notice to be given to the Shareholder Minister. All that is required of Transnet, in order to comply with the provisions of the Shareholders Compact(s), is that the Minister is given detailed notification of the acquisition and/or disposal of the significant asset, prior to the conclusion of the transaction”*.

5.6.18.16. We noted that at the time when Molefe concluded the contract with CSR, Transnet had not yet notified DPE of the acquisition of the 100 locomotives. Transnet’s action to conclude the agreement without notifying the Shareholder was in contravention of the Shareholders Compact Agreement.

#### 5.6.19. **Section 54 of the PFMA application to the Minister DPE**

5.6.19.1. It is our understanding that Section 54 of the PFMA should be read in conjunction with the Shareholders Compact Agreement in respect of the significance and materiality framework. We further understand that an application and notification should be submitted to the Shareholder Minister before the public entity concludes the acquisition and disposal of a significant asset (**Annexure B37**)

5.6.19.2. It is our understanding that the Shareholder Minister needs to make an informed decision on whether to acquire or dispose of the asset before the actual event takes place. It is further our understanding that the PFMA section above indicates that the public entity must obtain approval before concluding the transaction. It would however appear that the accounting authority can at any time from the commencement of the process to acquire or dispose of the asset, but before the conclusion of acquiring or disposing the asset seek permission from the Shareholder Minister.

5.6.19.3. Based on the above, it is therefore apparent that the accounting authority contravened section 54 of the PFMA relating to seeking approval from the Shareholder Minister in that approval was sought and obtained after the conclusion of the contract with CSR on 17 March 2014.

5.6.19.4. We determined that on 10 April 2014, Mkwanazi submitted an application in terms of section 54 of the PFMA for the acquisition of 100 locomotives at an ETC of R4.8 billion to Minister Gigaba. (**Annexure B38**)

- 5.6.19.5. We further determined that Mkwanazi informed Minister Gigaba that the Board initially approved ETC of R3.8 billion on 24 January 2014. However, subsequent to contract negotiations, ETC increased to R4.8 billion.

#### **Scathing letter from DPE**

- 5.6.19.6. On 19 May 2014, Kgomotso Modise, “Modise” (Deputy Director-General: Transport) wrote a memorandum advising the Minister in regard to Section 54 of the PFMA Transnet’s application for approval of the acquisition of 100 Dual Voltage Electric locomotives for the coal line at an estimated cost of R4.8 billion. Modise raised the following analysis and findings (**Annexure B39**);

- 5.6.19.6.1. *“Having reviewed the business case and engaged Transnet, the Department is of the view that the business case in its current format has not provided all the critical information necessary to allow for a proper assessment,*
- 5.6.19.6.2. *Transnet projects to the value of R2 billion and above require a notification to the DPE as per the agreed and binding Shareholders Compact of 2013/2014,*
- 5.6.19.6.3. *Transnet failed to notify the Department, prior to commencing with supplier negotiations as required, while the project costs were estimated below R3.9 billion.*
- 5.6.19.6.4. *It was only on submission of section 54 application (when the estimated cost reached the threshold of R3.9 billion) that this project was first brought to the attention of the Department,*
- 5.6.19.6.5. *It is of a great regret that Transnet failed to adhere to the signed Shareholders Compact of 2013/2014 and the Department feels that Transnet belittled the agreement with no justifiable reason as Transnet admitted it was an error of judgment not to submit the notification post the Board’s approval in January 2014.*
- 5.6.19.6.6. *This is unacceptable and the Department highly flags this and requires Transnet to take note this behaviour is utterly unacceptable.”*
- 5.6.19.6.7. *The 100 locomotives business case is underpinned by the 2014/2015 Corporate Plan volume forecast and if previous years trends are anything to go by, the merit of the business case remains questionable; and*
- 5.6.19.6.8. *Despite the investment plan to create capacity for the road to rail migration, Transnet’s volume attraction strategy remains unclear, in the absence of a clear volume attraction strategy, the return on these capital investment remain*

*uncertain in the short term, over the long term, however, the Department is comfortable that the investment in these locomotives will bear fruit.*

5.6.19.7. Based on the facts raised above, the acquisition of 100 locomotives was not in line with the investment plan. This might be the reason why all the necessary steps were not followed, *i.e.* informing DPE and National Treasury on time before the contract was signed.

#### **Operational considerations raised by Modise**

5.6.19.8. Modise further indicated the following Operational considerations:

5.6.19.8.1. *Despite the benefit of increased traction capacity from additional locomotives, this project would be expected to also yield efficiency benefits: however, these benefits have not been quantified in the business case. In the absence of scientifically quantified benefits linked to the investment programme, it is almost impossible to hold the SOC accountable to deliver on efficiency improvements that are expected to be derived from the Capital investment.*

5.6.19.8.2. *TE is currently maintaining and repairing 19E locomotives which demonstrate that they are accustomed to maintenance regimes of the more modern dual voltage electric locomotives. Limited training will be required and optimum utilisation of the current facilities will be met.*

5.6.19.9. We determined that 100 the locomotives were then changed from 19E to 21E locomotives and would require TE to train the engineers as they were not accustomed to a 21E locomotives, which would require added cost over a period of time.

#### **Material risks raised by Modise**

5.6.19.10. Modise indicated *inter alia* the following material risks that may affect the acquisition of 100 locomotives,

5.6.19.10.1. *Transnet needs to provide clarity in regard to the deviation from the original mitigation plan on the 1064 locomotive project delays. The purpose of an additional 100 coal locomotives did not form part of the original mitigation plan against the 1064 locomotives delays risk, therefore Transnet needs to provide reasons from the deviation of the initial risk mitigation plan,*

5.6.19.10.2. *In relation to the confined procurement plan for this application; from a risk perspective the concern is the possible litigation challenges that can arise from other possible suppliers, thus impacting on the project execution and delivery*

*timelines. Transnet's is therefore requested to provide a mitigation plan against this risk,*

5.6.19.10.3. *Considering that this is a R4.8 billion transaction, the closed tender process could have been looked into rather than the confinement option which exposes Transnet to increased litigation risk. This issue needs to be explored further; and*

5.6.19.10.4. *The business case has not provided a proper risk assessment of the project and the mitigations thereof. This will further assist in the Department's assessment of this business case.*

5.6.19.11. Based on the material risk above; it is evident that a closed tender process was the best procedure that could have been considered.

5.6.19.12. Modise's memorandum further stated that in terms of section 54 (3) of the PFMA, a response by the executive authority (the Minister) pertaining to the outcome of the public entity's section 54 PFMA application, had to be given to the public entity within thirty (30) days. Transnet submitted the PFMA application on 10 April 2014. The Department was however, unable to meet the thirty (30) days period prescribed in the PFMA for assessment of a PFMA application due to the fact that Transnet furnished the Department with insufficient information.

#### **Legal analysis made by Modise**

5.6.19.13. Modise's memorandum further provided the legal analysis which raised concerns from a legal perspective and we noted the following concern;

5.6.19.13.1. *The team is however of the view that a closed tender procurement mechanism would have been appropriate given the bad publicity that Transnet has received in the past for having elected the confinement route for high value transactions. A closed tender procedure still affords transparency, while a confinement procurement procedure in a transaction of this magnitude arouses suspicion of corruption from media and the general public and poses reputational risk. Transnet, being a state owned company should steer clear from such reputational risks and endeavour to conduct business in a manner that inspires trust and honesty; and uphold the highest standards of corporate ethics, transparency and governance,*

5.6.19.14. We determined that regardless of the concerns raised, Modise recommended that Minister approve the application of the acquisition of 100 Dual Voltage Electric Locomotives and that Transnet should address the concerns and supply the information to address the concerns raised.



- 5.6.19.15. The memorandum referred to above was prepared and signed on 19 May 2014 as follows:
- 5.6.19.15.1. Malerato Goba; D: Transport;
  - 5.6.19.15.2. Dion Harold; D: Transport; and
  - 5.6.19.15.3. Vongani Masondo; D: LG.
- 5.6.19.16. The said memorandum was reviewed and supported and signed on 19 May 2014 by:
- 5.6.19.16.1. Ngoako Huma; CD: Transport
  - 5.6.19.16.2. Matsietsi Mokholo; DDG: LG
  - 5.6.19.16.3. Kgomotso Modise; DDG: Transport
  - 5.6.19.16.4. Tshediso Matona, Director General
- 5.6.19.17. The memorandum was further reviewed, supported and signed by the Deputy Minister: Gratitude Magwanishe (“Magwanishe”) and Minister Gigaba on 23 May 2014.

#### **Approval of section 54 by Minister Gigaba**

- 5.6.19.18. As indicated above, Transnet was required to either obtain approval or notify DPE before the acquisition or disposal of a significant asset. We determined that Transnet was required to notify DPE of acquisitions and disposals above R2 billion and obtain approval for acquisitions and disposal above R3.9 billion.
- 5.6.19.19. In his written response, Minister Gigaba indicated that *“the acquisition of 100 Dual Voltage locomotives was for an initial price of R3,871 billion, the Board opined that Ministerial consent in terms of section 54 was not required and had on 24 January 2014 resolved to approve the acquisition. There was thus no communication with me in specific regard to section 54 approval. As a result of the price increasing to R4,840 billion, Ministerial consent thus became necessary”*
- 5.6.19.20. According to Minister Gigaba, the Board had apparently approved the acquisition of the 100 locomotives without his approval for the reasons stated above.
- 5.6.19.21. According to the 2013-2014 Shareholders Compact agreement, Transnet had to notify the Shareholder of acquisitions and disposal above R2 billion and below R3.9 billion. Determined that Transnet had an obligation to notify the Shareholder of the acquisition of the 100 locomotives before Molefe concluded the contract with CSR on 17 March 2014.

5.6.19.22. We determined that on 23 May 2014, Minister Gigaba granted Transnet approval in terms of Section 54 of PFMA, to acquire 100 locomotives at ETC of R4.8 billion. **(Annexure B40)**

5.6.19.23. In his approval, Minister Gigaba raised the following concerns:

- (a) *“Since Transnet has already concluded the contract for this acquisition, subject to PFMA approval, I therefore request that Transnet furnish me with a copy of the agreement concluded with China South Rail (CSR) as this will provide an in depth understanding of the transaction that Transnet is entering into and enable the Department to assess the risks pertaining to the proposed transactions,*
- (b) *Considering that the 100 locomotives was not indicated by Transnet as part of the original mitigation action for the risk of delays in the 1 064 locomotives delivery, Transnet needs to provide reasons for the deviation from the initial risk mitigation plan.*
- (c) *In relation to the confined procurement plan for this application; from risk perspective the concern is the possible litigation challenges that can come from the other possible suppliers, thus impacting on the project execution and delivery timelines. More information on Transnet’ mitigation plan in this regard is therefore required.*
- (d) *Considering that this is a R4.84 billion transaction, the closed tender process could have been looked into rather than the confinement option as this would reduce Transnet’s risk exposure to litigation challenges. Transnet is therefore requested to provide full explanation as to why a closed tender process was not considered for this transaction,*
- (e) *Moreover, the amount indicated in the certified excerpt from the minutes of the special Board of Directors meeting held on 24 January 2014 differs from the amount indicated in the Transnet’s section 54 application. I therefore request the resolution of the board of directors approving the transaction at the current transaction amount of R4.84 billion as the one indicated in the section 54 application relates to the initial approved amount of R3.9 billion.*
- (f) *The significance and materiality framework agreed to in the 2013/14 shareholder compact, clearly stipulates that the Transnet should provide me with notification on all acquisition and disposal of assets above R2 billion. It would therefore have been my expectation that after the board had approved the acquisition, prior to entering into negotiations with the supplier, Transnet would have provided such notification.*
- (g) *In spite of the concerns raised above, I do acknowledge the business need for the acquisition of these additional 100 locomotives for the coal line in order to avail more locomotives to be cascaded to the General Freight Business. I therefore, grant Transnet*

*the approval to acquire the 100 locomotives subject to Transnet addressing the concerns raised above and providing the Department with the outstanding information as outlined”.*

- 5.6.19.24. As indicated above, we determined that Transnet had already concluded a contract with CSR at the time Mkwanazi applied for approval in terms of section 54 of PFMA.
- 5.6.19.25. We further determined that the Board had not approved the increased ETC from R3.8 billion to R4.8 billion at the time (10 April 2014) Mkwanazi applied for approval of section 54 of the PFMA.
- 5.6.19.26. We determined that the Board only approved the increased ETC to R4.8 billion on 28 May 2014. Therefore, Mkwanazi applied for approval in terms of Section 54 of PFMA without the Board’s resolution.
- 5.6.19.27. We further determined that Molefe, Singh and Gama recommended to the Board, an increase in ETC to R4.8 billion on 23 May 2014, the same day that Minister Gigaba requested Mkwanazi to submit the Board resolution confirming approval of the increase ETC from R3.8 billion to R4.8 billion.
- 5.6.19.28. As Chairman of the Board at the time he submitted the application to Minister Gigaba, Mkwanazi knew or should have known that the Board had not approved the increase of ETC from R3.8 billion to R4.8 billion at the time of his application.
- 5.6.19.29. We determined that the Board contravened section 54 of the PFMA in that they failed to obtain section 54 approval from the Shareholder Minister before Molefe concluded the contract with CSR at an increased ETC of R4.38 billion.
- 5.6.19.30. We further determined that Minister Gigaba approved the application in terms of Section 54 of the PFMA knowing that he was relying on incomplete documentation submitted by Mkwanazi. This is evident by his response to Mkwanazi requesting, after approving the application, the Board resolution for an increased ETC to R4.8 billion.
- 5.6.19.31. In his written response, Minister Gigaba indicated that the he was not furnished with a resolution of the Board approving the transaction and a result he requested Transnet to provide him with a copy of the resolution taken. According to Minister Gigaba, the Board resolution was one of his conditions for approval in terms of section 54 of the PFMA.

- 5.6.19.32. Minister Gigaba approved the acquisition of 100 locomotives at ETC of R4.8 billion, despite raising various concerns *inter alia*, failure by Mkwanazi to submit a Board resolution for the increased ETC to R4.8 billion.
- 5.6.19.33. In his written response, Minister Gigaba indicated that he granted Transnet approval in terms of section 54 subject to Transnet addressing the concerns raised below and providing the Department with outstanding information by June 2014:
- 5.6.19.33.1. Transnet indicating the current capacity of the corridors in which the cascaded locomotives were expected to be deployed, as well as the reasons as to why those corridors were selected.
  - 5.6.19.33.2. Transnet providing the incremental volumes expected to be derived for each of those corridors as a result of the deployment
  - 5.6.19.33.3. Transnet providing by specific corridors or by business units as per the deployment of the locomotives, the quantified and reliably measurable efficiency gains that were expected to be extracted from the acquisition.
  - 5.6.19.33.4. Transnet providing the following outstanding information:
    - 5.6.19.33.4.1. Transnet supplying the determined impact/total value add of the project to GDP.
    - 5.6.19.33.4.2. Since Transnet has already concluded the contract for this acquisition, subject to PFMA approval, I requested that Transnet furnish me with a copy of the agreement pertaining to the acquisition of 100 Dual Voltage electric locomotives as this would have provided me with an in depth understanding of the transaction that Transnet was entering into so as to enable the Department to properly assess the risks pertaining to the proposed transactions
    - 5.6.19.33.4.3. Considering that the 100 locomotives was not indicated by Transnet as part of the original mitigation action for the risk of delays in the 1,064 locomotives delivery, I requested Transnet to provide reasons for the deviation from the initial risk migration plan.

- 5.6.19.33.4.4. In relation to the confined procurement plan for this application; I requested more information on Transnet's mitigation plan from a risk perspective given the concerns that I had of possible litigation challenges that could come from other possible suppliers, thus impacting on the project execution and delivery timelines.
- 5.6.19.33.4.5. Transnet providing further information about the types of jobs/skills to be created through this transaction. I requested the SOC to specify how many jobs were expected to be created and retained in downstream enterprises.
- 5.6.19.33.4.6. Considering that this was a R4.84 billion transaction, requested Transnet to provide a full explanation as to why a closed tender process was not considered for this transaction, rather than the confinement option as this would have reduced Transnet's risk exposure to litigation challenges.
- 5.6.19.33.4.7. I requested the provision of a business case containing a proper risk assessment of the project and the mitigations thereof.
- 5.6.19.33.4.8. Transnet was requested to provide all contracts with CSR as well as a report on how CSR was performing against current SD commitments.
- 5.6.19.33.4.9. From the Procurement and Supplier Development (SD) perspective, I indicated that the Department should review the SD commitments, the enforceability of these commitments and the current performance of this supplier against set targets on contracts that are currently in place since the tender was confined to one supplier.
- 5.6.19.33.4.10. I requested to be furnished with an indication of whether other alternatives were considered to mitigate the impact of the delay of the 1064

locomotive delivery as this was not evident in the business case.

Given that the amount indicated in the certified excerpt from the minutes of the special Board of Directors meeting held on 24 January 2014 differed from the amount indicated in the Transnet's section 54 application, I requested a resolution of the board of directors approving the transaction at the current transaction amount of R4.84 billion as the one indicated in the section 54 application related to the initial approved amount of R3.9 billion.

- 5.6.19.34. It is unclear why Minister proceeded with the approval in respect of section 54 whilst he still had numerous concerns with Transnet's application.
- 5.6.19.35. We were not provided with any evidence to suggest that Transnet complied with Minister Gigaba's request.
- 5.6.19.36. Section 76 of the Companies Act deals with directors' standards of conduct and sub-section (3) provides that (**Annexure B41**) - *"a director of a company, when acting in that capacity, must exercise the powers and perform the functions of a director:*
- (a) *"in good faith and for a proper purpose;*
  - (b) *in the best interests of the company; and*
  - (c) *with the degree of care, skill and diligence that may reasonably be expected of a person*
    - (i) *carrying out the same functions in relation to the company as carried out by that director, and*
    - (ii) *having the general knowledge, skill and experience of that director."*
- 5.6.19.37. Section 50 of the PFMA also deals with fiduciary duties of accounting authorities and sub-section (1)(a) and (b) provides that (**Annexure B42**)- *" the accounting authority of a public entity must –*
- (a) *exercise the duty of utmost care to ensure reasonable protection of the assets and records of the public entity;*
  - (b) *act with fidelity honesty, integrity, and in the best interests of the of the public entity in managing the financial affairs of the public entity;.."*

- 5.6.19.38. We determined that the Board contravened section 76(3) of the Companies Act and section 50 of the PFMA, in that it failed to act in the best interest of Transnet and exercise a duty of utmost care to ensure reasonable protection of Transnet's assets when they approved the ETC to R4.8 billion and procured locomotives at R4.4 billion instead of R3.1 billion.
- 5.6.19.39. We determined that Molefe, Singh and Gama informed the Board that Transnet, represented by Molefe, had already committed the Company to a contract value of R4.38 billion.
- 5.6.19.40. We further determined that at the time that Mkwanazi applied to the Shareholder in terms of section 54, Transnet had already paid CSR a 30% advance payment of R1.5 billion inclusive of VAT.
- 5.6.19.41. The 10% advance payment made to CSR was not negotiated between Transnet and CSR. The advance payment was in fact offered by Molefe in as reflected in paragraph 4(e) of his letter to Pan dated 25 February 2014 Molefe's letter to Pan was a request for proposal and as such it is questionable why Molefe would have already offered an upfront payment even before CSR responded to the RFP.
- 5.6.19.42. According to Principle 2.9 of King III, *"The board should ensure that the company complies with applicable laws and considers adherence to non-binding rules, codes and standards"*. We determined that the Board did not ensure that they comply with Section 54 of the PFMA when acquiring 100 locomotives. (**Annexure B43**)
- 5.6.20. **Section 54 of the PFMA Notification to the National Treasury**
- 5.6.20.1. In addition to the application for approval to the Shareholder, section 54 of the PFMA, further provides that the accounting authority of a public entity must promptly and in writing inform the relevant treasury of the transaction for acquisition or disposal of significant assets.
- 5.6.20.2. We determined that on 10 April 2014 Transnet Board through, Mkwanazi submitted a letter to Minister Gordhan notifying the then Finance Minister of the procurement of the 100 locomotives in terms of Section 54 of the PFMA. (**Annexure B44**)
- 5.6.20.3. In his letter to Gordhan, Mkwanazi stated that the purpose of the letter: *"was to notify the National Treasury of Transnet's application to its shareholder Minister (Department of Public Enterprise) of our planned investment to acquire 100 dual voltage electric locomotives for the export line"*.

- 5.6.20.4. Mkwanzazi informed the Minister that the 100 locomotives were being acquired to mitigate against the volume risk posed to the MDS due to the delays experienced on the 1064 locomotive acquisition contract. He further indicated that it would result in existing locomotives on the export line being cascaded to TFR's GFB to increase tractive capacity to address some of the volume shortfall anticipated.
- 5.6.20.5. Mkwanzazi further stated that Transnet would be interacting with the shareholder representatives as well as National Treasury representatives as part of the stakeholder engagement strategy formulated for Transnet's investments requiring Shareholder approval.
- 5.6.20.6. We determined that Mkwanzazi informed National Treasury of the acquisition of the 100 locomotives after Molefe and Singh had already signed a service contract with CSR on 17 March 2014.
- 5.6.20.7. At the time that Mkwanzazi notified National Treasury and obtained approval from DPE, Transnet had already paid CSR 30% advance payment of R1.5 billion (VAT inclusive) on 28 March 2014.
- 5.6.20.8. We determined that Mkwanzazi did not inform National Treasury that Transnet had already paid an advance payment of R1.5 billion to CSR at the time of the application (to the Shareholder) and notification (to National Treasury).
- 5.6.20.9. The advance payment to CSR was irregular in that it was paid before obtaining approval from DPE and notifying National Treasury of the acquisition of the 100 locomotives.
- 5.6.21. **BBBEE PARTNER**
- 5.6.21.1. Matsete Basadi Consortium (Pty) Ltd with registration number 2012/139552/07 ("Matsete Basadi Consortium") was CSR's B-BBEE partner during the acquisition of the 100 locomotives.
- 5.6.21.2. Background searches conducted, determined that Matsete Basadi Consortium was registered on 2 August 2012 and is currently listed as in business. **(Annexure B45)**
- 5.6.21.3. Matsete Basadi Consortium had nine (9) directors upon incorporation (*as per the databases used for the purposes of this investigation*). We have discussed above the results of the background searches.
- 5.6.21.4. As discussed above, some of individuals who were directors of CSR were also directors of CSR's BBBEE partner, Matsete Basadi Consortium and this result in misrepresentation of the BEE partner.



- 5.6.21.5. Molefe and Singh, the latter signing as a witness, signed the Locomotive Supply Agreement (“LSA”) on behalf of Transnet with CSR’s South African entity, CSR E- Loco on 17 March 2014. **(Annexure B34)**
- 5.6.21.6. According to the signed contract, the effective date means *“the first business day following the fulfilment or waiver (as applicable) of the suspensive conditions contained in clause 2 (commencement)”*.
- 5.6.21.7. The following suspensive conditions as per clause 2.2.1 of the agreement had to be fully satisfied or waived in writing:
- “Company shall have confirmed in writing to the contractor (by providing certified copies of the relevant source documents) that:*
- (a) the company board of directors has approved the purchase of the locomotives; and*
  - (b) it has obtained such requisite approval/s in terms of section 54(2) of the Public Finance Management Act, No.1 of 1999 for the implementation of the works as contemplated in this Agreement to the extent such approval is required”.*

## **5.7. WAIVER OF SUSPENSIVE CONDITIONS**

- 5.7.1. On 27 March 2014 Molefe signed and sent a letter to CSR, confirming receipt of documents envisaged in the suspensive conditions, and further confirming fulfilment and/or waiver of the suspensive conditions. The letter was signed by Zhou Qinghe (President of CSR Zhou Electric Locomotive Co. LTD), agreeing to the terms of the letter. **(Annexure B46)**
- 5.7.2. In the above stated letter Molefe stated that; *“the letter serves to confirm that all of the suspensive conditions set out in clause 2 of the supply agreement (Suspensive Conditions) have either been fulfilled or waived as contemplated in clause 2.2 of the supply agreement”*.
- 5.7.3. Molefe contravened clause 2.2 of the LSA and misrepresented by confirming fulfilment or waiver of suspensive conditions, before Transnet obtained the section 54 approval of the acquisition of the 100 locomotives by Minister Gigaba DPE, when in fact that had not happened yet. We note further that the suspensive condition was not capable of being waived.
- 5.7.4. In the said notice, Molefe stated that - *“Each contractor and the company confirm to each other that, save as otherwise waived in accordance with the waiver letter dated the same date as this letter, each of the suspensive conditions referred to in clause 2 (Commencement) of the Supply Agreement, in so far as such conditions are stipulated for the benefit of such party, have*

*been satisfied. Each party hereby confirms that the Effective date of the supply agreement is 27<sup>th</sup> March 2014.*

5.7.5. On 27 March 2014, Molefe signed and sent the “waiver of the suspensive conditions” to CSR, which was then signed by Qinghe on the same day, agreeing to the terms of the letter. (**Annexure B47**)

**5.8. FINANCIAL ANALYSIS OF THE ACQUISITION OF 100 NEW CLASS 21E LOCOMOTIVES: CSR-TFRAC-HO-13365**

5.8.1. As indicated above in the report, Transnet entered into an LSA with CSR E-Loco Supply at a fixed and firm contract price of R44 000 000 per locomotive. The total contract price was R4 400 000 000 (VAT exclusive) and R5 016 000 000 (VAT inclusive) for design, manufacture, test and supply of 100 new Class 21E locomotives.

5.8.2. The contract price for the 100 new locomotives was expressed in South African rand (ZAR). As per Paragraph 1.2.1 of Schedule 1 to the LSA, the payment to CSR in respect of the 100 new locomotives was to be in stage payments, upon achievement of various identified milestones once each milestone had been achieved or reached.

5.8.3. We determined that the signed agreement further stipulated the following payment terms which were agreed between Transnet and CSR, as per paragraph 1.2.1 of Schedule 1 to the LSA - *“The contract price for the above referenced Locomotives shall be paid by the Company in stage payments (each a **Milestone Payment**) on the respective date/stages specified under the heading “date/Stage” in the table immediately below (each a **Milestone** and each such date on which such Milestone is achieved, a **Milestone date**) and in the amounts set opposite the respective dates or stages:*

**TABLE: 5.7.15.4A**

<b>Date/Stage</b>	<b>Payment %</b>
The effective date	30% of the Contract Price
The date of Design Review finalization	30% of the Contract Price
The date of issue of an Acceptance Certificate for a Locomotive	37% of the Contract Price of such Locomotive
The Mission Reliability Retention Release Date	1,5% of the Contract price of such Locomotive

Date/Stage	Payment %
The Fleet Availability Retention Release Date	1,5 of the Contract Price of such Locomotive

5.8.4. The LSA had a suspensive condition as per Clause 2.2 which stated that no payment would be made unless the suspensive condition was complied with by CSR.

**Advance payments made to CSR for the 100 locomotives**

5.8.5. We determined that in his request for proposal letter to CSR dated 25 February 2014, Molefe offered CSR an advance payment of 10% of the contract price. We further determined that at the time of Molefe’s RFP letter to CSR indicated above, the Board had approved a total ETC of R3.8 billion for the acquisition of the 100 locomotives. It is not clear as to what informed Molefe to make the offer of 10% advance payment to CSR prior to the entity providing Transnet with a proposal as per the RFP.

5.8.6. The 10% advance payment offered to CSR by Molefe was not reflected in the business case and memorandum submitted to Board for the approval of the confinement to CSR.

5.8.7. The Board’s resolution of 24 January 2014 mandated Molefe to sign and conclude all relevant documents to give effect to the resolution including the award and process approval. The Board however did not delegate Molefe to make the offer of an advance payment which he did in his letter to CSR.

5.8.8. Molefe’s financial delegated power for confinement was an amount of R250 million as per the 2013 PPM and therefore the offer of 10% of R3.8 billion was above his delegated authority.

5.8.9. On 19 March 2014, CSR issued an invoice with invoice number CSR-TRAC-HO-13365-001 for an amount of R1.3 billion (Excluding VAT) and R1.5 billion (Including VAT). The said invoice was issued under contract number TFRAC-HO-13365. The 001 at the end of the number reflected as the invoice number denotes that it was the first invoice for the 100 locomotives. The invoice reflects that it was signed by Andy (She Yongjun) and was addressed to Transnet for Mdletshe’s attention.

5.8.10. Mdletshe indicated that the reason CSR was addressing the invoices to her was because the OEM had seen her details on the advertisement for the acquisition of the 95 locomotives.

5.8.11. The invoice issued by CSR for the advance payment was prior to the suspensive conditions agreed upon in the LSA being met. It is our understanding that section 54 of

the PFMA is a legal requirement and must be complied with before the conclusion of the contract of a significant asset hence it was included as a suspensive condition in the LSA.

- 5.8.12. On 27 March 2014, Molefe issued a letter addressed to Zhou Qinghe (CSR President) stating *inter alia* that all of the suspensive conditions in clause 2 of the LSA were either fulfilled or waived.
- 5.8.13. The statement made by Molefe was not correct as we determined that not all suspensive conditions were either fulfilled or waived in that the Section 54 was not fulfilled and could not be waived as the contract value required DPE approval.
- 5.8.14. The letter issued by Molefe facilitated the payment of R1.3 billion as per the invoice dated 19 March 2014 which was not paid until Molefe issued the letter dated 27 March 2014.
- 5.8.15. Transnet eventually made the advance payment of R1.3 billion on 28 March 2014, a day after Molefe issued the letter which stated that all suspensive conditions were either fulfilled or waived, whilst that was clearly not the case. Therefore Molefe misrepresented the facts to CSR and not in the best interests of Transnet.

#### **Design Review Finalization Payment**

- 5.8.16. Transnet paid an amount of R1.3 billion, being 30% of the contract ETC of 4.4 billion, for the second payment for the design of locomotives. The said payment which amounted to R1.3 billion was made to CSR on 1 October 2014 for completion of design “Design Review Finalization” stage. Transnet made a cumulative payment of R2.6 billion (VAT exclusive) to CSR which equates to 60% of R4.38 billion (VAT exclusive) of the total contract price before actual delivery of locomotives, contrary to the terms of the LSA.
- 5.8.17. As discussed above, we determined that when Transnet made the decision to acquire the additional 100 locomotives as per various memoranda discussed, the said locomotives were going to be class 19E. Gama went to great length in differentiating between the 19E and 20E locomotives supplied by Mitsui and CSR respectively. In the said comparison, Gama concluded that the 19E locomotive was better and well suited to the coal line than the 20E.
- 5.8.18. Had Transnet gone with the initial proposal to confine through Mitsui, the company (Transnet) would not have incurred design costs as Mitsui had already designed and charged Transnet for the 19E and had already delivered the said locomotive class which was already being used on the coal line.

5.8.19. In their letter of enquiry to Transnet dated 19 March 2014, Mitsui wrote *inter alia* the following “19E locomotive constitute a bespoke locomotive and its design and performance have been approved by and proven over the years to Transnet. Transnet has also spent considerable amounts of time and money in securing a bespoke locomotive for its needs. Therefore, to incur additional substantial costs and the associated risks to procure locomotives other than those on which large amounts of time, effort and money have been spent to date would not be prudent”.

**Non Compliance Penalty**

5.8.20. In accordance with Clause 20.5 of Locomotive Supply Agreement, if CSR fails to deliver, at any time, to achieve its commitments under and in accordance with any Plan or Further Recognition Development Commitments, including any recommendations of the Engineer, CSR shall pay a Non Compliance Penalty to Transnet in respect of such non-compliance at the Applicable Rate.

5.8.21. As per the schedule of delivery attached to the LSA, CSR was required to deliver 100 locomotives as follows:

No.	Handover date	Acceptance date	Expected Quantity of Handover	Actual Quantity of acceptance	Late deliveries
1	May 2015	30 June 2015	18	12	6
2	June 2015	31 July 2015	18	18	0
3	July 2015	28 August 2015	18	12	0
		31 August 2015		6	0
4	August 2015	28 September 2015	18	12	0
		30 September 2015		6	0
5	September 2015	26 October 2015	18	12	0
		30 October 2015		6	0
6	October 2015	25 November 2015	10	6	0
		27 November 2015		6	-2

No.	Handover date	Acceptance date	Expected Quantity of Handover	Actual Quantity of acceptance	Late deliveries
		30 November 2015		4	-4
	<b>Total</b>		<b>100</b>	<b>100</b>	<b>0</b>

- 5.8.22. As per the delivery schedule contained in the LSA, CSR agreed to deliver 100 locomotives between June 2015 and November 2015.
- 5.8.23. Failure to deliver 100 locomotives within the stated duration or period would attract a non-compliance penalty.
- 5.8.24. We determined that CSR commenced with delivery of locomotives on 30 June 2015 until 30 November 2015.
- 5.8.25. We determined that CSR delivered 12 locomotives in June 2015 instead of 18 locomotives as per the delivery schedule. CSR therefore made late deliveries of 6 locomotives compared to delivery schedule as per LSA throughout the duration of the contract.
- 5.8.26. We however determined that Transnet failed to charge CSR a non-compliance penalty fees for late delivery. In their response to our second draft report, CSR indicated the following relating to the late delivery of the 100 locomotives :

*“The 100 locomotives were delivered within 19 Months of the effective date as compared with the 17 Months agreed at the signing of the contract.*

*Although all the 100 locomotives were delivered and tested on time, the two months delay was due to the delay in acceptance test processes and additional scope, TCS cable which was a free issue from Transnet Freight Rail. Transnet Engineering requested that we delay the delivery of some of the locomotives as the newly delivered locomotives were stock-piling at their facility in Koedoespoort and were concerned that if there is an overflow, it might result in new locomotives being vandalized. As the delays were attributed to activities that Transnet Engineering and Transnet Freight Rail were responsible for, therefore it was not possible to levy any penalty against CRRC.”*

- 5.8.27. According to our calculations, the non-compliance penalty that Transnet could have charged CSR for not delivering 6 locomotives between March 2015 until 30 November 2015, as per delivery scheduled contained in the LSA was R2 132 307.69.

5.8.28. Based on the review of the GPS co-ordinates provided by Transnet, we determined that 92 locomotives are in operation. During our consultations with Ramages, he indicated that the reason certain locomotives were not in operation was because some of the locomotives were taken for repairs and others were written off due to accidental damages.

### **Conclusions -**

5.8.29. Based on our findings as contained in our report above, we conclude as follows:

- 5.8.29.1. CSR failed to deliver a total of 6 locomotives on time during the period commencing from May 2015 to November 2015.
- 5.8.29.2. Transnet did not charge CSR the Non Compliance Penalty estimated at R2 132 307.69 for not complying with the delivery schedule as per the agreement.
- 5.8.29.3. Transnet Board approved confinement to CSR on 24 January 2014 before receiving proposal from CSR which was received in February 2014.
- 5.8.29.4. Transnet would have saved R1.2 billion if it procured 100 locomotives from Mitsui at R3.188 billion than procuring from CSR at R4.4 billion.
- 5.8.29.5. Molefe and Singh failed to conduct a cost /benefit analysis when a decision to change the locomotives from the 19E Mitsui locomotive to 21E CSR locomotives was taken.
- 5.8.29.6. Molefe and Singh failed to follow a proper confinement process when motivating for the acquisition of 100 locomotives from CSR.
- 5.8.29.7. Transnet Board failed to notify the Shareholder of acquisitions and disposal above R2 billion before the conclusion of the contract with CSR as required by 2013-2014 Shareholders Compact agreement.
- 5.8.29.8. Transnet Board breached the provisions of section 76(3) of the Companies Act and section 50 of the PFMA relating to their fiduciary duties. As such, provisions of section 86 of the PFMA relating to offenses and penalties against accounting authorities who breach the provisions of section 50 and 51 are applicable.

## **Recommendations**

- 5.8.30. Based on the conclusions as reflected above we recommend following:
- 5.8.30.1. Transnet Board provides this report to DPCI to investigate whether former Transnet Board members/ Executives and CSR received any gratification in terms of the Prevention and Combating of Corrupt Activities Act.
  - 5.8.30.2. Transnet Board provides this report to DPCI to investigate whether former Transnet Board members/ Executives and CSR contravened section 34(1) of the Prevention and Combating of Corrupt Activities Act.
  - 5.8.30.3. Transnet Board provides this report to DPCI to investigate whether former Transnet Board members committed any criminal offence in terms of Section 86 of the Public Finance Management Act.
  - 5.8.30.4. Transnet Board consider recovering the non-compliance penalty of R2 132 307.69 from CSR or any other role player.
  - 5.8.30.5. Transnet Board consider recovering the R1.2 billion possible overpayment from Transnet Board members/executives.
  - 5.8.30.6. Transnet Board consider taking appropriate disciplinary steps against Transnet officials who abused the supply chain management process who are still employed by Transnet.
  - 5.8.30.7. Minister of DPE recommends that Cabinet consider restricting Transnet Executives who abused the supply chain management process from employment/doing business with any organ of state for a period of five years.
  - 5.8.30.8. Minister of DPE recommends that Cabinet consider restricting former Transnet Board members who contravened section 50 and 51 of the PFMA from employment as political advisers or directors of Boards/Committees in any organ of state for a period of five years.

## **5.9. ACQUISITION OF THE 1064 LOCOMOTIVES**

### **Background**

- 5.9.1. It is our understanding that during April 2011 Transnet's TFR identified a need to acquire a total of 1064 locomotives. The decision to acquire the said locomotives was preceded by Transnet's Fleet Plan Strategy, wherein the company identified the need to replace the ageing fleet in order to deliver on its strategy of ramping up from 82.6



million tonnes in 2012/2013, to 127 million tonnes in 2015/2016, to 170 million tonnes in 2018/2019.

5.9.2. Based on documentation reviewed, we understand that Transnet's average age for the locomotives was 32 years before the acquisition of 1064 locomotives.

5.9.3. According to the Business Case dated 25 April 2013, there was a major procurement of over 1000 locally manufactured electric locomotives in the early 1970s and 1980s however, no new locomotives were purchased for GFB from 1992 through to 2008. In order to achieve its ("Market Demand Strategy") and socio-economic objectives, Transnet resolved to invest in GFB by procuring 1064 new locomotives (465 diesel and 599 electric). (**Annexure C1**)

5.9.4. **Request for approval of the process to acquire 1064 locomotives**

5.9.4.1. We determined that, on 13 April 2012, Singh and Gama presented a memorandum to Molefe seeking approval for the acquisition of 1064 locomotives at an ETC of R38.1 billion. (**Annexure C2**)

5.9.4.2. **Approval of the acquisition of the 1064 locomotives by the Transnet Board**

Transnet provided us with a copy of a presentation dated April 2012 titled "*TFR General Freight (1064) Locomotive Procurement Strategy Submission -7 Year Plan*" to be presented to the Transnet Board of Directors (**Annexure C3**). According to the said presentation, the following executive summary was presented:

1. *"Transnet Board approved the TFR locomotive fleet plan in February 2012.*
2. *1202 GFB locomotives were approved as part of the TFR fleet strategy.*
3. *Of the 1202 GFB locomotives, a contract was concluded for 43 diesels and a tender was issued for 95 electrics in December 2011.*
4. *TFR now requires 1064 (599 electric and 465 diesel) GFB locomotives.*
5. *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.*
6. *Procurement strategy;*
  - *Issue open tenders for both locomotive types*
  - *Local content of 55% and 60% for diesel and electric locomotives respectively as per PPPFA*

- *BBBEE*
  - *Minimum disqualifying thresholds for Local content (55% and 60%) and SD/BBBEE (40%) will form stage 1 of the evaluation process*
  - *Stage 2 will comprise of price (60%), SD (20%) and BBBEE (20%)*
7. *Procurement strategy was recommended to the Board by the Board Acquisitions and Disposals Committee on 19<sup>th</sup> April 2012 after minor changes were incorporated"*

5.9.4.3. According to the presentation, the procurement of the 1064 locomotives was to take place over a 7 year period from 2012. Furthermore, we noted that both the procurement of the electric and diesel locomotives would be conducted through an open tender process.

5.9.4.4. The memorandum suggested a parallel process to be followed, which included the following:

- 5.9.4.4.1. Obtaining PFMA approval from DPE and National Treasury
- 5.9.4.4.2. Obtaining PPPFA exemption from National Treasury if no tender respondents met the local content thresholds; and
- 5.9.4.4.3. Evaluation of the RFP between August 2012 and September 2012 and award by December 2012.

5.9.5. **Approval by the Board to acquire 1064 locomotives**

5.9.5.1. We determined that on 25 April 2012, the Board met to consider the approval of the procurement of 1064 GFB locomotives (**Annexure C4**).

5.9.5.2. The following Board Members were present during the said Board meeting:

Present	Position
ME Mkwanazi	Chairman
B Molefe	GCE (EXCO)
NK Choubey	Non-Executive Director
Y Forbes	Non-Executive Director
MA Fanucchi	Non-Executive Director

Present	Position
HD Gazendam	Non-Executive Director
NBP Gcaba	Non-Executive Director
BD Mkwanazi	Non-Executive Director
T Mnyaka	Non-Executive Director
N Moola	Non-Executive Director
MP Moyo	Non-Executive Director
A. Singh	Acting CFO (EXCO)
E Tshabalala	Non-Executive Director
DLJ Tshepe	Non-Executive Director

- 5.9.5.3. We determined that Sharma and Ntshingila were not present at the said meeting. We further determined that Ceba was the Company Secretary at the said meeting.
- 5.9.5.4. The Board resolved to approve the acquisition of the 1064 GFB locomotives in line with the procurement strategy and process, capital and financial risk and further subject to PFMA approval. Transnet issued two RFPs for the 465 diesel locomotives and 599 electric locomotives respectively. The Board further resolved to delegate its authority to Molefe to approve the RFPs, subject to PFMA approval.
- 5.9.5.5. Section 5.1 of Transnet Group Limits of Authority (“Limits of Authority”) states that *“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”*. **(Annexure C5)**
- 5.9.5.6. We determined that the cost for the acquisition of the 1064 locomotives was at an ETC of R38.1 billion.
- 5.9.5.7. We were not provided with any documentation to confirm that CAPIC recommended to Group EXCO to recommend to the Board to approve the ETC of R38.1 billion for acquisition of 1064 locomotives.

5.9.5.8. Section 5.1.1 of Limits of Authority states that “*If the set limit (currently 1% of total assets) is exceeded then the Board to consider and recommend to Shareholder Minister for approval. Approval limits are per individual project, reported on a monthly basis to Group Financial Planning*”. As indicated above, Singh and Gama requested approval for the acquisition for the acquisition of 1064 locomotives at an ETC of R38.1 billion. The transaction value required the Board to apply and obtain approval from the Shareholder Minister in terms of section 54 of the PFMA to acquire the 1064 locomotives.

#### **Application for approval in terms of section 54 of the PFMA**

5.9.5.9. As stated above, the Board resolved in its meeting of 25 April 2012 that section 54 approval in terms of the PFMA should be obtained from the Shareholder Minister prior to the issuance of the RFPs.

5.9.5.10. According to the above board resolution, Molefe was delegated to approve the issuing of the RFPs, subject to Shareholder approval in terms of section 54 of the PFMA.

5.9.5.11. We determined that at the time that the RFP for the acquisition of the 1064 locomotives was advertised *i.e.* 23 July 2012, Transnet had not yet obtained approval from the Shareholder Minister in terms of Section 54 of the PFMA.

5.9.5.12. As discussed below, Transnet Board obtained approval from the Shareholder Minister in terms section 54 of the PFMA on 3 August 2013. We noted that the said date was more than a year after the tender advertisement was issued on 23 July 2012.

#### **5.9.6. Shareholder’s Compact Agreement**

5.9.6.1. We determined that the Transnet Board and DPE concluded the 2012-2013 Shareholder’s Compact Agreement signed on 2 April 2012 and 26 April 2012 by Mkwanazi and Minister Gigaba respectively (“2012-2013 Shareholders Compact”).  
**(Annexure C6)**

5.9.6.2. According to the 2012-2013 Shareholder’s Compact, the agreement would remain in full force and effect until it was renegotiated provided that the parties would consider the renegotiation at least once per annum.

5.9.6.3. We further determined that the 2012 - 2013 Shareholder’s Compact outlined the significance and materiality framework in terms of Sections 54 of the PFMA as follows:

PFMA	Description	Exemption from Section 54 of the PFMA
S54(2)(d)	Acquisition or disposal of a significant asset	1. If the acquisition does not exceed R2.5 billion

5.9.6.4. Based on the above mentioned Shareholder’s Compact, Transnet was not exempted from Section 54 application process for the acquisition of the 1064 locomotives as the tender value of R38.1 billion was above the R2.5 billion threshold.

5.9.6.5. As discussed below, we determined that the Transnet Board did not apply to DPE in terms of section 54 of the PFMA prior to the advertisement of the tender for the acquisition of 1064 locomotives.

5.9.6.6. The Board contravened the 2012-2013 Shareholder’s Compact Agreement and section 54 of the PFMA in that it did not apply to the Shareholders prior to the commencement of the acquisition of 1064 locomotives, which was above the R2.5 billion threshold, as that the Board only applied to the Shareholders after the procurement process had commenced.

**Notification to National Treasury in terms of Section 54 of the PFMA**

5.9.6.7. Section 54 of the PFMA further provides that the accounting authority (Transnet Board) should inform National Treasury of the envisaged transaction.

5.9.6.8. We determined that on 30 April 2013 the Board informed National Treasury of the acquisition of the 1064 locomotives after issuance of the RFP (**Annexure C7**).

**5.9.7. Exemption from PPPFA procurement process for 1064 locomotive transaction**

**Exemption dated 7 December 2011**

5.9.7.1. We determined that the Finance Minister granted an exemption to Transnet dated 7 December 2011 relating to non-designated sectors (**Annexure C8**). The said exemption excluded designated sectors (e.g. rolling stock) and therefore Transnet was required to follow the prescripts of the instruction note and apply the 80/20 and 90/10 principle.

5.9.7.2. As reflected above, Transnet was therefore not exempted from applying the 80/20 or 90/10 principle in terms of the PPPFA regulations.

5.9.7.3. We determined that there was a memorandum dated 13 April 2012 signed by Singh, and Gama and addressed to Molefe. The said memorandum *inter alia* reflected that

Transnet would obtain PPPFA exemption from National Treasury, if no tender respondents met the local content threshold. We determined that Molefe approved the memorandum but did not put a date next to his signature.

#### **Instruction note dated 16 July 2012**

5.9.7.4. On 16 July 2012, National Treasury issued an instruction note signed by Minister Gordhan regarding the *“Invitation and Evaluation of bids based on a stipulated minimum threshold for Local Production and Content for Rail Rolling Stock”*, which:

- Prescribed that Local Content (“LC”) threshold for diesel was 55% and for electric locomotives was 60%;
- Stipulated that amendments to the stipulated minimum threshold for LC were not allowed; and
- Prescribed that bids which passed the minimum stipulated threshold for LC must be evaluated in accordance with 80/20 or 90/10 preference point system prescribed in the Preferential Procurement Regulations of 2011. (**Annexure C9**)

5.9.7.5. The instruction note dated 16 July 2012 was issued seven days before Transnet advertised the RFP for the procurement of 1064 locomotives.

5.9.7.6. As discussed above, Transnet sought an exemption from the application of the PPPFA as contained in the Exemption dated 7 December 2011.

#### **Memorandum dated 23 July 2012 to BADC**

5.9.7.7. We determined that on 23 July 2012, Singh and Pita signed a memorandum addressed to BADC stating that: (**Annexure C10**)

5.9.7.7.1. On 17 July 2012, iSCM met with officials from National Treasury to understand the implications of the Instruction Note specifically for the RFPs (Diesel and Electrics) which were scheduled to be issued to the market on 23 July 2012. In particular, clarity was sought on the following aspects:

5.9.7.7.1.1. Whether Transnet was required to apply the 80/20 or 90/10 principle despite the exemption from most of PPPFA regulations which the Minister of Finance granted to schedule 2 entities on 7 December 2011. Transnet had sought exemption from the PPPFA regulations on grounds that the regulations did not enable Transnet to give effect to the

objectives of the New Growth Path or to follow a more robust approach to empowerment;

5.9.7.7.1.2. Whether Transnet could include Further Recognition Criteria (“FRC”), current or future in the RFPs; and

5.9.7.7.1.3. Whether Transnet could apply its standard evaluation methodology during stage 1 of the tender process *i.e.* to include a threshold for SD/B-BBEE in addition to the thresholds for Local Content and Quality.

5.9.7.8. According to a memorandum from Singh and Pita dated 23 July 2012, National Treasury responded as follows to the abovementioned issues raised by Transnet:

5.9.7.8.1. The Local Content threshold for diesel locomotives was 55% and the threshold for electric locomotives was 60% and that should not be deviated from;

5.9.7.8.2. The exemption granted by the Minister on 7 December 2011 still applies in respect of non-designated sectors. However, in respect of designated sectors (e.g. rolling stock), Transnet was required to follow the prescripts of the instruction note and apply the 80/20 and 90/10 principle;

5.9.7.8.3. FRC should not be included in the evaluation of preference since preference must be scored strictly in accordance with the B-BBEE scorecard;

5.9.7.8.4. The threshold for SD/B-BBEE should not be included during the first stage; and

5.9.7.8.5. The only thresholds that should be followed were in respect of LC and quality.

5.9.7.9. The Transnet memorandum further stated that National Treasury comments were as follows:

5.9.7.9.1. In light of the National Treasury instruction note and further clarification sought from National Treasury, it was clear that the locomotive RFPs needed to be amended to conform to the Practice Note;

5.9.7.9.2. Preference had to be scored strictly in accordance with the 90/10 principle, as 80/20 applied only to tenders less than R1 million;

5.9.7.9.3. Preference had to be scored based only on the B-BBEE scorecard;

- 5.9.7.9.4. The SD/B-BBEE threshold should not form part of stage 1;
- 5.9.7.9.5. The RFP had to indicate that the only applicable thresholds were in respect of Local Content and quality;
- 5.9.7.9.6. Furthermore, SD ought to be taken out of stage 2 which would be the final weighted scoring;
- 5.9.7.9.7. The final weighted scoring ought to be as follows: Price (90%) and B-BBEE (10%);
- 5.9.7.9.8. Consequently, SD could not feature in the evaluation of the locomotives tenders at all;
- 5.9.7.9.9. The RFP could however still have required bidders to submit their SD proposals. These proposals could be used to negotiate SD value during the post tender negotiation phase of the tender.
- 5.9.7.10. The memorandum further proposed the following as a way forward:
  - 5.9.7.10.1. As a result of the National Treasury's instruction note, and based on guidance given by Molefe, Singh and Gama, the RFPs had to be amended in line with the instruction note and be issued on 23 July 2012;
  - 5.9.7.10.2. The RFPs would be issued in parts. Part 1 of the RFP would be issued on 23 July 2012 and contain all the information required by National Treasury instruction note including the following information:
    - 5.9.7.10.2.1. General information;
    - 5.9.7.10.2.2. Technical information;
    - 5.9.7.10.2.3. BBBEE scorecard;
    - 5.9.7.10.2.4. Supplier Development;
    - 5.9.7.10.2.5. Financial proposal; and
    - 5.9.7.10.2.6. Administrative information e.g. pertaining to closing dates, briefing sessions, returnable documents, etc.
  - 5.9.7.10.3. Subsequent parts would be issued at a later stage and would address aspects such as evaluation criteria, evaluation methodology; weightings and supply agreement, Financial Total Cost of Ownership (TCO) model;
  - 5.9.7.10.4. Whilst the RFP was in the market, Transnet would approach National Treasury (with the support of DPE) to obtain full exemption from all



PPPFA regulations as a matter of urgency. Should such exemption be granted, Transnet would issue an addendum to the RFP to align it with the Board approved strategy.

- 5.9.7.10.5. As discussed below, we determined that Gigaba wrote a letter to National Treasury dated 16 April 2013 requesting full exemption from PPPFA principles for Transnet to procure 1064 locomotives.
- 5.9.7.11. We determined that Molefe did not sign the memorandum dated 23 July 2012 reflected above. We could not determine Molefe's reasons for not signing the memorandum as he did not respond to questions posed to him relating to the acquisition of the 1064 locomotives.
- 5.9.7.12. We determined further that on 31 July 2012, Management (Molefe, Singh and Pita) updated the BADC on the progress on the acquisition of 1064 GFB locomotives. The following was discussed during the said meeting (**Annexure C11**):
  - 5.9.7.12.1. Tshepe, one of the BADC members, enquired on the exemption from National Treasury and content thereof. She stated that the decision amounted to an administrative action and could only be reversed by a court of law;
  - 5.9.7.12.2. Management informed the Committee that Transnet acted on a decision that was taken by National Treasury, and that Transnet would challenge the exemption decision through the DPE;
  - 5.9.7.12.3. Tshabalala, one of the BADC suggested that the matter be dealt with at Ministerial level;
  - 5.9.7.12.4. Tshepe recommended that a legal opinion be sought to determine the legality of National Treasury's action;
  - 5.9.7.12.5. The acting Chairman, Sharma enquired whether documentation had been prepared in support of submission to the Shareholder Minister;
  - 5.9.7.12.6. Mkwanazi stated that a meeting was scheduled for 1 August 2012 between himself, Shareholder Minister, GCE and Director-General ("DG"), DPE.
- 5.9.7.13. We determined that additional management team who attended the BADC meeting comprised the following officials:
  - 5.9.7.13.1. Volmink;

- 5.9.7.13.2. Sunderlall;
  - 5.9.7.13.3. Mabelo;
  - 5.9.7.13.4. Mungroo; and
  - 5.9.7.13.5. Hadebe.
- 5.9.7.14. On 7 December 2012, Malusi Gigaba (“Gigaba”), then Minister: DPE wrote to Mkwanzazi, former Chairman: Transnet and copied Molefe. In his letter, Minister Gigaba stated *inter alia* the following (**Annexure C12**):
- 5.9.7.14.1. *“Transnet should continue to procure as if extension to the exemption is in place;*
  - 5.9.7.14.2. *No communication should take place between the SOC and National Treasury pertaining to the PPPFA until the situation has been resolved;*
  - 5.9.7.14.3. *Should any queries be directed to the SOC from National Treasury regarding the PPPFA, please refer National Treasury to my office;*
  - 5.9.7.14.4. *With regards to the instruction note relating to the invitation and evaluation of bids based on stipulated stock sector Transnet should procure taking the designation threshold into account;*
  - 5.9.7.14.5. *However, Transnet should not feel constrained by Section 5.1.2 of the instruction note and should rather establish an evaluation framework that provides reasonable incentives to suppliers to support our industrialisation and transformation objectives; and*
  - 5.9.7.14.6. *Should my agreement with the Minister of Finance require a change to this framework, Transnet can alert the bidders at that stage”.*
- 5.9.7.15. We were not provided with communication from Mkwanzazi to Minister Gigaba which prompted the above response from the Minister.
- 5.9.7.16. As indicated above, in his response to Mkwanzazi, we determined that Minister Gigaba advised that Transnet should continue to procure the locomotives as if the exemption was in place. This effectively meant that Transnet had to disregard the PPPFA provisions relating to 80/20 or 90/10 principle.
- 5.9.7.17. We provided Minister Gigaba with questions relating to the above letter, however as at date of this report, he had not responded to our questions.
- 5.9.7.18. We further determined that Minister Gigaba advised Mkwanzazi that he was engaging with the Minister of Finance to resolve the issues.

- 5.9.7.19. We determined from the above that Minister Gigaba further advised Transnet in a letter dated 7 December 2012 to disregard paragraph 5.1.2 of the instruction note issued by National Treasury. This section referred to stage 2 of procurement processes, which was the evaluation in terms of 80/20 or 90/10 preferred point systems, and stated further under paragraph 5.1.2 .1 that *“Only bids that achieve the minimum stipulated threshold for local production and content may be evaluated further. The evaluation must be done in accordance with the 80/20 or 90/10 preference point system prescribed in Preferred Procurement Regulations, 2011”*. Minister Gigaba advised Transnet to rather establish an evaluation framework that provides reasonable incentives to suppliers.
- 5.9.7.20. We however determined that from 23 July 2012 to 7 December 2014, four months after the issuing of the RFP, the exemption was not granted. We could not find any documentation that Minister Gigaba provided Transnet with feedback on whether the SOC was exempted from PPPFA.

**Mkwanazi’s letter to Gigaba dated 28 December 2012**

- 5.9.7.21. We determined that on 28 December 2012, Mkwanazi wrote to Minister Gigaba requesting the Minister to advice on the outcome of discussions with Minister Gordhan on the locomotive procurement, by 1 February 2013, so that any required award would be in line with the agreement between the two Ministers relating to exemption from the PPPFA. **(Annexure C13)**
- 5.9.7.22. We further determined that on 15 April 2013, Mkwanazi wrote another letter to Minister Gigaba requesting him to provide Transnet with an update on the status of his engagements with Minister Gordhan. **(Annexure C14)**.
- 5.9.7.23. There is no indication that Gigaba responded to Mkwanazi’s letters dated 28 December 2012 and 15 April 2013. As reflected below, we determined that instead of responding to Mkwanazi’s letters, Gigaba wrote a letter dated 16 April 2013 to Minister Gordhan.

**Minister Gigaba’s letter to Minister Gordhan dated 16 April 2013**

- 5.9.7.24. We determined that on 16 April 2013, Minister Gigaba wrote to Minister Gordhan informing him that there was an urgent situation surrounding the Transnet locomotive fleet procurement that he believed required immediate action and resolution.
- 5.9.7.25. According to Minister Gigaba, the urgency emanated from the potential impact on Transnet’s ability to deliver on their Corporate Plan commitments and the legal risks

and challenges that Transnet would possibly be exposed to due to uncertainty for both Transnet and potential suppliers regarding the implications of NT's Instruction note for Transnet's procurement. **(Annexure C15)**

- 5.9.7.26. Minister Gigaba further stated in his communication to Minister Gordhan that he was persuaded that there were substantial socio-economic and industrial development benefits that could be derived from Transnet's locomotive fleet procurement if the tender was allowed to proceed as advertised, which was done prior to the issuance of the NT's Instruction Note. We determined that Minister Gigaba pleaded with Minister Gordhan to allow Transnet to conclude the procurement process with the exemption from the Instruction Note's requirements for re-instatement of the 90/10 provision of the PPPFA.

#### **Minister Gordhan's response to Minister Gigaba's letter**

- 5.9.7.27. We determined that Minister Gordhan responded to Minister Gigaba's letter of 16 April 2013 on 24 April 2013 **(Annexure C16)**.

In his response, Minister Gordhan stated *inter alia* the following:

*"It is noted that the tender was structured in a manner that is not in conflict with the National Treasury's instruction note issued in July 2012.*

*In light of the above, I am of the view that Transnet should proceed with the evaluation of the tender in terms of the criteria stipulated therein".*

- 5.9.7.28. During our consultation with Minister Gordhan, he confirmed that the letters transmitted between Minister Gigaba and him were authentic.
- 5.9.7.29. As discussed above, we determined that the BADC of 31 July 2012 resolved to seek a legal opinion to determine the legality of National Treasury's actions regarding the PPPFA instruction notice.
- 5.9.7.30. The BADC held a meeting on 25 April 2013 to discuss the legal opinion on the implications of the expiry of the PPPFA exemption for the 1064 locomotives transaction. We further determined that Management informed the committee that Advocate Soni had advised that the PPPFA did not apply to the locomotives tender as it was advertised during the period when the exemption from the PPPFA was in force. **(Annexure C17)**
- 5.9.7.31. As discussed below, we determined that Transnet did not apply the PPPFA evaluation criteria of 90/10 when evaluating the 1064 locomotives bid documents. The evaluation criteria applied by Transnet is discussed in the paragraphs below.

5.9.8. **Approval of business case for acquisition of 1064 locomotives**

**CAPIC meeting held on 18 April 2013**

- 5.9.8.1. During the CAPIC meeting of 18 April 2013, the Acting Chairman of the said meeting (who could not be identified from the submitted extract) presented a submission relating to the acquisition of 1064 locomotives. We noted further that the said minutes are referred to as a draft and unsigned. (**Annexure C18**)
- 5.9.8.2. The purpose of the submission was to approve the acquisition of 1064 locomotives for GFB at an ETC of R38.6 billion as per the corporate plan (excluding the potential effects from forex hedging, forex escalation, other price escalations and borrowing costs). We determined that the ETC had increased from R38.1 billion to R38.6 billion as previously approved on 25 April 2012.
- 5.9.8.3. The Acting Chairperson of the CAPIC meeting of 18 April 2013 highlighted the following:
- 5.9.8.3.1. *“The RFP for this acquisition has been issued;*
  - 5.9.8.3.2. *Approval was obtained from the Board to conduct the Board approval and the PFMA process in parallel;*
  - 5.9.8.3.3. *The business case was tabled on 18 April 2018 at the newly constituted Locomotive Steering Committee which is a subcommittee of the Group Executive Committee.*
  - 5.9.8.3.4. *The Locomotive Steering Committee has recommended the business case for approval to the Group Executive Committee.”*
- 5.9.8.4. We determined that on 18 April 2013, CAPIC resolved to recommend that the Group Executive Committee (“EXCO”) approve:
- 5.9.8.4.1. The acquisition of 1064 locomotives for TFR’s GFB; and
  - 5.9.8.4.2. Estimated total cost of the acquisition of R38.6 billion as per Corporate Plan (excluding the potential effects from forex hedging, forex escalation, other price escalations and borrowing costs).
- 5.9.8.5. Contrary to the minutes of the CAPIC meeting of 18 April 2013, which indicated that the ETC of R38.6 billion excluded (the potential effects from forex hedging, forex escalation, other price escalations and borrowing costs) we determined that the business case presented during the CAPIC meeting of 18 April 2013 indicated that the ETC of R38.6 billion only excluded borrowing costs.

- 5.9.8.6. As reflected in the table below, the ETC of R38.6 billion clearly included the potential effects from forex hedging, forex escalation, other price escalations and excluded borrowing costs:

Description	R'bn
Bus. Case ETC	31 887
Forex	1 706
Escalation	2 775
Contingency	2 232
<b>Bus. Case ETC to Board</b>	<b>38 600</b>

- 5.9.8.7. The assertion by Singh and Molefe that the amount R38.6 billion excluded the potential effects from forex hedging, forex escalation, other price escalations and borrowing cost was not correct as the business case clearly indicated the relevant costs were included. Singh and Molefe therefore misled the Board into believing that the R38.6 billion only excluded borrowing costs when in fact the said estimated value included potential effects from forex hedging, forex escalation, other price escalations.

#### **Memorandum issued to BADC and Board dated 18 April 2013**

- 5.9.8.8. We determined that on 18 April 2013, Molefe and Singh issued a memorandum to BADC (**Annexure C19**) and Board (**Annexure C20**) to obtain support for submission to the Shareholder Minister to acquire 1064 locomotives for TFR's GFB.
- 5.9.8.9. According to the memorandum, Molefe and Singh stated that the acquisition of 1064 locomotives was conceptualised in 2011 and initiated around April 2012. Molefe and Singh further stated that the DPE was engaged on various occasions in 2012 to take the Department through the transaction. As indicated below, the Board approved the acquisition of 1064 locomotives on 25 April 2012, subject to approval in terms of section 54 of PFMA.
- 5.9.8.10. We determined that Molefe and Singh further stated that the project exceeded the materiality and significance framework threshold of R4 billion at the time, and consequently approval from Shareholder Minister was required in terms of the PFMA. Molefe and Singh requested that the Board recommend to the Shareholder Minister to approve the business case for the acquisition of 1064 locomotives at an

ETC of R38.6 billion, (excluding potential effects from forex hedging, forex escalation and other price escalations) as per the Corporate Plan. As discussed below, the ETC of R38.6 billion included forex hedging, forex escalation and other price escalations.

#### **EXCO meeting of 22 April 2013**

- 5.9.8.11. Based on documentation reviewed, we determined that on 22 April 2013, EXCO resolved that the Committee recommended that the Board approve the business case for the acquisition of 1064 locomotives for TFR's GFB at an ETC of R38.6 billion as per Corporate Plan (excluding potential effects from forex hedging, forex escalation and other price escalations). **(Annexure C21)**.
- 5.9.8.12. EXCO was not correcting in their resolution as the amount of R38.6 billion also included effects from forex hedging, forex escalation, other price escalations.

#### **Special BADC meeting of 23 April 2013**

- 5.9.8.13. We determined that on 23 April 2013 the BADC held a special meeting and resolved that the Committee recommend that the Board approve the business case for the acquisition of the 1064 locomotives for TFR's GFB at an ETC of R38.6 billion (excluding potential effects from forex hedging, forex escalation, and other price escalations) as per the Corporate Plan. **(Annexure C22)**.

#### **Special Board meeting of 25 April 2013**

- 5.9.8.14. We determined that on 25 April 2013, the Board held a special meeting wherein it approved *"The business case for the acquisition of the 1064 locomotives for TFR's General Freight Business at an estimated cost of R38.6 billion (excluding potential effects from forex hedging, forex escalation, and other price escalations) and the submission of the PFMA application to the Shareholder Minister DPE for approval"*. **(Annexure C23)**.
- 5.9.8.15. We determined that CAPIC, EXCO and BADC recommended to the Board for the approval of the business case which approval came in April 2013.
- 5.9.8.16. We further determined that the Board approved the business case for acquisition of the 1064 locomotives on 25 April 2013, nine (9) months after part 1 of the tender was issued in July 2012.
- 5.9.8.17. On 25 April 2012, the Board approved ETC of R38.1 billion for acquisition of 1064 locomotives. After the said board approval, Transnet commenced with the procurement process, however, at that time, Section 54 application to the Shareholder was not done. Subsequently, on 25 April 2013, the Board approved ETC of R38.6

billion for acquisition of 1064 locomotives. This resulted in an increase in ETC of R500 million. The memorandum did not provide the detail of the increase of R500 million.

### **Preparation of the Business Case for the acquisition of the 1064 locomotives**

5.9.8.18. During our consultation with Pillay, he indicated that in 2012 he and Callard prepared the business case for the acquisition of the 1064 locomotives. According to Pillay, the BADC recommended that their business case be validated by an external consultant. Pillay indicated that in 2013 McKinsey was appointed to validate the business case.

5.9.8.19. According to Pillay, the McKinsey consultants appointed to validate the business case were not rail/locomotives experts and this resulted in some disagreements when validating the business case.

According to Pillay, Hassim Salogy, Alinaph and Nishal from McKinsey assisted Transnet with the business case submission to DPE under the Advisory Services Relating to the acquisition of 1064 locomotives' contract.

5.9.8.20. We determined that at the date of the said business case report, 25 April 2013, the acquisition process had already commenced and the closing date for the 1064 locomotives tender was 30 April 2013. We further determined that the said business case was prepared for Board approval 5 days before the closing date on the RFP.

### **5.9.9. Changes to the business case**

5.9.9.1. During our consultation with Callard, he indicated that the initial business case he prepared made provision for forex, escalations and contingency in the ETC of R38.6 billion.

5.9.9.2. Callard provided us with an ETC reconciliation detailing how he arrived at the cost of R38.6 billion (**Annexure C24**):

5.9.9.3. According to Callard, the business case submitted to the Board incorrectly stated that the ETC of R38.6 billion excluded forex escalation and other price escalations.

5.9.9.4. We determined that the final business case dated 25 April 2013 submitted to the Board was amended to state that the ETC of R38.6 billion excluded the potential effects from forex hedging, forex escalation and other price escalations.

5.9.9.5. We further determined that the changes to the business case were effected by Yusuf Mahomed ("Mahomed"), who tracked the changes he made to the business case.



- 5.9.9.6. We determined that Mahomed deleted the words “*borrowing costs*” and inserted the words “*the potential effects from forex hedging, forex escalation and other price escalations*” after the ETC of R38.6 billion. **(Annexure C25)**
- 5.9.9.7. Below are the changes effected by Mahomed:
- 5.9.9.8. “*The risks that are inherent in a procurement event of this nature have been identified and mitigation strategies are in place. Accordingly, it is recommended that the 1064 Locomotives Business Case be approved with ~~at a cost~~with estimated total costs of the acquisition of R38.6 billion as per the Corporate Plan (excluding ~~borrowing costs~~. the potential effects from forex hedging, forex escalation and other price escalations).*”
- 5.9.9.9. We further determined that the initial business case indicated that the ETC was R38.6 billion excluding borrowing costs.
- The deletion of the caption “excluding borrowing costs” is a clear indication that the ETC of R38.6 billion was amended to create an impression that the ETC excluded the potential effects from forex hedging, forex escalation and other price escalations.
- 5.9.9.10. During our consultation with Mahomed, he admitted that he changed the business case figures to indicate that the amount of R38.6 billion excluded potential effects from forex hedging, forex escalation and other price escalations. Mahomed further indicated that prior to him changing the business case figures, the business case indicated that R38.6 billion was inclusive of potential effects from forex hedging, forex escalation and other price escalations and excluded borrowing costs.
- 5.9.9.11. Mohamed indicated that Singh verbally instructed him to change the business case to reflect that the R38.6 billion did not include potential effects from forex hedging, forex escalation and other price escalations.
- 5.9.10. **Business Case / Budget**
- 5.9.10.1. We were provided with a copy of a business case dated 25 April 2013 titled “*Procurement of 1064 Locomotives for the General Freight Business-Final version*” which outlined the need for 1064 (465 diesel and 599 electric) locomotives **(Annexure C25)**. The said business case recommended the purchase of 1064 locomotives at a total cost of R38.6 billion excluded potential effects from forex hedging, forex escalation and other price escalations as per Corporate Plan.
- 5.9.10.2. Furthermore, the Business Case indicated that the R38.6 billion was estimated using the 2013 calendar year prices.

- 5.9.10.3. We noted that Singh, Gama and Molefe did not sign the business case dated 25 April 2013. We were not provided with reasons why they did not sign the said business case. We however noted that Singh, Gama and Molefe were in attendance and the minutes of the meeting indicated that management presented the business case to the BADC of 25 April 2013.
- 5.9.10.4. According to the Business case, the procurement process for the 1064 Locomotives was a High- Value-Tender Process (“HVT”) which would consist of the following stages:
- 5.9.10.4.1. Demand review and development of specification and Business Case development;
  - 5.9.10.4.2. Acquisition process;
  - 5.9.10.4.3. Evaluation process;
  - 5.9.10.4.4. Negotiations;
  - 5.9.10.4.5. Final contract validation process and Contract Award; and
  - 5.9.10.4.6. Project Management.
- 5.9.10.5. As indicated above, we determined that at the date of the business case *i.e.* 25 April 2013, the acquisition process had already commenced and the closing date for the 1064 locomotives tender was 30 April 2013). The said business case was prepared for the Boards approval 5 days before the closing date on the RFP .
- 5.9.10.6. Furthermore, the business case indicated that the demand review, development of specification, Business Case development and acquisition phases had been completed.
- 5.9.10.7. As indicated above, the Business case was prepared after the tender process for 1064 locomotives had commenced.
- 5.9.11. **Approval in terms of section 54 of the PFMA**
- 5.9.11.1. **Mkwanazi’s letter to Minister Gigaba**
- 5.9.11.2. We determined that on 30 April 2013 Mkwanazi wrote two letters to Minister Gigaba and Minister Gordhan respectively (**Annexure C26**).
- 5.9.11.3. In his letter to Minister Gigaba, Mkwanazi sought approval in terms of Section 54 of the PFMA for the acquisition of the 1064 locomotives for Transnet TFR’s GFB.

- 5.9.11.4. In his second letter, Mkwanazi wrote to Minister Gordhan notifying National Treasury of Transnet's application to its Shareholder Minister of their plans to acquire 1064 locomotives for TFR's GFB. (**Annexure C27**)
- 5.9.11.5. We determined that the Board applied for approval in terms of section 54 of PFMA from the Shareholder Minister on 30 April 2013, nine (9) months after Part 1 of the tender was issued on 23 July 2012. We further determined that the application was made on the closing date of the tender.
- 5.9.11.6. Minister Gigaba approved the above transaction in August 2013, eighteen (18) months after Part 1 of the tender was issued on 23 July 2012 and closed in April 2013.
- 5.9.11.7. **Minister Gigaba's letter to Mkwanazi**
- 5.9.11.8. On 3 August 2013, Minister Gigaba wrote to Mkwanazi stating that the approval was granted to Transnet for the procurement of 1064 locomotives, subject to the following being met (**Annexure C28**):
- 5.9.11.8.1. A clear statement by Transnet with regard to TE's vision in the locomotive supply chain and what capabilities would need to be developed to make this vision a reality;
  - 5.9.11.8.2. Transnet to provide TE's seven-year locomotive supply chain strategy illustrating what was being imported, what TE was producing, what was being outsourced to the private sector and the broad conditions associated with outsourcing to the private sector and the broad conditions associated with outsourcing that would result in the building of a competitive national industry;
  - 5.9.11.8.3. Such conditions may include industry competitiveness benchmarking, investment in plant and skill and requirement that industry masters quality and learn manufacturing disciplines in exchange for long term contracts;
  - 5.9.11.8.4. Transnet to provide a clear plan to the strategic fit of this locomotive procurement to the broader road to rail migration to objective; and
  - 5.9.11.8.5. Transnet to provide the Department with a view of the localisation strategy for the following strategic components:
    - 5.9.11.8.5.1. Traction convertor;
    - 5.9.11.8.5.2. Traction motor;

- i. Diesel engine;
- ii. Bogies;
- iii. Electrical system;
- iv. Management system; and
- v. Control system.

We could not find any evidence that the conditions provided in Minister Gigaba's letter to Mkhwanazi were complied with.

#### **Mkwanzazi's letter to Minister Gordhan**

5.9.11.9. As stated above, Mkwanzazi's second letter was addressed to Minister Gordhan on 30 April 2013. We determined that the said letter was issued 9 months after the closing date for submission of tender documents for the procurement of the 1064 locomotives.

#### **Minister Gordhan's response to Mkwanzazi**

5.9.11.10. We determined that on 30 October 2013, Minister Gordhan wrote to Mkwanzazi stating the following (**Annexure C29**) :

- 5.9.11.10.1. He had noted Transnet's intention to acquire 1064 locomotives over the following seven years at an estimated cost of R38.6 billion.
- 5.9.11.10.2. He was aware that the acquisition aimed to facilitate the ramp up in volumes transported from 80 million tons to 170 million tons as envisaged in the MDS which formed the basis of Transnet's 2013/14 Corporate Plan;
- 5.9.11.10.3. However, he was concerned that the profitability of the project was highly dependent on Transnet's GFB being able to grow the volumes transported at amounts above GDP growth and tariffs charged at above CPI.
- 5.9.11.10.4. Failure to achieve these optimistic growth figures would have an adverse effect on the expected revenues and thus the profitability of the project. Moreover, potential fluctuations in the operational costs could also adversely affect the profitability of the project.
- 5.9.11.10.5. The success of the project entails further capital expenditure, including the purchase of wagons and other expansionary expenditures was incurred.

### **The increase from R38.6 billion to R54 billion**

- 5.9.11.10.6. As noted above, Gordhan clearly indicated in his letter to the Transnet Board Chairman that, he would be expecting a further Section 54(2) disclosure on all the relevant capital expenditures.
  - 5.9.11.10.7. The increase in ETC from R38.6 billion to R54.5 billion clearly forms part of the capital expenditure.
  - 5.9.11.10.8. We could not find any documentation reflecting that Transnet informed National Treasury of the increase in ETC from R38.6 billion to R54.5 billion.
  - 5.9.11.10.9. Furthermore, Transnet was required to submit a detailed implementation plan demonstrating how the above GDP growth volume increases and the above inflation tariff increases anticipated in the MDS would be achieved together with the possible mitigation strategies;
  - 5.9.11.10.10. In addition, operational costs must be monitored and rigorously controlled throughout the lifespan of the project to avoid any costs escalations;
  - 5.9.11.10.11. Moreover, Gordhan had noted that, whereas Transnet was claiming that increasing locomotives capacity and efficiency would lead to lower tariffs for customers, real increases in tariffs were in fact being projected to sustain the project;
  - 5.9.11.10.12. Transnet was required to provide regular feedback to National Treasury on their initiatives to attract customers from road to rail; and
  - 5.9.11.10.13. Transnet was further required to submit quarterly feedback to National Treasury on the status of the acquisition and the above mentioned related issues.
- 5.9.11.11. Minister Gordhan noted the acquisition for the 1064, however, he recommended various plans to be put in place in that regard. We further determined that Transnet did not comply with certain conditions outlined by Minister Gordhan.
- 5.9.11.12. We could not find any evidence that Transnet gave regular feedback to National Treasury on their initiatives to attract customers from road to rail and disclosure on all the relevant capital expenditures associated with the project in respect of section 54(2).

5.9.11.13. Furthermore, we were not provided with evidence that Transnet provided quarterly feedback to National Treasury on the status of the acquisition.

5.9.11.14. As will be discussed further below, we noted that Transnet increased the amount for the acquisition of the 1064 locomotives from an ETC of R38.6 billion to R54.5 billion. There is no indication that Transnet or the Transnet Board notified the Shareholder Minister or National Treasury prior to the said increase.

#### 5.9.12. **Increase in Estimated Total Cost**

5.9.12.1. Based on documentation reviewed, we determined that on 23 May 2014, Molefe addressed a memorandum to BADC requesting the Committee to recommend to the Board, an increase in the ETC for the acquisition of 1064 locomotives for GFB from R38.6 billion to R54.5 billion. The memorandum was signed by Gama, Singh and Molefe on 21 May 2014, 22 May 2014 and 23 May 2014 respectively. According to the memorandum, the increase of R15.9 billion in ETC was due to the following (**Annexure C30**):

5.9.12.1.1. *“Escalations from the approved business case to award date;*

5.9.12.1.2. *Forex from the approved business case to award date;*

5.9.12.1.3. *Additional scope of work allocated to Transnet Engineering (“TE”) for the strategy to enable TE to eventually transform to an Original Equipment Manufacturer (“OEM”) of locomotives;*

5.9.12.1.4. *The cost of reducing the batch size;*

5.9.12.1.5. *The cost of future escalations over the life of the contract;*

5.9.12.1.6. *The cost of fixing forex exposure over the life of the contract; and*

5.9.12.1.7. *Contingencies related to variation orders, options and capital spares”.*

5.9.12.2. We determined however that by that time, the Locomotives Supply Agreements had already been signed on/about 17 March 2014.

#### **BADC Meeting of 26 May 2014**

5.9.12.3. We determined that on 26 May 2014, Molefe and Singh attended a BADC meeting where the above request to increase ETC was tabled. We determined that Gama did not attend the meeting of 26 May 2014. (**Annexure C31**).

5.9.12.4. According to the minutes of that BADC meeting, the Committee resolved that *“the Committee noted the reason behind the increase in Estimated Total Cost, and recommended*

*that the Board approves an increase in the Estimated Total Cost for the acquisition of the 1064 Locomotives for the General Freight Business from R38.6 billion to R54.5 billion”.*

5.9.12.5. As discussed above, we determined that the original ETC of R38.6 included the items that Molefe and Singh told the BADC of 26 May 2013 that they were excluded.

5.9.12.6. Molefe and Singh therefore misled the BADC into believing that the ETC of R38.6 billion excluded the relevant costs when it was Singh who instructed Mohamed to change the Business Case to reflect that the relevant costs were excluded.

The misrepresentation by Molefe and Singh contributed to the increase in ETC by at least R6.7 billion.

**Board Meeting of 28 May 2014**

5.9.12.7. On 28 May 2014, the Board noted the reasons for the increase in ETC and approved an increase in ETC for the acquisition of 1064 locomotives for GFB from R38.6 billion to R54.5 billion. We determined that, as with the BADC of 26 May 2014, Gama did not attend this Board meeting (**Annexure C32**).

5.9.12.8. The following Board members and invitees were present in the Board meeting:

Present	Position
ME Mkwanazi	Chairman
B Molefe	GCE
Y Forbes	Non-Executive Director
MA Fanucchi	Non-Executive Director
HD Gazendam	Non-Executive Director
N Moola	Non-Executive Director (Video conference)
A. Singh	GCFO
E Tshabalala	Non-Executive Director
DLJ Tshepe	Non-Executive Director (Partial attendance)
NP Mnxasana	Non-Executive Director

<b>Present</b>	<b>Position</b>
NR Njeke	Non-Executive Director (Partial attendance)
IM Sharma	Non-Executive Director (Partial attendance)
IB Skosana	Non-Executive Director
In Attendance	
NJ Mabandla	Group Executive: Legal and Compliance
KL Mosia	Company Secretary
ANC Ceba	Group Company Secretary
Partial Attendance	
P Bezuidenhout	Consultant: KPMG
L Govender	Manager: Talent Management
M Gregg - Macdonald	Group Executive: Planning and Sustainability
R Lepule	Group Executive: Enterprise Information Management Systems
DC Moephuli	Chief Risk Officer
R Narsai	Consultant: KPMG
DZ Nkonki	Consultant: Nkonki
S Qalinge	General Manager Monitoring: Results Management Office
A Van Der Merwe	Consultant: Ithemba Governance and Statutory Solutions

5.9.12.9. We determined from the minutes of the Board meeting that Management took the Board through the submission as contained in the meeting pack. According to the minutes of the Board meeting, the purpose of the submission was to request the



Board to note the rationale behind the increase in the ETC, and approve an increase in the estimated total cost for the acquisition of the 1064 locomotives for the GFB from R38.6 billion to R54.5 billion. The matter had been considered by the BADC.

- 5.9.12.10. Management indicated to the Board that the increase in ETC of R15.9 billion could be attributed to the following:

Update of business case for updated economic factors	R5.4 billion	34%
Risk Mitigation – Forex and Escalation	R9.5 billion	59%
TE Scope of Work	R2.6 billion	16%
Contingencies	R4.9 billion	31%
Lower capital acquisition cost of the locomotive obtained through the competitive tender and negotiation process less the batch pricing adjustment of R2.7 billion	-R6.5 billion	41%

- 5.9.12.11. According to the minutes, the Board resolved *“that they noted the reason for the increase in Estimated Total Cost, and approved an increase in the Estimated Total Cost for the acquisition for the acquisition of the 1064 Locomotives for the General Freight Business from R38.6 billion to R54.5 billion”*.
- 5.9.12.12. Paragraph 5.1.3 of the Transnet Delegation of Authority Framework (“DAF”) approved by the Board on 29 August 2012 and effective from 1 September 2012 states that - *“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%”* (**Annexure C33**).
- 5.9.12.13. We determined that the above approved increase in ETC of the project was in excess of 15%. There is no evidence confirming that the Board reported the above increase in ETC to the Shareholder Minister before the conclusion of the contract with the OEMs.
- 5.9.12.14. Minister Gordhan stated in his letter to Mkwanazi of 30 October 2013 that he would be expecting a further section 54 (2) disclosure on all relevant capital expenditures associated with the project. There is no evidence that the Board complied with Minister Gordhan’s directive. .

- 5.9.12.15. The Board contravened Paragraph 5.1.3 of the Transnet DAF in that they failed to report the increase in ETC of R15.9 billion for the acquisition of the 1064 locomotives to the Shareholder Minister;
- 5.9.12.16. Section 51(1)(b)(ii) of the PFMA states that - *“an Accounting Authority for a public entity must take effective and appropriate steps to prevent irregular expenditure, fruitless and wasteful expenditure, losses resulting from criminal conduct, and expenditure not complying with the operational policies of the public entity”* (**Annexure C34**).
- 5.9.12.17. The Board contravened section 51(1)(b)(ii) of the PFMA in that they failed to report the increase in ETC of R15.9 billion for the acquisition of the 1064 locomotives to the Shareholder Minister, prior to the conclusion of the contract at an increased ETC.
- 5.9.12.18. Section 50(2)(a) of the PFMA provides that - *“a member of an accounting authority or, if the accounting authority is not a board or other body, the individual who is the accounting authority, may not act in way that is inconsistent with the responsibilities assigned to an accounting authority in terms of this Act”*. Molefe contravened section 50 (2) of the PFMA in that he committed Transnet to an unauthorised additional amount in the excess of R15 billion, however the Board had delegated him to sign contracts worth R38.6 billion (**Annexure C35**).

**Spreadsheet prepared by Callard**

- 5.9.12.19. Based on the analysis of Gama’s Mimecast emails, we determined that on 8 February 2018, a Transnet employee Mohammed Moola (“Moola”) sent an e-mail to Nomfuyo Galeni (“Galeni”) and copied Gama, Pita, Laher, Sibusiso Nkosi, and Xabiso Mtebele. Attached to the e-mail was a spreadsheet titled *“1064 ETC Business Case Recon”* reflecting two scenarios in the increase of ETC from R38.6 billion to R54 billion (**Annexure C36**).
- 5.9.12.20. The tables below reflect the two scenarios as contained in the spreadsheets.
- 5.9.12.21. According to the spreadsheet found in Gama’s emails, Callard calculated the ETC of R38.6 billion.
- 5.9.12.22. The table below indicates the breakdown of the R38,6 billion:

Description	R'bn	Comments
Bus. Case ETC	31 887	
Forex	1 706	

5.9.12.23.

Escalation	2 775	
Contingency	2 232	
<b>Bus. Case ETC to Board</b>	<b>38 600</b>	Per Original business case model
Additional impact of new forward curve at March 2014 vs business case		As per updated forward curve per Transnet Treasury as at March 2014
<b>Total</b>	<b>38 600</b>	
Impact of changing the business case delivery schedule to the contracted delivery schedule		As per contract
Impact of changing the business case payment terms to the contracted payment terms		As per contract
<b>Total</b>	<b>38 600</b>	
Impact of change of loco technical spec between the business case spec and contracted spec		
<b>Total</b>	<b>38 600</b>	

As discussed earlier in the report, the ETC calculated by Callard included forex, escalations and contingency fees amounting to R6.7 billion. We further determined that Callard’s calculations did not make provision for the change in delivery schedule. According to Callard’s calculations, the change in delivery would be determined in the contract.

5.9.12.24.

During our consultation with Callard, he confirmed that the business case he drafted included an ETC that took into account foreign exchange and escalations. According to Callard, he conducted his own calculations after he heard of the increase in ETC to R54.5 billion and could not determine how Transnet arrived at an increased ETC of R54.5 billion.

- 5.9.12.25. As will be seen from our findings below, we analysed the calculations on Callard spreadsheet and also analysed the calculations increase in ETC presented to BADC by Molefe in support of the increase in ETC from R38.6 billion to R54.5 billion.
- 5.9.12.26. The said analysis and comparisons led us to conclude that Callard’s spreadsheet indeed contained the items that were allegedly not included in the ETC of R38.6 billion.
- 5.9.12.27. We further determined that the revised calculated ETC of R54.6 billion was calculated as follows:

**Scenario 1 as per Moola’s spreadsheet**

Description	R'bn	Comments
Bus. Case ETC	31 887	
Forex	1 706	
Escalation	2 775	
Contingency	2 232	
<b>Bus. Case ETC to Board</b>	<b>38 600</b>	Per Original business case model
Add cost of rebasing dollar price from April 13 to March 14	800	Based on US inflation of 2.2%
Additional impact of new forward curve at March 2014 vs business case	6 671	As per updated forward curve per Transnet Treasury as at March 2014
<b>Total</b>	<b>46 071</b>	
Add additional cost of increasing TE scope per OEM submissions (SCS to track submissions and confirm)	883	As per the memo submitted to Board dated May 2014
Add additional cost of reducing the batch size per OEM submissions (SCS to track submissions and confirm)	2 754	As per the memo submitted to Board dated May 2014
Contingency	4 950	As per the memo submitted to Board dated

Description	R'bn	Comments
		May 2014
Recalculated Business case ETC as at March 2014	54 658	<b>This recalculated ETC is incomplete - refer exclusions and notes below</b>

5.9.12.28. We determined that the revised ETC was allegedly supported by the following notes and exclusions:

- a) *"No adjustment has been made for the changed delivery schedule per contract.*
- b) *No adjustment has been made for the changed payment terms per contract.*
- c) *No adjustment has been made for base \$ price of the loco for higher technical specification.*
- d) *Escalation indices have been kept the same as per the original business case assumptions*
- e) *Local & foreign content have been kept the same as per the original business case assumptions*
- f) *The above exclusions are not included as the financial model does not cater for these input cells considering we have four bidders with different payment terms and different delivery schedules. In order to calculate the impact of the above exclusions a totally new financial model will need to be constructed by a modelling expert."*

5.9.12.29. The second scenario indicated below detailed how the ETC of R54.6 billion was determined.

**Scenario 2 as per Moola's spreadsheet**

Description	R'bn	Comments
Bus. Case ETC	31 887	
Forex	1 706	
Escalation	2 775	
Contingency	2 232	
Bus. Case ETC to Board	38 600	Per Original business case model

Description	R'bn	Comments
Less: Contingencies for recon purpose	2 232	
Business case ETC excluding contingencies	36 368	
Adjusting business case base price to OEM submitted base price 2014	(893)	USD price converted (Diesel \$2.6m vs \$2.9m and Electric \$3.5m vs \$3.1m)
Additional impact of new forward curve at March 2014 vs business case forward curve and moving the start date from business case April 2013 to March 2014	7 995	As per updated forward curve per Transnet Treasury as at March 2014 and moving the start date to March 2014
Adjusting business case delivery schedule to OEM contracted delivery schedule	(1 451)	Shortening the delivery schedule as per contract resulted in less forex exposure and less escalations
Adjusting business case payment terms to OEM contracted payment terms	(1 362)	Larger payment contracted for upfront resulted in less forex exposure
Adjusting business case localisation % to OEM contracted localisation %	(200)	Higher local content contracted resulted in less forex exposure
Total	40 457	
Original TE scope (SCS to track submissions and confirm)	1 706	As per the memo submitted to Board dated May 2014
Add additional cost of increasing TE scope per OEM submissions (SCS to track submissions and confirm)	883	As per the memo submitted to Board dated May 2014
Add additional cost of reducing the batch size per OEM submissions (SCS to track submissions and confirm)	2 754	As per the memo submitted to Board dated May 2014

Description	R'bn	Comments
Recalculated Business case ETC as at March 2014	45 800	
Difference between recalculated business case ETC and amount contracted with OEMs	3 747	
Amount contracted with OEMs	49 547	
Contingencies	4 955	
Amount contracted including contingencies	54 502	

- 5.9.12.30. McKinsey confirmed that the ETC of R38.6 included the related costs comprised of Forex, escalation and contingencies.
- 5.9.12.31. Based on the above scenarios calculated by Transnet it is evident that the initial ETC of R38.6 million included forex, escalations and contingencies amounting to R1.7 billion, R2.7 billion and R2.2 billion respectively
- 5.9.12.32. The ETC of 1064 Locomotives as per the business case dated 18 April 2013 was recommended at R38.6 billion (excluding borrowing costs) (**Annexure C37**). The business case dated 25 April 2013 was changed by Mahomed to read as follow (**Annexure C1**):
- “Accordingly, it is recommended that the 1064 Locomotives Business Case be approved with estimated total costs of the acquisition of R38.6 billion as per the Corporate Plan (excluding the potential effects from forex hedging, forex escalation and other price escalations).”*
- 5.9.12.33. The business case dated 18 April 2013 was correct in reflecting that the ETC of R38.6 billion excluded borrowing costs. The effects of foreign exchange, escalations, and contingencies were already taken into account in arriving at the ETC of R38.6 billion. (**Annexure C37**).
- 5.9.12.34. According to Pillay, a comprehensive research was conducted by McKinsey in arriving at the ETC of R38.6 billion for the supply of 1064 locomotives. Pillay indicated that after validation of the business case by McKinsey, the company arrived at the same contract amount of R38.6 billion and the same number of locomotives required (1064).

5.9.12.35. We conducted an analysis of the escalation of ETC from R38.6 billion to R54.6 billion and determined that the increase of ETC was overstated by R9.2 billion. A detailed calculation on the increase in ETC is discussed below.

We determined that McKinsey had already withdrawn their services to Transnet relating to the 1064 locomotives advisory services when Transnet increased the ETC from R38.6 billion to R54.5 billion.

5.9.12.36. McKinsey stated that Regiments were part of the Consortium that provided advisory services, including the calculations of the ETC of R38.6 billion.

5.9.12.37. McKinsey was therefore adamant that Regiments were aware that the ETC of R38.6 billion included all the related costs and excluded only the contingencies.

5.9.12.38. We determined that Regiments were part of the team that assisted Transnet in the calculation of the increased ETC of R54.5 billion. Regiments did so knowing that the costs were already included in the ETC of R38.6 billion.

#### 5.9.13. **Acquisition of 359 locomotives – new dual voltage electric**

##### **Background**

5.9.13.1. As indicated above, during 2012, Transnet embarked on a tender process to procure 1064 locomotives for the TRF's GFB. The 1064 locomotives consisted of 465 diesel and 599 electric locomotives. The 599 electric locomotives were awarded to two bidders namely, CSR and Bombardier to supply 359 and 240 locomotives respectively.

5.9.13.2. We discuss below the procurement process followed in the award of 359 electric locomotives to CSR.

##### **Procurement process for acquisition of the 599 electric locomotives**

#### 5.9.14. **Advertisement RFP: TFRAC-HO-8608**

5.9.14.1. We were presented with a copy of an advertisement in respect of RFP: TFRAC-HO-8608 for the supply of 599 new dual voltage electric locomotives for the GFB. The 599 new dual voltage electric locomotives was part of the total 1064 locomotives (**Annexure C38**). According to the advertisement, tender documents were available from Monday, 23 July 2012 at Transnet Tender Advice Centre in Parktown at a non-refundable cost of R40 000.00. Documents could also be downloaded and viewed on Transnet's website [www.transnetfreightrail.co.za/Website/tenders.html](http://www.transnetfreightrail.co.za/Website/tenders.html).



- 5.9.14.2. The advertisement reflected that, a formal compulsory clarification/site meeting was scheduled for 16 August 2012 at 10:00. The compulsory clarification/site meeting was to be held at Transnet Inyanda Building in Parktown.
- 5.9.14.3. The advertisement indicated the closing date of the tender as 2 October 2012 at 10:00. Submissions in respect of RFP: TFRAC-HO-8608 were to be made at 21 Wellington Road, Parktown.
- 5.9.14.4. According to the advertisement, the preference system applicable to RFP: TFRAC-HO-8608 was highlighted in the tender document (**Annexure C39**).
- 5.9.14.5. The advertisement of the 599 new dual voltage electric locomotives was issued in July 2012, without approval from DPE and notification to National Treasury.
- 5.9.15. **Specifications**
- 5.9.15.1. We requested minutes of the bid specification meetings but these were not provided to us.
- 5.9.15.2. During our consultation with Harris, he indicated that the Technology Management division prepared the specifications for the 1064 diesel and electric locomotives. According to Harris, Martin Mulder and Winfred Mors were part of the team that prepared the specifications.
- 5.9.16. **Change of briefing session date and venue**
- 5.9.16.1. We reviewed a copy of the bid document RFP: TFRAC-HO-8608 and determined that the venue of the compulsory clarification/site meeting changed from Inyanda House 2, 13-15 Girton Road, Parktown to Esselenpark Campus Main Building Hall, No.1 P91 Road (Modderfontein Road off R25), Kaalfontein (**Annexure 40**) .
- 5.9.16.2. According to copies of the submissions made by the various bidders, the date of the compulsory briefing session was 14 December 2012 and not 16 August 2012 as stipulated in the tender advertisement. The venue of the briefing session remained as Esselenpark Campus Main Building Hall, No.1 P91 Road (Modderfontein Road off R25), Kaalfontein.
- 5.9.16.3. During our consultation with Mdletshe, she indicated that the venue changed as a result of the number of the bidders that had shown interest in attending the briefing session.
- 5.9.16.4. According to Mdletshe, the boardrooms at Parktown were small and could not accommodate all the bidders, whilst Esselenpark Campus Main Building Hall was a bigger venue that could accommodate all the bidders.

5.9.16.5. Mdletshe indicated that the closing date was extended as a result of the number of clarification questions received from the various bidders. According to Mdletshe, the clarifications were communicated to the Board for approval. We were not provided with Board approval in respect of the extended closing date to 30 April 2013.

5.9.17. **Briefing session of 14 December 2012**

5.9.17.1. We determined from a review of the attendance register for RFP: TFRAC-HO-8608 dated 14 December 2014 that 72 individuals from various entities attended the briefing session (**Annexure C41**). We further determined that not all the individuals listed signed the attendance register, which was prepared before the actual briefing session date. This is determined by the fact that the briefing session register was typed out and not hand written by each individual attending the briefing session.

5.9.17.2. According to Mdletshe, she prepared the briefing session attendance register before the briefing session. Mdletshe indicated that the bidders who bought bid documents and those who had interest in bidding were requested to provide names of the attendees before the briefing session. The information provided was then used to prepare the attendance register for briefing session.

5.9.17.3. During our consultation with Shabalala, she confirmed that the briefing session register was prepared beforehand upon contacting the bidders who had bought bid documents.

5.9.17.4. We determined that 17 entities were listed on the attendance register. We further determined that some of the entities were not supported by a representative's signature as a confirmation of attendance, which could mean they decided not to attend.

5.9.17.5. Based on the attendance register, we determined that CNR Import and Export Corporation Ltd did not sign the attendance register. We determined that the briefing session for RFP TFRAC-HO-8608 and RFP: TFRAC-HO-8609 for the diesel locomotives were held on the same date and time.

5.9.17.6. It is evident that CNR did not sign both the diesel and electric locomotives briefing session attendance registers.

5.9.17.7. According to page 6 of the bid document, the briefing session was compulsory and respondents who failed to attend the compulsory briefing session would be disqualified.

- 5.9.17.8. We were provided with e-mail correspondence dated 18 December 2012 between CNR's representative, a certain Johan and Londiwe Shabalala of Transnet (**Annexure C42**). We determined that Shabalala sent an e-mail to CNR notifying them that none of their company representatives signed the attendance register. Shabalala requested CNR to send names of the company representatives who attended the briefing session and to attach a copy of the attendance certificate.
- 5.9.17.9. We further determined that CNR responded to Shabalala stating that the following company representatives attended the briefing session:
- 5.9.17.9.1. Ouyang Jingpin;
  - 5.9.17.9.2. Jeff Wang;
  - 5.9.17.9.3. Rowlen von Gericke;
  - 5.9.17.9.4. Chris von Gericke; and
  - 5.9.17.9.5. Sam Mkorosi.
- 5.9.17.10. We reviewed CNR's bid document and determined that the entity attached a copy of attendance certificate which was signed by Shabalala. According the attendance certificate, Jingpin and von Gericke attended the briefing session on behalf of CNR (**Annexure C 43**).
- 5.9.17.11. During our consultation with Shabalala, she confirmed that she signed CNR's attendance certificate at the briefing session.
- 5.9.17.12. We requested minutes of the briefing session to confirm whether indeed CNR was present at the briefing session, however as at the date of this report, we were not provided with the said minutes.
- 5.9.17.13. We were presented with a copy of CSR's attendance of briefing session certificate dated 14 December 2012 which confirmed that CSR attended the briefing session as indicated in the briefing attendance register (**Annexure C44**).
- 5.9.18. **Change of closing date and bid opening**
- 5.9.18.1. As mentioned above, the initial closing date for RFP: TFRAC-HO-8608 as per the advertisement was 2 October 2012 at 10:00. According to the tender submission register dated 30 April 2013 (**Annexure C39**), the bid opening in respect of RFP: TFRAC-HO-8608 was held on 30 April 2013 at 10:00. Based on the tender submission register, the closing date of the tender changed from 2 October 2012 to 30 April 2013.

The closing date for RFP: TFRAC-HO-8608 was extended by 6 months from the initial closing date of 2 October 2012.

- 5.9.18.2. During our consultation with Mdletshe, she indicated that the tender closing date was extended as a result of a number of bidders requesting for an extension. A decision was thus taken by the Acquisition Committee to extend the closing date.
- 5.9.18.3. We determined that CSR was the only bidder that requested an extension of the closing date. We further determined that CSR provided the following as reasons for the closing date extension request: *"We would like to request to extend the closing date at least 4 months after the publication of the draft supply agreement, as the closing date of the previous tender of "the supply of 95 new electric locomotives for the general freight business (GFB)/RFP no. HOAC-HO-7801" was more than 4 months after the publication of the draft supply agreement"* (**Annexure C45**).
- 5.9.18.4. The request by CSR and referring such a request to a previous tender comes out as some sort of entitlement by the Chinese Company. The fact that CSR was granted an extension on the closing date for the tender for the procurement of the 95 locomotives did not have anything to do with the tender for the procurement of 1064 locomotives. CSR should therefore not have used it to substantiate for the request of extension on the closing date for this tender.
- 5.9.18.5. Contrary to CSR's reasons that the tender for the supply of 95 locomotives was extended by more than four months, we determined that the tender the tender was extended by less than two months from 28 February 2012 to 17 April 2012.
- 5.9.18.6. We further determined that Transnet adhered to CSR request and extended the closing date by 6 months from 2 October 2012 to 30 April 2013.
- 5.9.18.7. We determined that on 14 May 2013, Volmink informed the Board that Part 1 of the tender for the procurement of the 1064 locomotives for GFB was issued on 23 July 2012 (**Annexure C46**). The tender was due to close on 16 October 2012. We however determined that, the closing date was extended to 30 April 2013.
- 5.9.18.8. Paragraph 17.1.8 (a) of the Transnet Procurement Procedures Manual, of 2009/2012 ("2012 PPM") states that "Transnet is entitled to amend any bid condition, validity, period, specification or plan, or extend the closing date before the closing date, or in case of a compulsory briefing session, before the scheduled session". *"However, such amendments or extension must be advertised and/or all bidders who obtained bid documents must be advised in writing per fax or e-mail of such amendments or extension a minimum of*

*three working days before schedule date. The new closing date and time must be clearly reflected” (Annexure C47).*

5.9.18.9. There is no evidence to confirm that the abovementioned extension of closing date was advertised and/or all bidders were advised in writing of such extension a minimum of three days before scheduled date.

5.9.19. **Bid Opening Process**

5.9.19.1. The tender documents were opened by the following Transnet Supply Chain Management officials (Annexure C48):

5.9.19.1.1. Prudence Nkabinde;

5.9.19.1.2. Thuli Mathebula;

5.9.19.1.3. Nomsa Maseko; and

5.9.19.1.4. Hendrina van der Merwe.

5.9.19.2. According to the tender submission register dated 30 April 2013, 7 bidders submitted their tenders in respect of RFP: TFRAC-HO-8608 for the supply of 599 new dual voltage electric locomotives for the GFB. The following bidders submitted their bids:

**Bids received for RFP: TFRAC-HO-8608**

No	Name of Bidder	No of copies submitted	No of CDs submitted
1	Bombardier Transportation	20 files	1 CD
2	CSR ZhuZhou Electrical Locomotives Co. LTD	24 files	1 CD
3	ALSTOM	24 files/ 24 Booklets	9 CD's
4	Bongiveli	12 files	1 CD
5	SIEMENS	45 files	3 CD's/ 3 Models
6	CNR Import and Export Corporation Ltd	24 files	3 CD's
7	Mitsui/Toshiba	51 files	9 CD's

5.9.20. **Evaluation Phase RFP: TFRAC-HO-8608 – Step 1 and 2**

- 5.9.20.1. During a review of the various evaluation reports, we determined that the scores allocated to each bidder did not comprise individual scores by each evaluation team member.
- 5.9.20.2. During our consultations with Harris, Laher and Marias, they confirmed that the evaluation teams worked on one computer and determined the scores as a collective.
- 5.9.20.3. Paragraph 18.2.3(d) of the PPM states that “*Members of the evaluation committee must score each Bid individually, i.e. each member must score every Bid without consulting any other members (Annexure C47).*” The conduct by the evaluation teams, of discussing the scoring of each bidder on one computer was in contravention of paragraph 18.2.3(d) of the PPM.
- 5.9.20.4. We determined that the HVT lead by SekelaXabiso (“SKX”) raised a concern with Transnet concerning the fact that there was no individual scoring taking place. SKX further reminded Transnet of the individual scoring, as required by the PPM. **(Annexure C49)**
- 5.9.20.5. We further determined that the CFET (Finance) members confirmed in their finance report dated 6 December 2013 that the process of scoring, checking and evaluating the shortlisted bidders was done jointly by all members of the CFET Finance in the presence of the CFET (SCS) and CFET members (TIA) **(Annexure C50)**. According to the CFET Finance report, all the results submitted were based on consensus agreement amongst all the CFET Finance members. The conduct of the CFET Finance was in contravention of the PPM.
- 5.9.20.6. We were presented with a copy of an undated CFET report in respect of the pre-qualification evaluation of the supply of 599 new dual voltage electric locomotives **(Annexure C51)**.
- 5.9.20.7. According to the report, evaluation of step 1 and step 2 commenced on 8 May 2013. Step 1 and step 2 entailed administrative responsiveness in respect of returnable documents and substantive responsiveness in respect of the bid submitted respectively.
- 5.9.20.8. The CFET consisted of the following members:

No	Name	Designation
1	Lindiwe Mdletshe	Comodity Manager

No	Name	Designation
2	Sarah Assegai	Governance Manager
3	Tarryn Foster	Commercial Specialist
4	Londiwe Shabalala	Graduate in Training
5	Princess Nsibande	TIA only as observer of the process
6	Emma Molotsane	TIA only as observer of the process

- 5.9.20.9. According to the CFET report, the respondents (tenderers) were supposed to adhere to the pre-requisites listed as mandatory and essential. Furthermore, the mandatory requirements related to the requirements that were critical to the process. We understand that failure to submit all mandatory returnable documents by closing date and time would lead to disqualification of the respondents. Furthermore, the report stated that failure to meet the essential requirements without providing an alternative would result in negative scoring during the evaluation phase.
- 5.9.20.10. The bid document stated the following in respect of alternative proposals *“TFR recognises that Respondents may feel able to deliver a better overall solution that meets TFR’s objectives without meeting all of the essential requirements. Failure to meet an essential requirement therefore may not lead to a Proposal being deemed non-compliant and being rejected, provided that a satisfactory alternative that meets all mandatory requirements and which provides a satisfactory alternative to the essential requirements is provided. Respondents should note that a failure to meet an essential requirement, without providing a satisfactory alternative, will attract a negative score in the evaluation process. Conversely, exceeding an essential requirement will attract a positive score during evaluation.”*
- 5.9.20.11. The tender document further stated that *“respondents are required to submit the following returnable documents and schedules with their responses. All Sections, as indicated in the footer of each page, must be signed, stamped and dated by the Respondent”*
- 5.9.20.12. Furthermore, amongst others, the following were listed as mandatory returnable documents and schedules (**Annexure C 52**):
- 5.9.20.12.1. SECTION 1 : Notice to Bidders;
- 5.9.20.12.2. ANNEXURE C: Local Content Declaration: Summary Schedule;

- 5.9.20.12.3. ANNEXURE D: Imported Content Declaration: Supporting Schedule Annexure C; and
- 5.9.20.12.4. ANNEXURE E: Local Content Declaration: Supporting Schedule to Annexure C.
- 5.9.20.13. According to the bid document *“Failure to provide all the above-referenced mandatory returnable documents by the closing date will result in a Respondent’s disqualification. Bidders are therefore urged to ensure that all these documents are returned with their Proposals.”*
- 5.9.20.14. According to the bid document, respondents were required to submit the following essential returnable documents:
- 5.9.20.14.1. SECTION 5 : Vendor Application Form;
  - 5.9.20.14.2. Original cancelled cheque or bank verification of banking details;
  - 5.9.20.14.3. Certified copies of IDs of shareholder/ directors/ members [as applicable];
  - 5.9.20.14.4. Certified copy of Certificate of Incorporation [CM29/CM9 name change];
  - 5.9.20.14.5. Certified copy of share certificates [CK1/CK2 if CC];
  - 5.9.20.14.6. Entity’s letterhead;
  - 5.9.20.14.7. Original VALID Tax Clearance Certificate;
  - 5.9.20.14.8. Certified copy of VALID VAT Registration Certificate [SA companies only];
  - 5.9.20.14.9. Certified copy of VALID Company Registration Certificate;
  - 5.9.20.14.10. VALID B-BBEE Verification Certificate [Large Enterprises and QSEs];
  - 5.9.20.14.11. VALID B-BBEE Certificate from Auditor, Accounting Officer or SANAS accredited verification agency [EMEs]; and
  - 5.9.20.14.12. Audited Financial Statements for previous 3 years.
- 5.9.20.15. Furthermore, the bid document provided that *“Failure to provide all the above-referenced essential returnable documents may result in a Respondent’s disqualification. Bidders were therefore urged to ensure that all these documents are returned with their Proposals. According to the bid document, Transnet in its sole discretion would afford Bidders a further opportunity to submit these essential returnable documents.”*
- 5.9.20.16. The bid document required the Respondents to submit the essential returnable documents and schedules with their responses. Furthermore, all Sections, as



indicated in the footer of each page, must be signed, stamped and dated by the Respondent.

5.9.20.17. We determined that the CFET did not make reference to the bidders names during the evaluation of RFP: TFRAC-HO-8608, instead the CFET referred to the bidders as "Bidder 1, Bidder 2, Bidder 3, and Bidder 4" etc. We have identified the bidders as follows:

5.9.20.17.1. Bidder 1: Bombardier Transportation;

5.9.20.17.2. Bidder 2: CSR ZhuZhou Electrical Locomotives Co. LTD;

5.9.20.17.3. Bidder 3: ALSTOM;

5.9.20.17.4. Bidder 4 Bongiveli;

5.9.20.17.5. Bidder5: SIEMENS;

5.9.20.17.6. Bidder 6: CNR Import and Export Corporation Ltd; and

5.9.20.17.7. Bidder 7: Mitsui/Toshiba.

5.9.20.18. The CFET noted various findings and clarifications in their report (**Annexure C52**). The following findings were made against CSR by the CFET:

5.9.20.19. Bidder no 2: CSR ZhuZhou Electrical Locomotives Co. LTD did not submit the following essential requirements:

5.9.20.19.1. Annexure D: Imported Content Declaration C;

5.9.20.19.2. Annexure E: Local Content Declaration; and

5.9.20.19.3. Validity period was not stipulated in the RFP as requested in the RFP.

5.9.20.20. The Imported Content Declaration was reflected as one of the essential documents in the undated CFET report. As indicated above, Imported Local Declaration Annexure C, Annexure D and Annexure E were listed as Mandatory documents in the bid document.

5.9.20.21. We determined that there was part 2 of the RFP document that was issued. That part 2 revised the Mandatory returnable documents and listed Annexure D and E in respect of local content, as essential returnable documents.

5.9.20.22. According to part 2 of the RFP, the closing date for the submission of the tender was 26 February 2013 at 10:00. We however determined from the metadata that part 2 of the RFP was created on 18 April 2013 by Lyndsay McInnes. According to the

metadata, the document was last modified by Silvia Martini on 29 April 2013, a day before the closing date of the tender.

5.9.21. **Non submission of local content annexures by CSR**

5.9.21.1. Based on the initial bid document, the Local Content Declarations were mandatory returnable documents. As indicated above, the mandatory documents were amended and Annexure D and E in respect of local content were made essential documents.

5.9.21.2. We determined that the Administrative and Substantive scoring report indicated that CSR did not submit the following essential documents (**Annexure C53**):

5.9.21.2.1. Annexure D: Imported Content Declaration: Supporting Schedule to Annexure C; and

5.9.21.2.2. Annexure E: Local Content Declaration: Supporting Schedule to Annexure C.

5.9.21.3. According to the Administrative and Substantive scoring sheet, Annexure C: Local Content declaration: Summary Schedule was a mandatory returnable document. As stated above, CSR did not submit Annexures D and E of Local Content declaration Supporting Schedule. The fact that the summary schedule was a mandatory document is indicated by the colour coded legend emphasising that it was mandatory.

5.9.21.4. Considering that Annexure D and E were essential documents, CSR should have been negatively scored during the evaluation process. Furthermore, Local Content formed an integral part of the points allocation.

5.9.21.5. Mdletshe indicated that Annexure D and C in respect of Local Content were not mandatory submission documents as per Instruction Note issued by the National Treasury.

5.9.21.6. According to section 5 of the note, titled "Evaluation of bids for rolling stock" paragraph 5.1.1.2 of the Instruction Note dated 16 July 2012 , "the declaration made by the bidder in the Declaration Certificate for Local Content (SBD 6.2) and Annex C (Local Content Declaration: Summary Schedule) must be used for this purpose. If the bid is for more than one product, the local content percentages for each product contained in the Declaration C must be used". The Instruction note does not make reference to Essential and Mandatory documents.

**5.9.22. Evaluation of Local Content Declaration – Step 3**

5.9.22.1. According to the Local Content (“LC”) scoring report dated 30 July 2013 (**Annexure C53**), CSR was evaluated on local content and the following notes were made by the evaluation:

5.9.22.1.1. *“Point 5 & 5.1 completed. Not stamped and signed but this was not a requirement.*

5.9.22.1.2. *Completed, LC minimum threshold stipulated and duly signed by authorised signatory (68.2%);*

5.9.22.1.3. *Completed and signed by Auditor;*

5.9.22.1.4. *Imported content figure on Annexure A and C differs;*

5.9.22.1.5. *Bidders submitted 2x Annexure C documents; and*

5.9.22.1.6. *Not submitted (DTI/SABS requirement – SABS/ TFR will obtain should they be the preferred the bidder).”*

5.9.22.2. We determined that CSR indicated imported local content of R3 684 365.14 in Annexure A and imported local content of R4 425 296.08 in Annexure C. There was a thus difference of R740 930.94 in the local content declared. Our findings were confirmed by the HVT report dated 20 January 2014 which indicated that CSR submitted two different figures relating to imported content. According to the HVT report, the figure declared on Annexure A (declaration certificate for local production and content for designated sectors) R3 684 365.14 was used for evaluations.

5.9.22.3. Furthermore, we determined that no scores were allocated to the bidders during the local content scoring phase. We further determined that the evaluation team verified the percentage of local content declared in order to confirm whether any local content was declared.

5.9.22.4. The following local content was declared by the bidders:

Bidder No	Name of Bidder	Local Content %	Ranking
1	Bombardier Transportation	69.83%	2
2	CSR ZhuZhou Electrical Locomotives Co. LTD	68.20%	4

Bidder No	Name of Bidder	Local Content %	Ranking
4	Bongiveli	69.20%	3
5	SIEMENS	61%	6
6	CNR Import and Export Corporation Ltd	67.02%	5
7	Mitsui/Toshiba	87.66%	1

5.9.22.5. We determined that Mitsui committed 87.66%, the highest percentage in respect of local content. We further determined that CSR committed the fourth highest percentage in respect of local content.

5.9.22.6. We determined that the local content evaluation was conducted by Abdool Lutchka and Itumeleng Msibi.

5.9.23. **Extension of financial statement pre-qualification**

5.9.23.1. According to the CFET report, on 14 June 2013, first clarifications were issued to all tenderers requesting the following (**Annexure C51**):

5.9.23.1.1. Latest 3 year signed audited financial statements; and

5.9.23.1.2. Confirming that the company that will be providing the Parent Company Guarantee.

5.9.23.2. According to the bid documents, audited financial statements for the previous 3 years were part of the essential returnable documents. It is unclear why the CFET required clarity from the bidders if this was clearly indicated in the bid document.

5.9.23.3. We determined that that there was a 27 working days gap between the dates (8 May 2013) when the CFET convened for pre-qualification evaluation and the date (14 June 2013) when the clarification was sent to the tenderers. We are in the process of obtaining clarification relating to the said delays.

5.9.23.4. According to the CFET report, the closing date in respect of the extension for the clarifications was extended to 25 June 2013 at 10:00.

5.9.23.5. We further determined that a new decision was taken by the CFET that clarifications previously issued, must be re-issued to all tenderers for the following reasons:

5.9.23.5.1. *“Transnet requires a Parent Company Guarantee from the ultimate parent company within the group. As such, they are required to provide the latest 3 years signed audited consolidated Financial Statements for the ultimate parent company within your group.*

5.9.23.5.2. *Confirmation that the Parent Company Guarantee and latest 3 years signed audited consolidated Financial Statements provided was for the ultimate parent company within your group.”*

### **Disqualification of Bidder 3 (Alstom)**

5.9.23.6. We determined that the re-evaluation of the pre-qualification resulted in Bidder 3 (Alstom) being disqualified from the bidding process because Alstom did not meet the financial pre-qualification minimum requirements. The CFET indicated that the reasons for disqualification were listed in the finance report.

5.9.23.7. We were presented with a copy of the finance report dated 24 July 2013 (**Annexure C54**) titled *“Locomotive tender pre-qualification evaluation for the supply of 599 new electric locomotives - Report of the Cross Functional Evaluation Team (Finance)”* which indicated reasons for Bidder 3 (Alstom) disqualification. According to the said finance report, the following are reasons which led to Alstom’s disqualification:

5.9.23.8. *“Based on these further clarification requests all bidders with the exception of Bidder 3 complied with the request by either providing the consolidated financial statements of the ultimate parent company within the group or indicating that they have already done so. Bidder 3 submitted a company structure (attached as annexure) which indicates that the ultimate parent company within the group. The financial statements of the indicated ultimate holding company by Bidder 3 is not a consolidated set of financial statements as was required by the post tender clarification request. The financial statements indicate the fact that this company is itself 100% owned by another entity where consolidation takes place. Taking this into consideration as well as the submitted structure we are of the view that the indicated ultimate holding company by Bidder 3 is not necessarily the ultimate holding company within the Bidder 3 group of companies. It is our view that Bidder 3 has provided the structure of a sub group within the wider group. Therefore based on the financial statements and the group company structure submitted by bidder 3 it appears to us that the PCG will not be issued by the ultimate parent company of Bidder 3”*

5.9.23.9. Based on the findings mentioned above the CFET concluded that Bidder 3 could not move on to the next stage for further evaluation.

5.9.23.10. The said finance report was signed by the following parties:

- 5.9.23.10.1. Yousuf Laher: Executive Manager, Finance;
- 5.9.23.10.2. Zunaid Vally: Executive Manager, Finance;
- 5.9.23.10.3. Thabo Seapi : Senior Manager, Finance; and
- 5.9.23.10.4. Mohammed Moola: Senior Manager, Finance
- 5.9.23.11. Based on the requirements outlined in the bid document, failure to provide essential returnable documents without providing an alternative would result in negative scoring during the evaluation process. Furthermore, failure to submit essential returnable documents may result in disqualification.
- 5.9.23.12. Alstom should not have been disqualified from the tender process at this stage and in the least should have been negatively scored for failing to submit essential documents as required
- 5.9.24. **Non disqualification of Bidder 2 (CSR)**
- 5.9.24.1. During the financial pre-qualification process, concerns were raised in respect of CSR's financial submission which required further clarity. The concerns raised are listed in the finance report dated 24 July 2013, as follows (**Annexure C54**):

*"One tenderer (Bidder 2) initially only provided the financial statements for the immediate parent company (not the ultimate parent company). The clarification wording issued states the following "The financial statements of the ultimate parent company that will be providing the PCG (Parent Company Guarantee) must be provided. "During the course of the pre-qualification evaluation we noted that the RFP clarification wording could possibly be subject to different interpretations of what would constitute the ultimate parent company. As such based on advice from SCS the 1st and 2nd "post tender closing" clarification requests were issued to bidders.*

*Bidder 2 provided the financial statements of its ultimate parent company following this clarification request process. Accordingly the financial stability evaluation was performed using this ultimate parent company's financial statements of Bidder 2. Bidder 2 would meet the financial stability requirements based on the ultimate parent company's financial statements. Bidder 2 would also have met the financial stability requirements had the financial statements of the immediate parent company been utilised.*

*Bidder 2's financial statements for the immediate parent company in English were not signed-off by an auditor, however the foreign language versions was signed off by auditors. Bidder 2's financial statements for the ultimate parent company received through the 2nd clarification process were not signed, however it should be noted that this bidder is a large*

*international company whose financial statements are publicly published, which provided a level of comfort that these were audited financial statements. As the test for administrative responsiveness is performed by the SCS team and is not within the scope of the Finance team's evaluation we have thus assumed that the financial statements provided to the Finance team by SCS would have passed the administrative responsiveness test."*

5.9.24.2. The CFET (Finance) accepted the unsigned English version of CSR's financial statements based on the assumption that they were publicly available as CSR was a large international company. There is no evidence that the CFET (Finance) verified the unsigned Financial Statements.

5.9.24.3. Based on the finance report dated 24 July 2013 (Annexure C54), it is evident that CSR were not disqualified or negatively scored for submitting unsigned financial statements. As indicated above, the RFA indicated that the non-submission of essential documents would result in negative scoring or may result in disqualification.

5.9.25. **Evaluation of B-BBEE and Supplier Development – Step 4**

5.9.25.1. We noted a copy of the B-BBEE and Supplier Development ("SD") evaluation report dated 8 August 2013 (Annexure C55) which makes no reference to Bidder 2 (CSR), Bidder 3 (Alstom) and Bidder 5 (SIEMENS) evaluation in respect of their BBBEE and supplier Development evaluation.

5.9.25.2. The evaluation report only covered evaluations conducted on the following bidders:

5.9.25.2.1. Bidder 1 (Bombardier);

5.9.25.2.2. Bidder 4 (Bongiveli);

5.9.25.2.3. Bidder 6 (CNR); and

5.9.25.2.4. Bidder 7 (Mitsui/Toshiba)

5.9.25.3. Below is a summary of the B-BBEE and the evaluations conducted as per evaluation report:

**Bidder 1**

*"The bidder under Skills Development (Proposed Rand value to be used on training persons with disabilities) did not calculate correctly and gave a total value of R 4.089.1288. The evaluation team noted that this could be a typing error. The evaluation team manually calculated the total value to be R3 999 128. The impact of the both values will have a material*

*effect on the scoring. The bidder was not scored on this element. Clarification to be requested”.*

#### **Bidder 4**

*“The bidder responded under Down-Stream Supplier Development (Rand value to be spent on businesses within the town/city of operation) with a number where a rand value was requested. The bidder was not scored on this element. Clarification to be requested”.*

#### **Bidder 6**

*“The bidder responded under Investment in Plant (Potential percentage increase in export content that will result from the increased industrial capability locally with a rand value where a percentage was requested. The bidder was not scored on this element. Clarification to be requested”.*

#### **Bidder 7**

*“Bidder submitted two (2) Annexure G (SD Value Summary) for COCO's and BOBO's. The bidder was evaluated on both the SD Value Summaries. The bidder meets the minimum B-BBEE Scorecard and Supplier Development Thresholds for COCO and BOBO submissions.”*

- 5.9.25.4. The report concluded by stating that *“All bidders meet the minimum B-BBEE Scorecard and Supplier Development "Thresholds" without going out on any clarifications. However as B-BBEE and SD scores are to be carried over to the final stage, any clarification would assist the bidder's final SD score positively.”*
- 5.9.25.5. We determined that some sections of the evaluation report stated that the evaluation team would request clarifications from the shortlisted tenderers; however in their report the evaluation team concluded that all bidders met the minimum B-BBEE and SD without going out on any clarification. The conclusion made by the evaluation team contradicts the findings detailed in their report.
- 5.9.25.6. The B-BBEE and SD evaluation report was signed by:
- 5.9.25.6.1. Yousuf Laher: Executive Manager, Finance;
  - 5.9.25.6.2. Zunaid Vally: Executive Manager, Finance;
  - 5.9.25.6.3. Thabo Seapi: Senior Manager, Finance; and
  - 5.9.25.6.4. Mohammed Moola: Senior Manager, Finance.



5.9.26. **Technical Evaluation - Step 5**

- 5.9.26.1. We determined that a Technical Evaluation report was prepared by Harris and Mors on 25 October 2013 in respect of the 599 GFB Dual Voltage electric locomotives (**Annexure C 56**). Mdletshe presented us with an extract of the said technical report.
- 5.9.26.2. The extract of the report was five pages of a 323 paged report. The extract included the cover page, executive summary, technical evaluation results for both diesel and electric locomotives and recommendations.
- 5.9.26.3. Based on the interrogation of the extract provided to us by Mdletshe, we came to the conclusion that there had to be a report that informed the final report. It was for this reason that we conducted a search of the hard drive provided to us by Transnet and found a draft technical evaluation report dated 23 October 2013. We noted that the draft technical evaluation report reflected a different score to the technical evaluation report dated 25 October 2013. The details of the draft technical evaluation report dated 23 October 2013 are discussed in a separate heading below.
- 5.9.26.4. We determined that the purpose of the technical evaluation report dated 25 October 2013 was to present the technical evaluation process, findings and results of the fifth stage of the tender evaluation process for Transnet's 1064 new GFB locomotives.
- 5.9.26.5. According the technical report, seven bids for the 599 electric locomotives tender (number HOAC-HO-8608, technical specification BBF 3975 (Rev 4)) and four bids for the 465 diesel locomotives tender (number HOAC-HO-8609, technical specification BBF3701 (Rev 3)), passed the initial stages for the tender evaluations.
- 5.9.26.6. We determined that the evaluation team considered two options in respect of specifications during the evaluation phase. The following two categories were considered by the evaluation team:
- 5.9.26.6.1. *"options required to comply with the specification requirements (i.e. desirable requirements) and*
  - 5.9.26.6.2. *options that are over and above the basic requirements, but that were offered to enhance the product (e.g. the trip optimiser)".*
- 5.9.26.7. We determined that the Technical Evaluation team indicated that it was imperative that the "OPTIONS" be used by the finance department to determine the same base line for the offers during the financial adjudication process.

5.9.26.8. According to the Technical Evaluation report, the following technical evaluation results were achieved in terms of compliance to the technical specifications for the 599 Electric Bo-Bo Locomotives:

**Scoring for the 599 Electric Bo-Bo Locomotives**

Ranking	Tender Number	Tenderer Name	Final Score
1	T2	CSR E-LoCo Supply (Proprietary) Limited	96.5%
2	T1	BOMBARDIER Transportation	96.1%
	T7	MITSUI/TOSHIBA (MARS)	96.1%
3	T5	SIEMENS	91.9%
4	T3	ALSTOM Rail Consortium	89.7%
5	T6	CNR Import and Export	86.1%
DSQ	T4	BONGIVELI	72.6%

5.9.26.9. According technical report, *“Six of the seven 599 Bo-Bo tenderers passed the minimum threshold of 80%. Tenderer 4 did not achieve the minimum 80% threshold. (Tenderer 4 did also not comply with all the mandatory clauses and has therefore been disqualified), two of the 599 Bo-Bo tenderers scored the same and share the second place in the rankings.”*

5.9.26.10. The report further indicated the technical evaluation results for the 599 Electric Co-Co Locomotives as follows:

**Scoring for the 599 Electric Co-Co Locomotives**

Ranking	Tender Number	Tenderer Name	Final Score
1	T2	CSR E-LoCo Supply Proprietary Limited	96.5%
2	T1	BOMBARDIER Transportation	96.0%
3	T7	MITSUI/TOSHIBA (MARS)	95.9%
4	T5	SIEMENS	92.1%
5	T3	ALSTOM Rail Consortium	89.8%

Ranking	Tender Number	Tenderer Name	Final Score
DSQ	T4	BONGIVELI	69.6%
N/A	T6	CNR Import and Export	0.0%



- 5.9.26.11. According technical report, *“Tenderer T6 only submitted a Bo-Bo locomotive proposal and has not been scored. Five of the six 599 Co-Co tenderers passed the minimum threshold of 80%. Tenderer 4 did not achieve the minimum 80% threshold. Five of the six 599 Co-Co tenderers passed all the MANDATORY clauses. Tenderer 4 did not comply with all the mandatory disqualifying clauses. Some of the sections of the specification in which tenderer 4 failed to comply include Control Systems, Brake Systems, Electrical Safety, Locomotive Power and Pantographs amongst others.”*
- 5.9.26.12. We determined that there was a difference of 0.1% between the technical score allocated to Bombardier Transportation and Mitsui/Toshiba who received scores of 96.0% and 95.9% respectively in respect of the Co-Co locomotives.

**Draft Technical Evaluation report dated 23 October 2013**

- 5.9.26.13. We obtained various technical evaluation reports from the hard drive that was used to back up documentation during the procurement process of the acquisition of 1064 locomotives. The said technical evaluation reports were dated 23 October 2013, 24 October 2013 and 25 October 2013 respectively.
- 5.9.26.14. Paragraph 1.2 of the draft technical evaluation report dated 23 October 2013 indicates that *“the mandate, responsibility and involvement of the technical teams during the 1064 tender evaluation process was limited to stage 5, namely to:*
- 5.9.26.14.1. *(a) determine the level of compliance to the TFR technical specifications with judgement of compliance level based only on the submitted information - the teams were requested to base their evaluation purely on the information contained in the tender documents; (i.e. knowledge of tenderers capabilities and or products based on previous projects, e.g. the class 20E (CSR), the class 19E (Toshiba) and the Class 43 locos (GE) should not be used);*
- 5.9.26.14.2. *(b) early identification of potential technical risks (i.e. early identification of items that may need to be further negotiated during the technical negotiations with “preferred bidders”);*
- 5.9.26.14.3. *(c) providing of a technical evaluation summary report” (Annexure C57).*

- 5.9.26.15. According to the draft technical evaluation report, *“the technical team’s understanding was that the final technical score would NOT be transferred to the next stage of the evaluation, but that the technical scores would only be used as a “gate” through which the locos have to pass to reach the next stage of the tender evaluation, using a minimum technical pass rate of 80%. The technical scores therefore DO NOT influence the final outcome of whom the tender would be awarded to”*.
- 5.9.26.16. From documentation provided to us as well as consultations conducted during the course of our investigation, we could not establish what informed the technical evaluation team to have an understanding that final technical score would not be transferred to the next stage of the evaluation, but only be used as a “gate” through which the “locos” have to pass to reach the next stage of the tender evaluation. The outcome of the said understanding by the technical evaluation team is that each bidder’s scores were discarded at the end each evaluation stage and all bidders had to start on a clean slate for the next evaluation stage.
- 5.9.26.17. We compared the draft technical evaluation report dated 23 October 2013 with the final technical evaluation report dated 25 October 2013 and noted differences in the points allocated to the bidders for 599 electric Co-Co locomotives. The table below reflects the differences in the scores allocated to the bidders:

	<b>Draft Technical Evaluation report dated 23 October 2013</b>	<b>Final Technical Evaluation report dated 25 October 2013</b>	<b>Difference</b>
<b>Tenderer Name</b>	<b>Draft Score</b>	<b>Final Score</b>	
Bombardier Transportation	95.8%	96.0%	0.2% ↑
Mitsui/Toshiba (MARS)	95.5%	95.9%	0.4% ↑
CSR E-LoCo Supply Proprietary Limited	94.5%	96.5%	2% ↑
Siemens	91.7%	92.1%	0.4% ↑




	<b>Draft Technical Evaluation report dated 23 October 2013</b>	<b>Final Technical Evaluation report dated 25 October 2013</b>	<b>Difference</b>
Alstom Rain Consortium	89.1%	89.8%	0.7% 
Bongiveli	69.5	69.6%	0.1% 
CNR Import and Export Corporation Ltd	0.0%	0.0%	0.0%

5.9.26.18. We noted from the review of both technical evaluation reports that CSR’s final score was increased by 2% while the other entities’ final scores were increased by less than 1%.

5.9.26.19. From the said review, CSR’s scoring was increased by 2% resulting in the entity scoring the highest points amongst the seven bidders. The final score was adjusted in the technical evaluation report dated 25 October 2013.

5.9.26.20. As indicated above, according to the draft technical evaluation report dated 23 October 2013, CSR was ranked number 3 with a final score of 94.5%. Bombardier and Mitsui were ranked number 1 and number 2 with final scores of 95.8% and 95.5% respectively. We were not provided with the evaluation scoring sheets or technical evaluation report that informed the adjustments that resulted in CSR scoring the highest points.


5.9.26.21. We noted that after the final scoring as per the technical report dated 25 October 2013, the top three bidders were ranked as follows:

<b>Ranking</b>	<b>Tenderer Name</b>	<b>Final Score</b>	<b>Tenderer Name</b>	<b>Percentage increase</b>	<b>Final Score</b>	<b>Net Effect</b>
1	BOMBARDIER	95.8%	CSR E-Loce	2%	96.5%	
2	MITSUMI	95.5%	BOMBARDIER	0.2%	96.0%	
3	CSR E-Loce	94.5%	MITSUMI	0.4%	95.9%	

- 5.9.26.22. As reflected in the table above, the net effect of CSR’s 2% increase resulted in them moving from ranking 3 to number 1, while Bombardier and Mitsui were relegated to number 2 and 3 respectively.
- 5.9.26.23. We could not find any formula that was applied to effect/allocate the scorings in the final technical evaluation dated 25 October 2013.
- 5.9.26.24. In order to establish if the technical evaluation team was consistent in its application of the evaluation criteria for the 1064 locomotives tender evaluation, we conducted an analysis and comparison between the draft technical evaluation report dated 23 October 2013 and the final report dated 25 October 2013 in respect of the 465 Diesel Co-Co locomotives. The table below reflects the said comparison:

	Draft Technical Evaluation report dated 23 October 2013	Final Technical Evaluation report dated 25 October 2013	Difference
Tenderer Name	Final Score	Final Score	
CSR Loliwe Consortium	95.6%	95.6%	0%
CNR Import and Export Corporation Ltd	92.9%	92.9%	0%
EMD Africa	86.2%	86.2%	0%
GE South Africa	86.1%	86.1%	0%

- 5.9.26.25. We determined that the final scores allocated to the bidders in respect of the 465 Diesel Co-Co locomotives were not adjusted between the 23 October 2013 and 25 October 2013.

Ranking	Tenderer Name	Final Score	Tenderer Name	Percentage increase	Final Score	Net Effect
1	CSR Loliwe	95.6%	CSR Loliwe	0%	95.6%	

Ranking	Tenderer Name	Final Score	Tenderer Name	Percentage increase	Final Score	Net Effect
	Consortium		Consortium			
2	CNR Import and Export Corporation Ltd	92.9%	CNR Import and Export Corporation Ltd	0%	92.9%	↔
3	EMD Africa	86.2%	EMD Africa	0%	86.2%	↔
4	GE South Africa	86.1%	GE South Africa	0%	86.1%	↔

5.9.26.26. From the table above, it is evident that there were no set evaluation criteria that informed the technical evaluation team to change the scoring of the electric locomotives technical evaluation process which saw CSR move from number 3 to number 1 and ended up being awarded the tender.

5.9.26.27. We were not required to and did not investigate the process followed in the appointment of service providers for the diesel locomotives. The above comparison was included for completeness.

**5.9.27. CFET Finance Evaluation - Step 6**

5.9.27.1. We determined that the finance evaluation in respect of the 599 electric locomotives was on 6 December 2013 (**Annexure C 58**). We further determined that the CFET Finance upon consultations with SCS, took a decision to exclude escalations and hedging costs from the price evaluation in order to attain a more normalised price for evaluation purposes.

5.9.27.2. We further determined that the various OEM’s quoted the following price per locomotives excluding TE as the main subcontractor:

Bidder 1 (Bombardier)	Bidder 2 (CSR)	Bidder 3 (Alstom)	Bidder 4 (Bongiveli)	Bidder 5 (Siemens)	Bidder 6 (CNR)	Bidder 7 (Mitsui/Toshiba)
R32 833 423	R34 716 188	R46 301 906	N/A (disqualified)	R38 091 755	N/A (disqualified)	R33 695 001

5.9.27.3. We determined that Bombardier offered the lowest base price per locomotive followed by Mitsui and CSR respectively.

5.9.27.4. We determined that the CFET Finance evaluated the bids in respect of break point pricing per locomotive depending on the batch size of the order. We further determined that the following break point pricing was offered by the bidders:

	Batch 1	Batch 2	Batch 3	Batch 4	Batch 5
Bombardier	R 49 860 694,00	R 37 247 559,00	R 34 555 142,00	R 33 245 507,00	R 30 955 000,00
CSR	R 42 500 732,00	R 36 462 977,00	R 35 255 426,00	R 34 737 905,00	R 34 380 000,00
Alstom	R 81 198 577,00	R 51 030 239,00	R 45 006 189,00	R 42 355 684,00	R 39 906 949,00
Siemens	R 51 359 000,00	R 37 338 000,00	R 34 175 000,00	R 32 575 000,00	R 31 358 000,00
Mitsui	R 51 264 417,00	R 42 438 403,00	R 39 742 636,00	R 37 201 313,00	R 29 880 000,00
locos per year	65	130	130	130	144
Locos cumulative	65	195	325	455	599

5.9.27.5. We determined that Siemens offered the lowest price followed by Bombardier in respect of the break point pricing dependent on the various batches. The table below illustrates the price per batch offered by each bidder:

	Batch 1	Batch 2	Batch 3	Batch 4	Batch 5	TOTAL
Bombardier	R3 240 945 110,00	R4 842 182 670,00	R4 492 168 460,00	R4 321 915 910,00	R4 457 520 000,00	<b>R21 354 732 150,00</b>



	Batch 1	Batch 2	Batch 3	Batch 4	Batch 5	TOTAL
CSR	R2 762 547 580,00	R4 740 187 010,00	R4 583 205 380,00	R4 515 927 650,00	R4 950 720 000,00	<b>R21 552 587 620,00</b>
Alstom	R5 277 907 505,00	R6 633 931 070,00	R5 850 804 570,00	R5 506 238 920,00	R5 746 600 656,00	<b>R29 015 482 721,00</b>
Siemens	R3 338 335 000,00	R4 853 940 000,00	R4 442 750 000,00	R4 234 750 000,00	R4 515 552 000,00	<b>R21 385 327 000,00</b>
Mitsui	R3 332 187 105,00	R5 516 992 390,00	R5 166 542 680,00	R4 836 170 690,00	R4 302 720 000,00	<b>R23 154 612 865,00</b>

5.9.27.6. We determined that the CFET finance scored the bidders using three different scenarios.

**5.9.28. SD/ BBBEE/ FURTHER RECOGNITION - Step 6**

5.9.28.1. We noted a copy of SD/ BBBEE/ Further Recognition dated 29 January 2014 which indicates the scores allocated to the various bidders (**Annexure C59**):

5.9.28.2. The table below illustrates the scores allocated:

**SD/ BBBEE/ Further Recognition for the TRAC - HO - 8608**

No	What was measured	Weight	Effective weight	Tenderer 1 (Bombardier)	Tenderer 2 (CSR)	Tenderer 3 (Alstom)	Tenderer 5 (Siemens)	Tenderer 7(Mitsui/Toshiba)
1	BBBEE Scorecard	10%	10	8	6	4	8	6
2	SD	20%	20	15.5	16.15	15.2	16.67	15.89
3	Further Recognition Criteria (Current)	5%	5	0.88	0.47	0.47	1.66	2.16
4	Further Recognition Criteria	5%	5	0.94	2.11	1.26	2.45	1.82

No	What was measured	Weight	Effective weight	Tenderer 1 (Bombardier)	Tenderer 2 (CSR)	Tenderer 3 (Alstom)	Tenderer 5 (Siemens)	Tenderer 7(Mitsui/Toshiba)
	(Future)							
<b>TOTAL</b>			<b>40</b>	<b>25.31</b>	<b>24.73</b>	<b>20.56</b>	<b>28.77</b>	<b>25.86</b>

5.9.28.3. Based on the above table the bidder that scored the highest in respect of the SD/BBBEE/ Further Recognition was Siemens followed by Mitsui/Toshiba and third was Bombardier. We noted that CSR was the 4th highest bidder.

5.9.29. **Best and final offer (BAFO)**

5.9.29.1. We determined that Molefe and Singh issued a memorandum to Jiyane dated 27 December 2013 titled “request for approval to request for the final and best offer for the supply of 599 (CoCo New Dual Voltage locomotives and 465 New Diesel locomotives for the GFB”( **Annexure C 60**).

5.9.29.2. We determined that the purpose of the memorandum was to *inter alia* authorise the CFET to issue a request for the best and final offer for both the 599 New Dual Voltage locomotives and 465 New Diesel locomotives.

5.9.29.3. According to the memorandum, the CFET was authorised to request best and final offers from 2 of the highest scoring bidders in respect of the 599 electric locomotives tender and all shortlisted bidders for the 465 diesel locomotives tender.

5.9.29.4. The requesting of BAFO from two highest scoring bidders and not five of the short listed bidders limited Transnet to make a fair assessment of which bidder the most competitive price. As discussed above, all five shortlisted bidders archived the 80% technical threshold to manufacture a locomotive.

5.9.29.5. We determined that there were inconsistencies in the manner in which the request for best and final offer was applied between the 599 tender and the 465 tender. We further determined that the process was unfair and not in line with Transnet SCM Policy which emphasises that Transnet’s procurement activities should be implemented in line with best practice principles which include the following:

5.9.29.5.1. Fairness and Transparency;

5.9.29.5.2. Equal treatment of bidders;

5.9.29.5.3. Openness and accountability; and

5.9.29.5.4. Ethical conduct.

- 5.9.29.6. We determined that Molefe and Singh and or Transnet's conduct did not treat the bidders equally when they requested best and final offers from two bidders only in respect of the 599 tender. We determined that Molefe and Singh and or Transnet's conduct was in contravention of Section 5 of the SCM Policy.
- 5.9.29.7. According to paragraph 19.1.2 of the PPM, *"in order to ensure that Post Tender Negotiation ("PTN") is conducted in a fair manner, shortlisted Bidders should be negotiated with individually. The negotiation process should follow the same agenda for all Bidders. After negotiation the Bidders should submit their best- and-final offers, in the relevant tender box, by a specified closing date and time. After proper evaluation of all best-and-final Bids received, business is ultimately awarded to the highest rank Bidder, based on these offers"*. We determined that Molefe and Singh failed to request the best and final offer from three of the five shortlisted bidders in respect of the 599 tender as required by the PPM.
- 5.9.29.8. As reflected above, Molefe and Singh contravened paragraph 19.1.2 of the PPM as they only requested BAFO from three of the five shortlisted bidders for the electric locomotives.
- 5.9.29.9. In his written response, Gama indicated that *"The above contention is plainly incorrect, in that the clear grammatical reading of the terms of clause 19 of the PPM dealing with Post Tender Negotiations, read together with clause 11.6 of the RFP, Transnet is entitled to enter into post tender negotiations with any number of shortlisted bidders."*
- 5.9.29.10. We noted that clause 19 and clause 12.6 of the PPM and RFP respectively were not consistently applied in dealing with the Post Tender Negotiations for the diesel and electric locomotives. The inconsistencies in the application of the said clauses compromised the integrity of the procurement process.
- 5.9.29.11. Stemming from how Mitsui was eliminated from the 100 locomotives confinement, could it be that Transnet did not negotiate with all shortlisted bidders to avoid negotiating with Mitsui?
- 5.9.29.12. We determined that the memorandum indicated that the request for the best and final offer on tenders should be based on a minimum split of 50/50. We further determined that the sentence *"should be based on a minimum split of 50/50"* was cancelled by hand and both Singh and Molefe signed next to the cancellation. The amendment of the 50/50 split allocation resulted in CSR being allocated a higher percentage *i.e.* 60% for the supply of the 599 locomotives. Had a 50/50 split been applied, CSR would have been allocated 300 locomotives instead of 359. CSR

benefited an additional amount of R2.97 billion as a result of the amendment of the split from 50/50 to 60/40.

- 5.9.29.13. We determined that Molefe and Singh signed the best and final memorandum on 31 December 2013, New Year’s Eve. We further determined that Gama signed the said memorandum on 14 January 2014 (**Annexure C 60**).
- 5.9.29.14. When we consulted with Gama on this issue he jokingly stated “*Chief, I was in Honolulu on that date.*” Gama was making a point that most of the people, including himself, were on leave/ holiday at that stage of the year as it was around festive season and a New Year’s Eve.
- 5.9.29.15. Gama indicated that he signed the memorandum on 14 January 2014 upon his return from holiday. Gama further indicated that Molefe and Singh had already proceeded with the best and final offer request. According to Gama, Singh requested him to sign the request of best and final offer memorandum upon his return from the December holidays.
- 5.9.29.16. We determined that on 15 January 2014, the CFET (Finance) sent two memorandum’s to the 1064 Locomotives Steering Committee in respect of the results of the best and final offer responses for the diesel and electric locomotives (**Annexure C 61**).
- 5.9.29.17. According to the memorandum, the following are the best and final offers in respect of the diesel locomotives :

	<b>Bidder 1 (CNR)</b>	<b>Bidder 2 (CSR)</b>	<b>Bidder 3 (EMD AFRICA)</b>	<b>Bidder 4 (GE)</b>
BAFO Evaluated price	R30 455 335	R30 320 728	40 244 313	27 159 485
Previous evaluated price	R44 232 853	R33 254 876	R42 761 272	R27 493 481
Difference	R13 777 518	R2 934 148	R2 516 959	R333 996

5.9.29.18. According to the memorandum, the following are the best and final offers in respect of the diesel locomotives:

	Bidder 1 (Bombardier)	Bidder 2 (CSR)
BAFO Evaluated price	R32 377 762	R32 462 295
Previous evaluated price	R32 833 423	R34 716 188
Difference	R455 661	R2 253 893

5.9.29.19. We were not provided with the actual submissions (written submissions) of the best and final offer from the various bidders to verify if they indeed provided the above mentioned offers.

5.9.30. **LATE APPOINTMENT OF EVALUATION TEAMS**

5.9.30.1. According to a copy of an undated CFET report (**Annexure C62**), evaluation of step 1 and step 2 commenced on 8 May 2013. We noted a memorandum dated 24 October 2013 (**Annexure C63**) titled *“Request for the Chief Executive to appoint the Chairperson of the evaluation sessions and sign the Cross Functional Sourcing Team appointment letters”*.

5.9.30.2. The memorandum was from Jiyane addressed to Gama. The memorandum indicated that its purpose was to request the Chief Executive to sign appointment letters appointing Cross Functional Sourcing Team members. The memorandum further indicated as background that the tender procurement of the 1064 Electric and Diesel locomotives was issued on 23 July 2012 and after various extensions it closed on 30 April 2013.

5.9.30.3. Based on the date of the memorandum, *i.e.* 24 October 2013, it is evident that CFET and other evaluation teams proceeded with the evaluation process without their appointments being officially signed off by Molefe. The memorandum further stated that the technical evaluation commenced on 22 August 2013.

5.9.30.4. We noted that Gama signed the memorandum on 28 October 2013 approving the appointment of the above mentioned team members.

5.9.30.5. In his response to our second draft report, Gama indicated the following relating to the appointment of the evaluation team *“The PPM is completely silent as to whether a person participating in an evaluation, may only do so after having been formally appointed by the GCE”*

5.9.30.6. Although the Transnet 2009 PPM and 2009 Procurement policies are silent on the late appointment of the evaluation team, good governance practise would dictate that the CFET should not have commenced with evaluation until appointed to do so. The said formal appointment would also assist Transnet Management in taking action against any CFET member where their conduct is not consistent with the requirements of the company's procurement processes.

#### 5.9.31. **AWARD OF 359 LOCOMOTIVES**

5.9.31.1. We noted a copy of a memorandum dated 16 January 2014 from Jiyane addressed to Gama, Singh and Molefe titled "*Request for approval to negotiate and award of business to the shortlisted tenderers for the supply of 599 (CoCo) New Dual Voltage Locomotives for the General Freight Business (GFB)*" which was intended to (**Annexure C64**)

5.9.31.1.1. Provide an update to the GCE on the progress of the tender evaluation process; and

5.9.31.1.2. Support the submission of the recommendation for the negotiations and award of business to the Transnet Board of Directors.

5.9.31.2. The said memorandum indicated that T1 and T2 scored the highest points and that their proposals offer the following benefits to Transnet:

5.9.31.2.1. "Local Content committed by both tenderers is higher than stipulated threshold of 60%, commitment for T1 is 69.83% and T2 commitment is 68.20%

5.9.31.2.2. T1 and T2 scored the highest points on technical evaluations.

5.9.31.2.3. Supplier Development commitment for T1 is 77.5%% and T2 is 80.75%;

5.9.31.2.4. T1 and T2 scored highest on technical evaluation;

5.9.31.2.5. Delivery schedule which is close to what Transnet requires, which means that Transnet will meet *the MDS targets with the combination of the 2 (two) bidders.*

5.9.31.2.6. *The GCE further requested that the CFET request the best and final offer from the two highest scoring tenderers and that the other tenderers be informed that Transnet will be engaging with the shortlisted tenders.*

5.9.31.2.7. *The outcome of the best and final offer is as follows:*

a) *T1 offered to increase procurement to small business by R50 million and technology transfer through skills development training and support by R10 million.*

b) T2 offered a discount of R2,1 million per locomotive.

5.9.31.3. We noted that the memorandum was supported by Singh on 20 January 2014 with the following comments “GCE approval should be subject to:

5.9.31.3.1. Use of 2 suppliers + motivation; and

5.9.31.3.2. Split of *work + motivation.*”

5.9.31.4. Singh’s comment as contained in Jiyane’s memorandum of 20 January 2014 is a clear indication of appointing two suppliers and splitting of work in relation the 599 electric locomotives.

5.9.31.5. The memorandum was approved by Molefe on 21 January 2014. We noted that Gama did not sign Jiyane’s memorandum dated 16 January 2014.

5.9.31.6. We noted a copy of a memorandum dated 17 January 2014 (**Annexure C 65**) addressed to the Transnet Board Disposals and Acquisitions Committee (“BADC”) titled “request for approval to negotiate and award of business to the short listed tenderers for the supply of 599 new diesel locomotives for The General Freight Business (GFB)”.

5.9.31.7. The said memorandum stated that the intention was “to support the recommendation of the shortlist of tenderers as a result of the tender and evaluation process for the negotiations and award of business to BOD and delegate all necessary powers to the Group Chief Executive to sign, approve and conclude all necessary documents to give effect to the above resolutions.”

5.9.31.8. Singh’s comments to Molefe effectively enabled the splitting of the allocation of the locomotives to two suppliers each for both diesel and electric locomotives.

5.9.31.9. Molefe’s signature on the memorandum which contained Singh’s comments is evident that he, Molefe, agreed to and approved the split of work to more than one OEM per diesel and electric locomotives supply.

5.9.31.10. The Board’s approval of the recommendations by Molefe effectively authorised the split of the procurement of the 1064 locomotives to 4 suppliers instead of two.

5.9.31.11. According to the memorandum, the Board approved the procurement of 599 Electronic locomotives on 19 April 2012, subject to Section 54 approval.

5.9.31.12. There not evidence that Section 54 of PFMA was applied before the tender was advertised in 2012 however it was applied for on 30 April 2013 on the same day the tender was closed.

5.9.31.13. The memorandum dated 17 January 2014; RFP No TFRAC-HO-8608 for the supply of 599 new electric locomotives for the General Freight Business (GFB) indicates that the RFP closed on the 30 April 2013 (**Annexure C 65**). The memorandum further indicated that seven (7) proposals were received from tenderers.

5.9.31.14. The memorandum further indicated that all seven tenderers were evaluated and allocated the following scores on technical evaluation:

**Scoring of tenderers for 599 new electric locomotives**

Ranking	Tender Number	Final Score
1	Tenderer 2 (T2) – CSR	96.5%
2	Tenderer 1 (T1) – Bombardier	96.0%
3	Tenderer 7 (T7) – Mitsui/Toshiba	95.9%
4	Tenderer 5 (T5) – SIEMENS	92.1%
5	Tenderer 3 (T3) – Alstom	89.8%

5.9.31.15. According to the memorandum, the following bidders did not meet the technical requirements:

**Scoring of tenderers for 599 new electric locomotives**

Ranking	Tender Number	Final Score
1	Tenderer 4 (T4) – Bongiveli	69.6%
2	Tenderer 6 (T6) – CNR	0.0%

**5.9.32. Board resolution – approval of the award of 599 electric locomotives**

5.9.32.1. We noted a copy of the extract of the minutes of a Special Board held on 24 January 2014 at 16:10 (**Annexure C66**) approving the acquisition of 599 Electric locomotives. According to the extract, the Board resolved the following:

5.9.32.1.1. Approved the tender evaluation process;

5.9.32.1.2. The acquisition of 599 Electric Locomotives estimated at 19.8bn (excluding hedging costs, escalations and scope of TE’s work);



- 5.9.32.1.3. Approved the recommendations of the Bidder T1 and Bidder T2 as a result of the evaluation process for the negotiations and award of business, subject a further endorsement by the Board Acquisition and Disposals Committee post the negotiation process;
  - 5.9.32.1.4. Approved the allocation on 60% - 40% basis; 60% to Bidder T2 and 40% to Bidder T1, subject to the performance clause in the contract; and
  - 5.9.32.1.5. Delegated authority to the GCE to sign, approve and conclude all necessary documents to give effect to the resolution.
- 5.9.32.2. The said extract of the Board minutes do not indicate which Board members were present in the meeting.
- 5.9.32.3. According to the disclaimer on bid document, Transnet reserved the right to split the award of the contract between two or more suppliers.
- 5.9.32.4. According paragraph 16.5.3 (h) of Transnet's PPM, Transnet is allowed to split the award of the contract between more than one supplier.

#### **Split of the 599 electric locomotives**

- 5.9.32.5. As discussed above, we determined that in awarding the 599 locomotives contract between Bombardier and CSR, Singh and Molefe did not apply the 50/50 split as they did with the 465 diesel locomotives contract awarded to GE and CNR.
- 5.9.32.6. As a result of the 60/40 split between CSR and Bombardier, CSR was awarded the contract to supply 359 locomotives of the 599 electric locomotives at a contract value of R18.1 billion whereas Bombardier was awarded 240 of the 599 electric locomotives at a contact value of R13 billion.
- 5.9.32.7. We calculated the effects of the 60/40 split in comparison with what Transnet would have paid to the two OEMs had Transnet applied the 50/50 split during the award of the 599 electric locomotives. From the said calculations we determined that CSR would have been allocated to supply 300 locomotives at an estimated contract value of R15.1 billion compared to the actual R18.1 billion awarded. We further determined that Bombardier would have been allocated 299 locomotives at an estimated contract value of R16.2 billion compared to the actual R13 billion awarded.
- 5.9.32.8. The 60/40 split to CSR and Bombardier resulted in saving of R229 609 887.00.
- 5.9.32.9. For completeness purposes we conducted an analysis on the diesel locomotives to confirm whether Transnet would have saved if they applied the 60/40 split on the diesel locomotives.

5.9.32.10. We determined that Transnet would have saved R308 217 020.00 if they applied a 60/40 split between GE and CNR since GE's locomotives were cheaper than CNR. **(Annexure C67).**

**The cost effects of splitting the tender to more than one OEM per bid**

5.9.32.11. As discussed above, we determined that Transnet issued two RFPs for the supply and delivery of the 1064 locomotives which were broken down as 465 diesel and 599 electric locomotives respectively.

5.9.32.12. During the evaluation of the RFPs, on 31 December 2013 Molefe and Singh took a decision to award each category to more than one service provider. As a result of the decision taken by Molefe and Singh to allocate the locomotives to more than one service provider, service providers applied a batch pricing adjustment on the total cost price for the locomotives.

5.9.32.13. From the analysis of the negotiations spreadsheets done by Transnet, we determined that the splitting of the awarding of the tenders to more than one service provider per RFP (465 diesel and 599 electric) had cost implications. The said additional costs were as a result of batch pricing adjustments that were applied as a result of reducing the number of locomotives allocated to each service provider. (Annexure 68).

5.9.32.14. In relation to the 465 diesel locomotives, we determined that based on the said negotiation spreadsheets CNR and GE were allocated amounts of R62 million and R730 million respectively. From the said calculations it is evident that the cost of splitting the diesel locomotives to more than one supplier resulted in an additional payment of R792 million.

5.9.32.15. In relation to the 599 electric locomotives, we determined that based on the negotiation spreadsheets CSR and Bombardier were allocated amounts of R581 million and R1.4 billion respectively. From the said calculations it is evident that the cost of splitting the electric locomotives to more than one supplier resulted in an additional payment of R1.98 billion.

5.9.32.16. The total cost for batch pricing for the entire tender is an amount of R2.7 billion.

5.9.32.17. We determined from the business case that there was no provision for the awarding of each of the categories (electric and diesel) of the locomotives to more than one service provider per category.

5.9.33. **Award letter to CSR for the supply of 359 electric locomotives**

- 5.9.33.1. We noted a copy of a letter dated 28 January 2014 from Molefe to Wang Pan of CSR titled "*Supply of 599 New Dual Voltage Electric Locomotives for General Freight Business (GFB)*" informing him that Transnet had selected CSR E-loco Supply (Pty) Ltd (CSR) as one of the successful respondents (Preferred Bidder) for the supply of new dual voltage electric locomotives (**Annexure C69**). Molefe invited CSR to participate in the negotiation scheduled for 3 February 2014.
- 5.9.33.2. According to the letter, the contract negotiations would take place at Webber Wentzel offices in Illovo.
- 5.9.33.3. We noted a copy of presentation dated February 2014 titled "*Award of Tender for 1064 (599 Electric and 465 Diesel) Locomotives Presentation to the Board Acquisition and Disposal Council (BADC)*" which indicates that the purpose of the presentation was to obtain approval from the BADC for the award of 465 Diesel Locomotives and 599 Electric Locomotives (**Annexure C70**).
- 5.9.33.4. According to the presentation, the award of the 465 Diesel Locomotive Contract would be awarded to Bidder 1 and Bidder 2 who would deliver 240 and 359 electric locomotives respectively. The said presentation further indicated that the cost per locomotive for Bidder 1 and Bidder 2 would be R55 330 000.00 and R50 899 647.00 respectively. The total cost per locomotive included various escalations such as foreign exchange increases and hedging costs. Furthermore, we noted that the total cost awarded to bidder 1 and bidder 2 was R13 279 200 000.00 and R18 272 973 273.00 respectively.
- 5.9.33.5. The presentation recommended to the BADC to approve the 40/60 (240/359) allocation and the award of business to each supplier.
- 5.9.33.6. We noted that the presentation was created on 26 February 2014 at 10:31am by Alessandro Bottega an external service provider with contact details 082 900 2110, [www.presentationmatters.co.za](http://www.presentationmatters.co.za)
- 5.9.33.7. We determined that the figures contained in the above mentioned presentation spreadsheet are higher than the final figures as awarded to the four service providers. This is reflected in the table below:

Price	CSR	Bombardier	CNR	GE
Pre-presentation	R50 899 647	R55 330 000	R42 005 000	R38 655 694
Post-presentation	R50 480 000	R54 371 693	R42 875 020	R36 174 650
<b>Difference</b>	<b>R -419 647</b>	<b>R -958 307</b>	<b>R 870 020</b>	<b>R -2 481 044</b>

5.9.33.8. From the table above, we determined that with the exception of CNR, there was cost saving of approximately R958 million.

5.9.34. **Contract Management - signed SLA Between Transnet and CSR**

5.9.34.1. We noted a copy of the signed Locomotive E Supply Agreement concluded between Transnet and CSR dated 17 March 2014 in respect of the design, manufacture, test and supply of up to 359 New Dual Voltage Electric Locomotives. (**Annexure C71**). The Supply Agreement was signed by Molefe and Singh on 17 March 2014 as approver and witness respectively. Furthermore, the Supply Agreement was signed by a CSR representative who did not provide their name.

5.9.34.2. According to schedule 1 attached to the Locomotive E Supply Agreement (**Annexure C72**), the contract price awarded to CSR was R50 480 000 (Fifty million, four hundred and eighty thousand) per locomotive.

5.9.34.3. We determined that CSR was meant to design, manufacture, test and supply 359 new Dual Voltage Electric Locomotives at a fixed and firm contract price of R50 480 000 per locomotive. Therefore the total original contract price was R18 122 320 000 (VAT exclusive) and R20 840 668 000 (VAT inclusive) for design, manufacture, test and supply of 359 new Dual Voltage Electric Locomotives.

5.9.34.4. The contract price for the locomotives was determined in South African Rand (ZAR) in accordance with the signed Locomotive Supply Agreement.

5.9.34.5. The contract price of each new Dual Voltage electric Locomotive was reduced by R241,000 per Locomotive for removal of Vacuum Brake System as per Variation Order leading to revised contract price of R50,239,000 per Locomotive (VAT exclusive), and total contract price of R18,035,801,000 (VAT exclusive).

5.9.34.6. The following were payment terms as stipulated in Schedule 1 of the contract:

Date / Stage	Payment %
The Effective Date	10% of the Total Contract Price for all Locomotives
The date on which “design freeze” is achieved as evidenced by a certificate issued by the Engineer	20% of the Total Contract Price for all Locomotives
The date of issue of an Acceptance Certificate for a Locomotive Subject to retention for Mission Reliability and Fleet Availability	65% of the Contract Price of such Locomotive
Mission Reliability Retention Release Date	2.5% of the Contract Price of such Locomotive
The Fleet Availability Retention Release Date	2.5% of the Contract Price of such Locomotive

5.9.34.7. The agreement further reflected that *“Transnet shall make payment to CSR for the tools and test equipment on the date and in the amount set as per invoice once the delivery of such tools and test equipment have been accepted by Transnet confirmed by signature on acceptance certificate.”*

5.9.35. **Advance payment made to CSR for the acquisition of the 359 locomotives**

5.9.35.1. According to the table above, Transnet made an advance payment of 10% as per the contractual agreement with CSR. The said advance payment of R2 065 944 480.00 (incl. VAT) was made on 28 March 2014 (**Annexure C73**).

5.9.36. **Delay Penalties for late deliveries**

5.9.36.1. Clause 9.1.1 of the LSA states that *“if the Acceptance of a Locomotive occurs after its Scheduled Acceptance Sate (a Delay), the Contractor shall (subject to Clause 9.2 (Delay Penalty Cap), pay a Delay Penalty to the Company in respect of that Delayed Locomotive at the Applicable Rate”.*

5.9.36.2. According to clause 9.1.2 *“Delay Penalties shall be calculated and accrue at the Applicable Rate of the Contract Price per Delayed Locomotive per month (with proportional adjustment*

*for any partial month), on a day-to-day basis from the applicable Delayed Locomotive Penalty Date until (and inclusive of):*

5.9.36.2.1. *The Acceptance Date of that Delayed Locomotive; or if earlier*

5.9.36.2.2. *This Agreement being terminated pursuant to clause 21.1.5 (Contractor Default)”*

5.9.36.3. Clause 9.4 of the LSA provides that the Delay Penalties or Delay Penalty Credit (as applicable) shall accrue at the following Applicable Rates:

5.9.36.3.1. For the first 30(thirty) days of any Delay or Advance Delivery, a rate of 0.5 (one half) per cent in accordance with clause 9.1.2

5.9.36.3.2. For any period of Delay or Advance Delivery greater than 30 days but less than or equal to 60 days, a rate of 1 (one) per cent in accordance with Clause 9.1.2;

5.9.36.3.3. For any period of Delay or Advance Delivery greater than 60 days but less than or equal to 90 days, a rate of 1.5 (one and half) per cent in accordance with Clause 9.1.2; and

5.9.36.3.4. For any period of Delay of Advance Delivery greater than 90 days, a rate of 2 (two) per cent in accordance with Clause 9.1.2.

#### **Delayed Penalties against CSR for late deliveries**

5.9.36.4. According to Transnet Cash flow projection spreadsheet dated 17 March 2014, CSR was scheduled to deliver 359 locomotives from 1 August 2015 to 1 February 2018. We determined that there was another spreadsheet (the second spreadsheet) with a revised delivery schedule indicating that CSR would deliver 359 locomotives from April 2016 until July 2019. We determined from the metadata that the second spreadsheet was authored by Andy (She Yongjun) on 11 August 2016 at 04:19 PM.

5.9.36.5. We determined that the spreadsheet authored by Andy was prepared approximately 3 months after the first locomotive was delivered on 29 April 2016 (**Annexure C74**).

5.9.36.6. As discussed in the procurement of the 95 locomotives above, we determined that Andy (She Yongjun) had various e-mail communications with Mdletshe during the tendering stage of the said tender. We fail to understand the reason the delivery schedule was prepared by CSR after the first locomotive was delivered.

5.9.36.7. We determined that CSR started delivering locomotives from 29 April 2016 and were scheduled to complete the delivery of 359 locomotives by July 2019. CSR delivered

174 locomotives from 29 April 2016 to 30 April 2018. According to the delivery schedule, CSR should have delivered 218 locomotives during the said period. CSR therefore 44 locomotives behind schedule as at 30 April 2018. We determined that Transnet did not charge CSR delayed delivery penalties for the late delivery of the locomotives.

- 5.9.36.8. We calculated the delayed delivery penalties based on clause 9 of the LSA as well as the revised delivery schedules prepared by CSR. From the said calculations we determined that Transnet should have imposed penalties to CSR for the delayed delivery
- 5.9.36.9. In their response to our second draft report, CSR confirmed our findings of late deliveries from November 2016 to April 2018. CSR attributed their late deliveries to TE production challenges. CSR further indicated that *“Transnet Freight Rail issued two letters of penalties, but as our contract with TE stipulates that should CRRC be levied with penalties that are due to any of the sub-contractors non-performance, CRRC will pass all penalties levied to the sub-contractor concern. In this case, the penalties should be passed on to TE. The discussions among the three parties are still going on and matter has been referred to 1064 Locomotives Steering Committee”*.
- 5.9.36.10. Transnet provided us with documentation indicating penalties levied on CSR for late deliveries in the amount of R53 839 461.67. (**Annexure C75**).
- 5.9.36.11. There is no evidence that Transnet collected the penalties levied on CSR.

#### **Delayed Penalties against Bombardier for late deliveries**

- 5.9.36.12. According to Transnet Cash flow projection spreadsheet dated 17 March 2014, Bombardier was scheduled to deliver 240 locomotives from 1 December 2015 to 1 December 2017 (**Annexure C74**).
- 5.9.36.13. From calculations of Transnet’s cash flow projection spreadsheet, we determined that Bombardier delivered zero (0) locomotives during the entire period in which they were projected to deliver 240 locomotives.
- 5.9.36.14. Bombardier should have completed the delivery of their allocated locomotives by 1 December 2017.
- 5.9.36.15. As reflected above, we determined that Bombardier was paid a total of R4 045 253 959.20 from signature of contract until 1 December 2017 which amount was paid regardless of Bombardier not having delivered a single locomotive to Transnet. The total amount paid as at 31 December 2017 was 31% of the original

contract price. The said amount is reflected as an advance payment payable in four stages of 9% of the contract per locomotive, per stage for three stages (27%) and an additional 4% (42 months after effective date).

- 5.9.36.16. We determined that on 28 September 2017, three months prior to the last delivery of the locomotive as per the projected cash flow delivery schedule, Galeni compiled a memorandum requesting Gama to accept Bombardier's revised delivery schedule. Galeni's memorandum further requested Gama to approve an additional advance payment of 4% based on the progress made on the project to date and to sign off the addendum in line with the latest amendments of the LSA.
- 5.9.36.17. Galeni's memorandum was signed by Galeni, Nair, Pita, Mlamuli Buthelezi and Gama as TFR Operational Locomotives Steering Committee member on 28 September 2017, 28 September 2017, 4 October 2017, 4 October 2017 and 5 October 2017 respectively.
- 5.9.36.18. Even though we did not investigate the matter relating to the Bombardier advance payments, we fail to understand what progress would have been made if not a single locomotive was delivered during the entire projection period. This matter warrants a detailed investigation.
- 5.9.36.19. Based on the revised schedule approved by Gama on 5 October 2017, Bombardier was schedule to commence delivering locomotives from December 2017 and was scheduled to complete the delivery of 240 locomotives by March 2020.
- 5.9.36.20. Bombardier delivered 13 locomotives from 6 December 2017 to 15 May 2018. According to the revised delivery schedule, Bombardier should have delivered 22 locomotives during the said period and were therefore behind schedule 9 as at 15 May 2018.
- 5.9.36.21. Transnet provided us with documentation indicating penalties levied on Bombardier for late deliveries in the amount of R2 174 867.72. (**Annexure C76**).
- 5.9.36.22. There is no evidence that Transnet collected the penalties levied on Bombardier.

#### **Delayed Penalties against GE for late deliveries**

- 5.9.36.23. According to Transnet Cash flow projection spreadsheet dated 17 March 2014, GE was scheduled to deliver 233 diesel locomotives from November 2015 to October 2017.
- 5.9.36.24. We determined that the approved delivery schedule as per the LSA dated 17 March 2014 was the same as the cash flow projection.



- 5.9.36.25. We determined that GE started delivering locomotives from November 2015 and were scheduled to complete the delivery of 233 locomotives by October 2017.
- 5.9.36.26. GE delivered 213 locomotives from November 2015 to 29 March 2018. According to the delivery schedule, GE should have delivered 233 locomotives during the said period. GE was therefore 20 locomotives behind schedule as at 29 March 2018.
- 5.9.36.27. Transnet provided us with documentation indicating penalties levied on GE for late deliveries in the amount of R104 552 159.50. (**Annexure C77**).
- 5.9.36.28. We determined that on 26 April 2018, GE paid R80 million in respect of penalties for late deliveries.

#### **Delayed Penalties against CNR for late deliveries**

- 5.9.36.29. According to Transnet Cash flow projection spreadsheet dated 17 March 2014, CNR was scheduled to deliver 232 diesel locomotives from September 2015 to February 2018.
- 5.9.36.30. Based on the revised delivery schedule CNR was scheduled to deliver 232 locomotives from August 2016 to October 2021.
- 5.9.36.31. CNR delivered 20 locomotives from 3 October 2017 until 10 January 2018. According to the delivery schedule, CNR should have delivered 21 locomotives during the said period. CNR were therefore 1 locomotive behind schedule as at 10 January 2018. Transnet did not charge CNR delayed delivery penalties for the late delivery of the locomotives.
- 5.9.36.32. Transnet provided us with documentation indicating penalties levied on CNR for late deliveries in the amount of R32 785 098.63. (**Annexure C78**).
- 5.9.36.33. There is no evidence that Transnet collected the penalties levied on CNR.

### **5.10 FINANCIAL ANALYSIS -ACQUISITION OF THE 1064 LOCOMOTIVES**

- 5.10.1 We conducted our own financial analysis and calculations of the figures reflected in the various spreadsheets for the ETC of R38.6 billion and ETC of R54.5 billion to determine the validity thereof. Below is detailed discussion of the said analysis. Some of the headings under the sections relating to the 1064 locomotives investigation reflected above maybe repeated below for background purposes.

## **5.10.2 Business Case dated 25 April 2013**

5.10.2.1 According to the Business Case dated 25 April 2013, the capital expenditure for the 1064 locomotive procurement transaction was expected to be R38.6 billion assuming that the exchange rate assumptions would hold.

5.10.2.2 We determined that the acquisition for the 1064 locomotives was divided into 465 diesel and 599 electric locomotives.

5.10.2.3 The Business Case indicated that the 1064 locomotives would be delivered annually as follows:

5.10.2.3.1 100 locomotives in 2013/14;

5.10.2.3.2 165 locomotives in 2014/15;

5.10.2.3.3 230 locomotives in 2015/16;

5.10.2.3.4 230 locomotives in 2016/17;

5.10.2.3.5 195 locomotives in 2017/18; and

5.10.2.3.6 144 locomotives in 2018/19 financial years.

5.10.2.4 During the course of our investigation we determined that delivery of the locomotives did not commence during the 2013/14 financial year as the procurement process was only finalised in January 2014 and the contracts were concluded in March 2014.

### **5.10.2.5 Total Cost of Ownership**

5.10.2.6 We noted from the Business Case that the total cost of ownership of new locomotives was calculated for the entire life cycle of the 1064 locomotives and has the following components:

#### ***Purchase price***

5.10.2.6.1 The purchase price per locomotive was assumed to be R25 million (USD 2.6 million) for a diesel locomotive and R34 million (USD 3.5 million) for an electric locomotive in 2013/14 financial year.

5.10.2.6.2 The USD price component was forecasted by escalating at USD inflation and converting back to South African Rands using forward ZAR/USD hedging rates.

- 5.10.2.6.3 The purchase price of both diesel and electric locomotives assumed a conservative 50 percent localisation component with a 2 percent localisation premium applied.

***Diesel costs***

- 5.10.2.6.4 The diesel cost for the 465 locomotives was based on the Gross Tonne Kilometres (GTK) of the locomotives and diesel consumption per GTK.
- 5.10.2.6.5 Prices were escalated from a 2013/14 price of R11 per litre escalated at ZAR/USD forward rate percentage change and US inflation.

***Electricity costs***

- 5.10.2.6.6 The cost of electricity for the 599 electric locomotives was based on the GTK of the locomotives and consumption per GTK.
- 5.10.2.6.7 Electricity costs were escalated at forecasted Eskom tariff rate increases of 8 percent up to 2017/18 and average of forecasted CPI and PPI thereafter.

***Maintenance costs***

- 5.10.2.6.8 Expected maintenance costs were calculated considering the useful life of the locomotives.

***Insurance***

- 5.10.2.6.9 Insurance was calculated based on the expected wreckage cost of locomotives per year escalated at the average of CPI and PPI.

***Pre - payment***

- 5.10.2.7 According to the Business Case, the capital cost outflows for the procurement of locomotives was structured with a conservative payment strategy wherein 90 percent of the purchase price would be paid on delivery and 10 percent on acceptance.
- 5.10.2.8 The Business Case indicated that an upfront payment of R250 million and R300 million for diesel and electric locomotives respectively would be paid on date of signature of the contract. The upfront payment would be off-set against the first batch delivered.

5.10.3 **The purchase price of both diesel and electric locomotives**

5.10.3.1 As indicated above, during 2013/14 financial year, the purchase price for the 1064 locomotives was assumed to be R25 million per locomotive for a diesel locomotive and R34 million for an electric locomotive respectively.

5.10.3.2 We computed the purchase price of 1064 locomotives based on a Business Case dated 25 April 2013 as follows:

Type of locomotive	Price per locomotive	Number of locomotives	Purchase price
Diesel locomotives	R25,000,000	465	R11,625,000,000
Electric locomotives	R34,000,000	599	R20,366,000,000
<b>Total</b>		<b>1 064</b>	<b>R31,991,000,000</b>

**Financial evaluation of the acquisition of the 599 electric locomotives**

5.10.3.3 We noted that CFET Finance evaluated 599 electric locomotives as per Report of the Cross Functional Team (Finance) dated 6 December 2013 to determine scoring that each bidder would obtain based on evaluation price, total cost of ownership, delivery schedule, payment terms, contractual compliance and financial stability.

5.10.3.4 We noted that the Transnet Board approved evaluation criteria as submitted by the CFET Finance indicating that the price evaluation must be done on the basis of the price including foreign exchange hedging costs and escalations.

5.10.3.5 We noted from the report of the CFET Finance that the RFP required bidders to submit a price in line with fixing price or escalation based pricing or indexation formula’s used in pricing calculations.

5.10.3.6 We determined that CFET Finance was unable to evaluate on the basis of a fixed price including escalations and hedging costs because most bidders chose option of providing escalation based pricing or indexation. Furthermore, most of the bidders did not offer a fixed price as was required by the Board approved evaluation criteria in order to conduct the evaluation.

5.10.3.7 According to the CFET Finance report, bidders provided various differing escalation regimes that were not comparable to normalise a Base Price over the period of the locomotive supply contract.

- 5.10.3.8 The CFET Finance report further indicated that committee normalised the price for all bidders to ensure fairness by evaluating the price excluding hedging and escalation costs from the prices submitted by all bidders.
- 5.10.3.9 We noted from the CFET Finance report that the bidders were recommended to provide a price including foreign exchange hedging costs.
- 5.10.3.10 The RFP stipulated that TFR would prefer a Rand based contract and that the bidders must submit the cost of hedging and hedging strategy.
- 5.10.3.11 We also noted from the report of the CFET that Transnet requested all bidders to confirm whether their base prices excluded foreign exchange hedging costs and if these costs were included to then provide the calculation thereof. Furthermore, bidders were required to provide Transnet with an estimated cost of hedging whether included in the base price or not.
- 5.10.3.12 We determined from review of the CFET Finance report that the evaluation team members agreed on evaluation methodology to proceed with the price evaluation on a consistent and fair basis that it was appropriate to exclude escalations and hedging costs from the price evaluation and thereby attain a more normalised price for evaluation purposes.
- 5.10.3.13 We further determined that CFET normalised the prices based on exchange rates as at 11 November 2013 when USD/ZAR, EUR/ZAR and JPY/ZAR was R10.37, R13.91 and R0.10457 respectively as bidders used their own assumptions, rate and date of their own choice which resulted in inconsistencies on submission of RFPs.
- 5.10.3.14 We determined that the purchase price of the 599 electric locomotives excluding impact of not using TE as the main sub-contractor, escalations and foreign hedging costs but including Re-basing foreign exchange movements and options was computed for evaluation purposes as per Annexure E to CFET Finance report.

**5.10.4 Calculation of ETC**

- 5.10.4.1 As indicated above, Callard indicated that the initial business case he prepared made provision for forex, escalations and contingency in his ETC of R38.6 billion.
- 5.10.4.2 Callard provided us with an ETC reconciliation detailing how he arrived at the cost of R38.6 billion. Below is a summary of the R38.6 billion ETC calculated by Callard:

Description	R'bn
Bus. Case ETC	31 887

Description	R'bn
Forex	1 706
Escalation	2 775
Contingency	2 232
<b>Bus. Case ETC to Board</b>	<b>38 600</b>

- 5.10.4.3 According to Callard, the business case submitted to the Board meeting of 25 April 2013 incorrectly stated that the ETC of R38.6 billion excluded forex escalation and other price escalations.
- 5.10.4.4 We determined that the final business case dated 25 April 2013 submitted to the Board was amended to state that the ETC of R38.6 billion excluded the potential effects from forex hedging, forex escalation and other price escalations.
- 5.10.4.5 We further determined that the changes to the business case were effected by Yusuf Mahomed (“Mahomed”), who tracked the changes he made to the business case.
- 5.10.4.6 We determined that Mahomed deleted the words “*borrowing costs*” and inserted the words “*the potential effects from forex hedging, forex escalation and other price escalations*” after the ETC of R38.6 billion. Below are the changes effected by Mahomed:
- 5.10.4.7 “*The risks that are inherent in a procurement event of this nature have been identified and mitigation strategies are in place. Accordingly, it is recommended that the 1064 Locomotives Business Case be approved with estimated total costs of the acquisition of R38.6 billion as per the Corporate Plan (excluding the potential effects from forex hedging, forex escalation and other price escalations).*” (Annexure\_C79)
- 5.10.4.8 Our understanding of Mahomed’s changes is that the said changes sought to create an impression that the R38.6 billion did not make provision for forex and other price escalations whereas the said costs were included in the R38.6 billion.
- 5.10.4.9 We further determined that the initial business case indicated that the ETC was R38.6 billion excluding borrowing costs.
- 5.10.4.10 We determined that during the evaluation of the tender, the CFET Finance issued a memorandum dated 15 January 2014 to the 1064 Locomotives Steering Committee. According to the memorandum, the bidders provided BAFO prices as follows:

**BAFO prices on 465 diesel locomotives**

	<b>Bidder 1 CNR</b>	<b>Bidder 2 CSR</b>	<b>Bidder 3 EMD Africa</b>	<b>Bidder 4 GE South Africa</b>
BAFO prices	R30,455,335	R30,320,728	R40,244,313	R27,159,485
Previous evaluated price	R44,232,853	R33,254,876	R42,761,272	R27,493,481
<b>Difference</b>	<b>R13,777,518</b>	<b>R2,934,148</b>	<b>R2,516,959</b>	<b>R333,996</b>

**BAFO prices on 599 electric locomotives**

	<b>Bidder 1 Bombardier</b>	<b>Bidder 2 CSR</b>
BAFO prices	R32,377,762	R32,462,295
Previous evaluated price	R32,833,423	R34,716,188
<b>Difference</b>	<b>R455,661</b>	<b>R2,934,148</b>

5.10.4.11 According to Annexures B and E of the CFET Finance memorandum dated 15 January 2014, the BAFOs included the following cost components:

5.10.4.11.1 Foreign Exchange Movements (Impact of re-basing);

5.10.4.11.2 Options; and

5.10.4.11.3 Impact of using TE as a main subcontractor.

5.10.4.12 According to note 1 of Annexure B, the impact of using TE as the main contractor was already factored into the initial BAFO price. It is our understanding that the initial BAFO referred to as the “previous evaluated price”.

The table below illustrates how Transnet normalised the prices for evaluation purposes:

Component	Bombardier	CSR	GE South Africa	CNR
Price per locomotive	R30,870,951	R29,526,007	R28,617,371	R27,448,193
Less: Forex hedging	(R1,253,756)	NIL	NIL	(R100,000)
Less: Capital spares	(R16,360)	(R122,648)	NIL	(R126,034)
Spares not included	NIL	NIL	R41,012	NIL
Options	R1,266,001	R1,262,187	R496,108	R196,399
Foreign exchange movements	R1,510,926	R1,796,749	R1,300,844	R2,902,170
<b>BAFO</b>	<b>R32,377,762</b>	<b>R32,462,295</b>	<b>R30,455,335</b>	<b>R30,320,728</b>

**Increase of ETC by R15.9 billion from R38.6 billion to R54.5 billion**

5.10.4.13 During the analysis of Molefe’s Mimecast emails, we found an e-mail dated 31 March 2014 from Ngoako Huma (“Huma”) (DPE employee) to Singh where Molefe was copied. From the email we determined that Huma was making an enquiry about the increase in the ETC on the acquisition of 1064 locomotives to R50 billion when the Department had only approved R38.6 billion as per the section 54 PFMA application. According to the e-mail, Huma enquired whether Transnet would make a formal submission to the Department to explain the difference to the Minister. Huma indicated that DPE’s enquiry was based on the media release from Transnet relating to “R50 billion” procurement which the shareholder was not aware of (**Annexure C80**).

5.10.4.14 We determined that Singh responded to Huma’s e-mail on 31 March 2014 and copied Molefe stating the following (**Annexure C81**):

*“Hi N*

*Thanks for the email.*



*Yes indeed the approval was for R38.6 billion but excluded the impacts of foreign exchange and escalations.*

*The above two items have had a significant impact on the total ETC due to the following:*

- volatility in the foreign exchange rates in the recent past 20% depreciation in ZAR versus USD*
- as well as the upward pressures on input costs such as labour and CPI in SA (local content is high)*
- These are further impacted by the length of time it takes to deliver the locomotives 3 to 4 years*

*Typically the above items are not included in the ETC as they are subject to the economic conditions at time of contracting and are not avoidable and are a mere function of the economic inputs at the time of contracting.*

*Hope this helps but will also provide to DPE a full report on the transaction once the BOD has approved the same.*

*Thanks*

*Anoj “*

5.10.4.15 We determined that Singh misled Huma and the Shareholder when he indicated that the ETC of R38.6 billion excluded the impact of foreign exchange and escalations. In his email as reflected above, Singh further indicated that the increase in ETC was not yet approved by the Board at the time of the media release by Transnet. The fact that the increase in ETC was not approved by the Transnet Board at the time of the media release was itself an indication of clear disregard of process by Transnet EXCO.

5.10.4.16 Based on documentation reviewed, we determined that Singh, Gama and Molefe issued a memorandum dated 23 May 2014 to BADC requesting the Committee to recommend to the Board, an increase in the ETC for the acquisition of 1 064 locomotives for GFB from R38.6 billion to R54.5 billion. According to the memorandum, the increase of R15.9 billion in ETC was due to the following :

5.10.4.16.1 *“Escalations from the approved business case to award date;*

5.10.4.16.2 *Forex from the approved business case to award date;*

5.10.4.16.3 *Additional scope of work allocated to Transnet Engineering (“TE”) for the strategy to enable TE to eventually transform to an Original Equipment Manufacturer (“OEM”) of locomotives;*

- 5.10.4.16.4 *The cost of reducing the batch size;*
- 5.10.4.16.5 *The cost of future escalations over the life of the contract;*
- 5.10.4.16.6 *The cost of fixing forex exposure over the life of the contract; and*
- 5.10.4.16.7 *Contingencies related to variation orders, options and capital spares”.*
- 5.10.4.17 We determined that on 26 May 2014, Molefe and Singh attended BADC meeting where the above request to increase ETC and abovementioned reasons thereof were tabled. We determined that Gama did not attend the meeting of 26 May 2014.
- 5.10.4.18 On 28 May 2014, the Board noted the reasons for the increase in ETC and approved an increase in ETC for the acquisition of 1064 locomotives for GFB from R38.6 billion to R54.5 billion. We determined that Gama did not attend this meeting.
- 5.10.4.19 In his response to our second draft report, Gama indicated the following relating to the increase in ETC of the 1064 locomotives *“In respect to the procurement of the 1064 locomotives, the cross-section of executives drawn from multi-disciplinary teams - and sitting on the various official committee's and structures of Transnet - have rationally considered all the financial, technical, operational, legal and compliance related facts before them and:*
  - 5.10.4.19.1 *Negotiated, and concluded contractual agreements with successful bidders (subject to PFMA and Board approval);*
  - 5.10.4.19.2 *Revised the Business Case, and recommended an increase in the ETC from R38.6 Billion to R54.5 Billion, in light of:*
  - 5.10.4.19.3 *Escalations from the approved business case to award date;*
  - 5.10.4.19.4 *Foreign currency fluctuations from the approved business case to award date\*
  - 5.10.4.19.5 *Additional scope of work all allocated to Transnet Engineering (hereinafter, "TE") - arising out of localised industrialisation considerations - to transform TE into an OEM of locomotives;*
  - 5.10.4.19.6 *The costs of reducing the batch size;*
  - 5.10.4.19.7 *The costs of future escalations over the life of the contract; and*
  - 5.10.4.19.8 *Contingencies relating to variation orders”.*
- 5.10.4.20 As indicated above, Callard indicated that the business case he drafted included an ETC that took into account foreign exchange and escalations. According to Callard,

he conducted his own calculations after he heard of the increase in ETC to R54.5 billion and could not determine how Transnet arrived at an increased ETC of R54.5 billion.

5.10.4.21 The ETC of 1064 Locomotives as per business case dated 18 April 2013 was recommended at R38.6 billion (excluding borrowing costs). The business case dated 25 April 2013 was changed to read as follow:

*“Accordingly, it is recommended that the 1064 Locomotives Business Case be approved with estimated total costs of the acquisition of R38.6 billion as per the Corporate Plan (excluding the potential effects from forex hedging, forex escalation and other price escalations).”*

### Negotiations with OEMs

5.10.4.22 We determined that subsequent to the award of the tender for the supply of 1064 locomotive in January 2014, Transnet negotiated with the winning bidders provided based on the BAFO submitted by the said bidder. We determined that the service providers submitted their BAFOs in respect of the supply of 465 diesel and 599 electric locomotives on 15 January 2014.

5.10.4.23 Based on documentation reviewed, we determined that the said negotiations commenced on 18 February 2014 and were finalised on 17 March 2014.

5.10.4.24 We obtained various negotiation spreadsheets from the hard drive that was used to back up documentation during the procurement process of the acquisition of 1064 locomotives. The said hard drive was provided to us by Mdletshe (**Annexure C82**).

5.10.4.25 The spreadsheets found in the hard drive contained various calculations detailing how Transnet arrived at the contract price agreed upon with the various bidders.

5.10.4.26 We determined that the total base price was R29.3 billion when taking into account the BAFOs from the bidders as reflected on the negotiation spreadsheets. The table below reflects the BAFOs and total base price for the acquisition of the 1064 locomotives:

<b>Bidder</b>	<b>BAFO Negotiation spreadsheet</b>	<b>as</b>	<b>Locomotives awarded</b>	<b>Total base price</b>
CSR	R 28 890 000		359	R10 371 510 000
Bombardier	R29 049 486		240	R6 971 876 640

Bidder	BAFO Negotiation spreadsheet	as	Locomotives awarded	Total base price
CNR	R27 360 000		232	R6 347 520 000
GE	R24 311 700		233	R5 664 626 100
<b>TOTAL Base price for 1064 locomotives as at 17 March 2014</b>				<b>R29 355 532 740</b>

- 5.10.4.27 As indicated above, the base price as per the business case and Callard’s calculations was R31.9 billion. Based on our recalculation of the base price, we determined that the actual base price of R29.3 billion as at 17 March 2014 was less than the estimated base price of R31.9 billion.
- 5.10.4.28 We further determined that the actual base price of R29.3 billion was R2.6 billion less than the estimated base price of R31.9 billion.
- 5.10.4.29 Based on the above analysis, it is evident that the estimated base price was realistic and a fair assumption of what Transnet would pay for the locomotives.
- 5.10.4.30 During the analysis of the said spreadsheet we identified inconsistencies and anomalies in the computation of the price per locomotive charged by the bidders.
- 5.10.4.31 The table below illustrate the negotiations that took place between Transnet and OEMs during the period 27 February 2014 to 17 March 2014:

CSR					
Description	27 Feb 2014	05 Mar 2014	10 Mar 2014	11 Mar 2014	17 Mar 2014
BAFO	28,890,000	28,890,000	28,890,000	28,890,000	28,890,000
Original TE scope	3,480,000	3,480,000	3,480,000	3,480,000	3,480,000
Exchange rate impact	2,784,425	2,784,425	2,784,425	2,595,537	2,595,537
Escalation up to date of signature	3,156,976	3,156,976	3,156,976	3,156,976	3,156,976
Batch pricing adjustment	3,242,416	1,618,500	1,618,500	1,618,500	1,618,500

<b>CSR</b>					
<b>Description</b>	<b>27 Feb 2014</b>	<b>05 Mar 2014</b>	<b>10 Mar 2014</b>	<b>11 Mar 2014</b>	<b>17 Mar 2014</b>
<b>New price</b>	<b>41,553,817</b>	<b>39,929,901</b>	<b>39,929,901</b>	<b>39,741,013</b>	39,741,013
Cost of change in payment terms change	0	0	0	0	0
Further discount	0	-800,000	-800,000	0	0
<b>Price excluding TE scope excluding forward escalation and hedging</b>	<b>41,553,817</b>	<b>39,129,901</b>	<b>39,129,901</b>	<b>39,741,013</b>	39,741,013
Cost to fix escalation going forward	9,962,422	9,870,099	9,870,099	7,936,367	7,936,367
Cost of hedging going forward	3,141,001	1,688,888	1,688,888	1,688,888	1,688,888
Additional TE scope	546,573	1,113,732	3,165,914	1,113,732	1,113,732
<b>ETC</b>	<b>55,203,813</b>	<b>51,802,620</b>	<b>53,854,802</b>	<b>50,480,000</b>	<b>50,480,000</b>

<b>Bombardier</b>					
<b>Description</b>	<b>27 Feb 2014</b>	<b>05 Mar 2014</b>	<b>10 Mar 2014</b>	<b>11 Mar 2014</b>	<b>17 Mar 2014</b>
BAFO	28,788,150	28,788,150	28,788,150	28,788,150	29,049,486
Original TE scope	2,166,850	2,166,850	2,166,850	2,166,850	1,905,514
Exchange rate impact	3,711,411	3,711,411	3,711,411	3,711,411	3,536,104
Escalation up to date of signature	1,941,299	1,941,299	1,941,299	1,941,299	1,941,299

<b>Bombardier</b>					
<b>Description</b>	<b>27 Feb 2014</b>	<b>05 Mar 2014</b>	<b>10 Mar 2014</b>	<b>11 Mar 2014</b>	<b>17 Mar 2014</b>
Batch pricing adjustment	4,277,290	5,952,290	5,952,290	5,952,290	5,859,171
<b>New price</b>	<b>40,885,000</b>	<b>42,560,000</b>	<b>42,560,000</b>	<b>42,560,000</b>	<b>42,291,574</b>
Cost of change in payment terms change					
Further discount		-43,000	339,000	339,000	
<b>Price excluding TE scope excluding forward escalation and hedging</b>	<b>40,885,000</b>	<b>42,517,000</b>	<b>42,899,000</b>	<b>42,899,000</b>	<b>42,291,574</b>
Cost to fix escalation going forward	8,705,000	7,411,000	7,411,000	7,411,000	7,646,119
Cost of hedging going forward	3,421,000	3,615,000	3,653,000	3,035,000	3,035,000
Additional TE scope	6,486,000	4,843,000	4,843,000	4,843,000	1,399,000
<b>ETC</b>	<b>59,497,000</b>	<b>58,386,000</b>	<b>58,806,000</b>	<b>58,188,000</b>	<b>54,371,693</b>

<b>CNR</b>						
<b>Description</b>	<b>18 Feb 2014</b>	<b>27 Feb 2014</b>	<b>05 Mar 2014</b>	<b>10 Mar 2014</b>	<b>12 Mar 2014</b>	<b>17 Mar 2014</b>
BAFO	28,207,060	27,992,052	27,992,052	27,992,052	27,992,052	27,360,000
Original TE scope						
Exchange rate impact	5,054,286	4,280,822	4,280,822	4,280,822	4,280,822	3,765,130

<b>CNR</b>						
<b>Description</b>	<b>18 Feb 2014</b>	<b>27 Feb 2014</b>	<b>05 Mar 2014</b>	<b>10 Mar 2014</b>	<b>12 Mar 2014</b>	<b>17 Mar 2014</b>
Escalation up to date of signature	3,020,341	3,026,686	3,026,686	3,026,686	3,026,686	3,498,038
Warranty/SD bond cost removal						-88,400
Fixed cost FX adjustment on other items						-385,717
Batch pricing adjustment	296,036	295,726	295,726	295,726	295,726	269,975
<b>New price</b>	<b>36,577,723</b>	<b>35,595,286</b>	<b>35,595,286</b>	<b>35,595,286</b>	<b>35,595,286</b>	<b>34,419,026</b>
Cost of change in payment terms change						
Further discount	-3,226,723	-2,244,285	-2,244,285	-2,244,285	-2,792,068	-608,643
Price excluding TE scope excluding forward escalation and hedging	<b>33,351,000</b>	<b>33,351,001</b>	<b>33,351,001</b>	<b>33,351,001</b>	<b>32,803,218</b>	<b>33,810,383</b>
Cost to fix escalation	5,400,000	5,900,000	5,900,000	5,900,000	5,900,000	

<b>CNR</b>						
<b>Description</b>	<b>18 Feb 2014</b>	<b>27 Feb 2014</b>	<b>05 Mar 2014</b>	<b>10 Mar 2014</b>	<b>12 Mar 2014</b>	<b>17 Mar 2014</b>
going forward						4,836,526
Cost of hedging going forward	2,605,000	2,605,000	2,605,000	2,605,000	4,030,000	4,038,494
Additional TE scope	649,000	649,000	649,000	649,000	649,000	189,617
ETC	<b>42,005,000</b>	<b>42,505,001</b>	<b>42,505,001</b>	<b>42,505,001</b>	<b>43,382,218</b>	<b>42,875,020</b>

<b>GE</b>						
<b>Description</b>	<b>18 Feb 2014</b>	<b>27 Feb 2014</b>	<b>05 Mar 2014</b>	<b>10 Mar 2014</b>	<b>12 Mar 2014</b>	<b>17 Mar 2014</b>
BAFO	24,312,000	24,312,000	24,312,000	24,312,000	24,312,000	24,311,700
Original TE scope						
Exchange rate impact	1,824,000	1,824,000	1,824,000	1,824,000	1,824,000	2,000,745
Escalation up to date of signature	479,000	479,000	479,000	479,000	479,000	484,640
Longer schedule delivery impact	23,000	23,000	23,000	23,000	23,000	
						-110,000



<b>GE</b>						
<b>Description</b>	<b>18 Feb 2014</b>	<b>27 Feb 2014</b>	<b>05 Mar 2014</b>	<b>10 Mar 2014</b>	<b>12 Mar 2014</b>	<b>17 Mar 2014</b>
Fixed cost FX adjustment	303 000	303,000	303,000	303,000	303,000	
Batch pricing adjustment	3,134,000	3,134,000	3,134,000	3,134,000	3,134,000	3,133,715
	-1,200	-1,200	-1,200	-1,200	-1,200	
<b>New price</b>	<b>30,073,800</b>	<b>30,073,800</b>	<b>30,073,800</b>	<b>30,073,800</b>	<b>30,073,800</b>	<b>29,820,800</b>
Cost of change in payment terms change						
Further discount					-110,000	
<b>Price excluding TE scope excluding forward escalation and hedging</b>						
Cost to fix escalation going forward	5,094,638	5,094,638	5,094,638	5,094,638	3,948,107	3,946,138
Cost of hedging going forward	1,914,756	1,914,756	1,914,756	1,914,756	2,042,022	1,963,112
Additional TE scope	1,572,500	1,572,500	1,572,500	444,600	444,600	444,600

GE						
Description	18 Feb 2014	27 Feb 2014	05 Mar 2014	10 Mar 2014	12 Mar 2014	17 Mar 2014
ETC	38,655,694	38,655,694	38,655,694	37,527,794	36,398,529	36,174,650

5.10.4.32 We determined that the final contract amount of R49.5 billion excluding contingencies of R4.9 billion was based on the negotiated price per locomotive for each bidder concluded on 17 March 2014.

5.10.4.33 As already stated above, Callard indicated that the business case he drafted included an ETC that took into account foreign exchange and escalations. According to Callard, he conducted his own calculations after he heard of the increase in ETC to R54.5 billion and he could not determine how Transnet arrived at an increased ETC of R54.5 billion.

### Transnet Engineering Scope

#### Using Transnet Engineering ("TE") as a main subcontractor

5.10.4.34 We determined from an unsigned document titled "Report of the Finance Negotiation Team" and dated March 2014, that *"strategic decision was taken at a Transnet level that TE should be enabled to eventually be able to become an Original Equipment Manufacturer (OEM) of locomotives. This 1064 tender process would be used as a catalyst to facilitate this strategy. As such bidders were advised to provide pricing based on providing TE with additional scope for the manufacture of the locomotives. Strategically it was decided that for specific items within the build process where TE were within 10 % of the market price then it would be acceptable to allow TE to retain this scope"*

5.10.4.35 We determined that the document was submitted to Singh and Gama for submission to the requisite authority to request for the increase in ETC of the acquisition of 1064 locomotives to R54.5 billion based on the outcome of the negotiation process.

5.10.4.36 Based on documentation reviewed, we noted that not all bidders included subcontracting costs for utilisation of TE. It is our understanding that bidders were evaluated on prices excluding the use of TE as a subcontractor.

5.10.4.36.1 We determined that Bombardier had provided a price of R1 905 514 per locomotive for using TE as a subcontractor.

5.10.4.36.2 We further determined that CSR provided a price of R3 480 000 per locomotive for using TE as a subcontractor.

5.10.4.36.3 CNR and GE's prices did not include sub-contracting costs for utilisation of TE.

5.10.4.37 The price provided by bidders was normalised for evaluation purposes by excluding TE as the main subcontractor.

5.10.4.38 It should be noted that the BAFO submitted by the bidders in January 2014 did not include the TE scope.

5.10.4.39 We determined that during the negotiations of the final contract price with the winning bidders, Transnet provided for the cost of TE scope initially excluded from Bombardier and CSR's BAFO. The said TE Scope was R1 905 514 (R457 323 360) and R3 480 000 (R1 249 320 000) per locomotive for Bombardier and CSR respectively resulting in a total of R1 706 643 360.

#### **Additional TE Scope**

5.10.4.40 We determined that Transnet included additional TE scope for all winning bidders for the diesel and electric locomotives. The additional TE scope amounted to R883 172 732.00 for the acquisition of the 1064 locomotives.

5.10.4.41 Based on our calculation as reflected in the table above, we determined that the total costs for TE scope (including initial TE scope excluded from BAFO of R1 706 643 360) amounted to R2 589 816 092.

5.10.4.42 The total TE scope of R2 589 816 092 (R2.6 billion) was reflected in the memorandum dated 23 May 2014 presented to Board as part of the ETC increase of the acquisition of 1064 locomotives to R54.5 billion.

5.10.4.43 As part of our investigation in order to confirm that the approved TE scope amounted to R2.6 billion, we requested the contracts concluded between TE and the various OEM's

#### **Contracts between TE and OEMs based on the TE scope**

5.10.4.44 We determined that subsequent to the award of the tender for the acquisition of the 1064 locomotives, TE concluded various contracts with OEMs in respect of the TE scope.

5.10.4.45 The said contracts were concluded on 17 March 2014. Below is the summary of the contracts between TE and the OEMs:

OEM	Average price per locomotive	Number of locomotives	Contract Amount	Amount paid as at 26 September 2018
CSR	R8 482 111.57	359	R3 045 078 053.00	R1 316 624 866.08
Bombardier	R3 154 652.33	240	R757 116 558.00	R55 908 036.00
CNR	R9 556 465.77	232	R2 217 100 060.00	R9 268 689.60
GE	R6 419 646.38	233	R1 495 777 607.00	R1 292 370 487.30
			R7 515 072 278.00	R2 674 172 075.98

5.10.4.46 Based on the contract reviewed, we noted that the total TE scope allocated for the acquisition of the 1064 locomotives was R7.5 billion. The actual TE scope was R5 billion more than the approved TE scope in the memorandum dated 23 May 2014.

5.10.4.47 During our consultation with Megan Govender; General Manager - Locomotives, TE (“Govender”), he indicated that all negotiations between the OEMs and TE/Transnet relating to the TE scope were concluded on 17 March 2014. Govender further stated that no further negotiation took place after the 17 March 2017 that would have informed the increase in TE scope from R2.6 billion to R7.5 billion.

5.10.4.48 We determined that Molefe, Gama and Singh misled the Board by indicating in the memorandum dated 23 May 2014 that TE scope was R2.6 billion whereas in truth and in fact the TE scope was R7 billion.

5.10.4.49 Molefe, Gama and Singh failed to ensure that the memorandum dated 23 May 2014 contained the actual figures of R7.5 billion in respect of the TE scope.

**Other issues identified in the supply of 1064 locomotives**

**Bombardier**

5.10.4.50 We determined that Bombardier entered into a contract with Transnet on 17 March 2014 for the supply of 240 Locomotives at a contract price of R54.3 million per Locomotive. The said contract was part the tender for the supply of the 1064.

5.10.4.51 We determined that the total contract price was R13 billion. The contract is still ongoing and the total payments made by Transnet to Bombardier as at 15 May 2018 was R4.5 billion.

5.10.4.52 We determined that as at May 2018, Bombardier had delivered 13 locomotives of the approved 240.

5.10.4.53 The actual payments made to Bombardier represent 34.00% of the total contract price. Transnet paid Bombardier an advance payment of R4 billion which represent 31% of the total contract price.

#### **5.10.5 China North Rail (“CNR”)**

5.10.5.1 We determined that CNR entered into a contract with Transnet on 17 March 2014 for the supply of 232 Locomotives at a contract price of R42 million per Locomotive. The said contract was part the tender for the supply of the 1064 locomotives.

5.10.5.2 The total contract price was R9.9 billion. The contract is still ongoing and the total payments made by Transnet to CNR in this regard amounted to R2.1 billion, with the last payment being made on 19 March 2018.

5.10.5.3 The actual payments made to CNR represent 21.47% of the total contract price. Transnet paid CNR advance payment of R1.5 billion which represent 15% of the total contract price as per LSA.

5.10.5.4 We determined that as 19 March 2018, CNR had only delivered 21 locomotives of the 232 allocated as per agreement.

#### **5.10.6 General Electric (“GE”)**

5.10.6.1 We determined that GE entered into a contract with Transnet on 17 March 2014 for the supply of 240 Locomotives at a contract price of R36.2 million per Locomotive. The said contract was part the tender for the supply of the 1064.

5.10.6.2 The total contract price is R8.4 billion. The contract is still ongoing and the total payments made by Transnet to GE in this regard amounted to R7.7 billion, with the last payment being made on 29 March 2018.

5.10.6.3 The actual payments made to GE represent 91.70% of the total contract price. GE has already delivered 213 Locomotives and left with only 20 to finalise its obligations in terms of the contract.

**5.10.7 Relocation costs**

- 5.10.7.1 We noted a memorandum dated 19 May 2015 from Ravi Nair to Gama requesting approval for the team to negotiate the relocation of Bombardier to Durban at a cost of R634 315 000.
- 5.10.7.2 We determined that Transnet approved Variation Order (“VO”) for the relocation of Bombardier and CNR. Gama approved the said VO on 25 July 2015.
- 5.10.7.3 We determined that Transnet paid Bombardier and CNR an amount of R618 457 125 and R647 181 494 for relocation costs respectively.
- 5.10.7.4 We determined that the relocation costs in the amount of R1.2 billion were paid from the contingency fees.
- 5.10.7.5 We have not investigated the relocation costs as they were not part of our mandate.

**5.10.8 BBBEE partners of the awarded OEM in respect of the of the 1064 tender**

5.10.8.1 We determined that the international Original Equipment Manufacturers (“OEM’s”) partnered with South African entities as part of the BBBEE requirements. We have summarised the various BBBEE partners of the successful OEM’s Below:

No	International OEM	BBBEE partners
1	Bombardier	<ul style="list-style-type: none"> <li>1. Sadiphiri Transport Services</li> <li>2. Jabatha Stationers</li> <li>3. Masana Hygiene Service</li> </ul>
2	CNR	<ul style="list-style-type: none"> <li>1. Global Railway Africa (Pty) Ltd (10%)</li> <li>2. Cadiz Corporate Solutions (10%)</li> <li>3. Azon Rail (Pty) Ltd (13.33%)</li> <li>4. Kopano Ke Matla Investment Company (20%);</li> <li>5. Linotando Investment (20%)</li> <li>6. Makana Investment Corporation (Pty) Ltd (20%)</li> <li>7. Mmpumelelo Julius Nobande (6.67%)</li> </ul>
3	CSR	<ul style="list-style-type: none"> <li>1. Basadi Dirang System Development;</li> <li>2. Matsete Industrial Services</li> </ul>

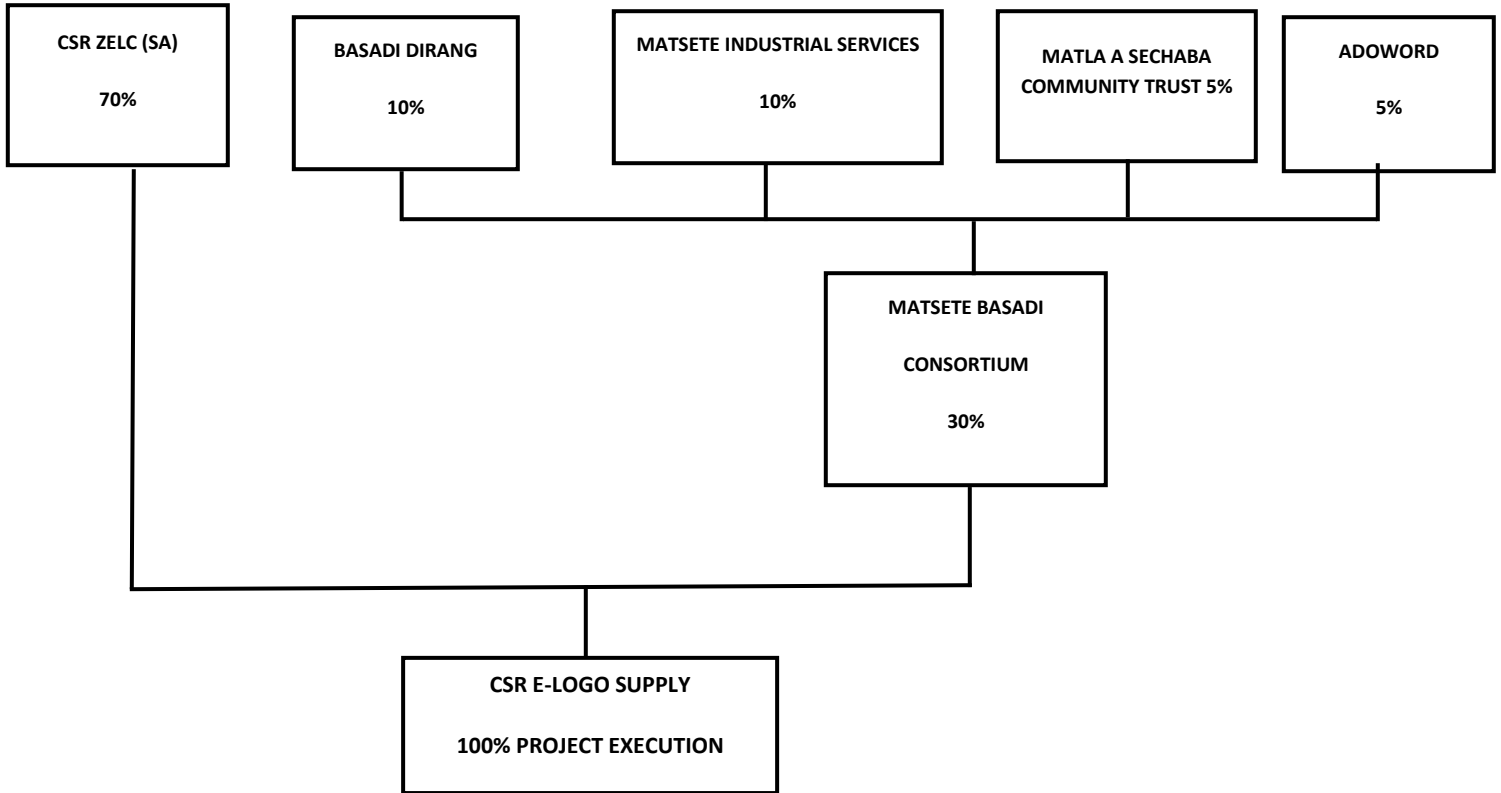
No	International OEM	BBBEE partners
		3. Matla a Sechaba Community Trust 4. Adoword Motivational and life Coaching
4	GE	1. The Mineworkers Investment Company

## CRRC

5.10.8.2 Based on background searches conducted, we determined that CRRC had eight (8) registered directors (*as per the databases used for the purposes of this investigation*). As pointed out in the table below, three (3) directors have since left the company / resigned ).

Name	Status	Appointment date	Resignation date
Polisa, Matseliso Hyacinth	Active	09 June 2016	Still Active
Seabi, Suzan Mapineng	Active	09 June 2016	Still Active
She, Yongjun	Active	18 July 2012	Still Active
Wang, Pan	Active	18 July 2012	Still Active
Zhang, Liqiang	Active	19 January 2016	Still Active
Malebye, Morongwe	Resigned	18 November 2014	09 June 2016
Mohapeloa, Lietsiso	Resigned	18 July 2012	09 June 2016
Zhang, Minyu	Resigned	18 November 2014	19 January 2016

### THE DETAILS OF THE SHAREHOLDERS





**5.10.9 Sadiphiri Transport Services**

5.10.9.1 Based on background searches conducted, Sadiphiri Transport Services CC with registration number 2005/148212/23 was registered on 14 October 2005 and is currently listed as in Annual Return Deregistration Process.

5.10.9.2 Sadiphiri Transport Services CC has two (2) registered members (*as per the databases used for the purposes of this investigation*). As illustrated in the table below, both members are still active :

Name	Status	Appointment date	Resignation date
Sethoga, Albert Madimetja	Active	14 October 2005	Still active
Sethoga, Ledile Marilyne	Active	17 October 2007	Still active

**5.10.10 MASANA HYGIENE SERVICES (PTY) LTD**

5.10.10.1 Based on background searches conducted, Masana Hygiene Services (Pty) Ltd with registration number 2014/110265/07 was registered on 06 June 2014 and is currently listed as in business.

5.10.10.2 The entity has two (2) registered directors (*as per the databases used for the purposes of this investigation*). As demonstrated in the table below, the two (2) directors are both listed as current:

Name	Status	Appointment date	Resignation date
Mkhombo, Mikateko Richard	Active	06 June 2014	Still active
Mkhombo, Tshililo Cynthia	Active	06 June 2014	Still active

**5.10.11 CNR**

5.10.11.1 Global Railway Africa (Pty) Ltd

5.10.11.2 Based on documentation reviewed, we determined that Global Railway Africa (Pty) Ltd with registration number 2005/011653/07 was registered on 20 April 2005 and is currently listed as in business.

5.10.11.3 Global Railway Africa (Pty) Ltd had nine (9) registered directors (as per the databases used for the purposes of this investigation). As indicated in the table below six (6) directors have since left the company / resigned:

Name	Status	Appointment date	Resignation date
Van Niekerk, Ilza Elizabeth	Active	02 July 2012	Still Active
Von Gericke, Johan Karl	Active	20 May 2005	Still Active
Von Gericke, Rowlen Ethelbert	Active	20 May 2005	Still Active
Coetzee, Elrinet Christine	Resigned	20 April 2005	Not established
Molebatsi, Kaizer Letlhoo	Resigned	01 July 2005	Not established
Nkosi, Morley Zebulon	Resigned	18 June 2007	16 February 2015
Nobanda, Mpumelelo Julius	Resigned	18 June 2007	24 October 2014
Sibiya, Bhekokuhle	Resigned	01 July 2005	Not established
Von Gericke, Martin Werner	Resigned	20 May 2005	24 October 2014

5.10.11.4 A search on the directors reflected common links relating to some of the directors as follows:

Director	Other business interests / Links
Rowlen Ethelbert Von Gericke	<ul style="list-style-type: none"> <li>• Endinamix (Pty) Ltd</li> </ul>
Mpumelelo Julius Nobanda	<ul style="list-style-type: none"> <li>• Endinamix (Pty) Ltd</li> <li>• Lineta Investments CC</li> </ul>

#### 5.10.12 Azon Rail (Pty) Ltd

5.10.12.1 We determined from background searches conducted that Azon Rail (Pty) Ltd with registration number 2013/048205/07 was registered on 20 March 2013 and is currently listed as in business.

5.10.12.2 The entity had two (2) registered directors (as per the databases used for the purposes of this investigation). As demonstrated in the table below, one (1) director have since left the company / resigned:

Name	Status	Appointment date	Resignation date
Dludlu, Babalwa Desiree	Active	20 March 2013	Still active
Pilane, Zahra Hashi	Resigned	20 March 2013	15 July 2015

5.10.12.3 Babalwa Desiree Dludlu was appointed the company secretary on the 20 March 2013 and is listed as current or active. We determined that she is both a director and the company secretary for Azon Rail (Pty) Ltd.

5.10.12.4 A search on the directors reflected common links relating to some of the directors as follows:

Director	Other business interests / Links
Babalwa Desiree Dludlu	<ul style="list-style-type: none"> <li>• Endinamix (Pty) Ltd</li> </ul>

5.10.12.5 We determined that Azon Rail was registered a month before the closing date of the 1064 locomotives tender. We further determined that, had the closing date remained the same, 16 October 2012, Azon Rail would not have been a BBBEE partner of CNR.

- 5.10.12.6 We determined that Dlodlu was a former TFR employee. We requested Dlodlu’s personnel file, however at the date of the report, we had not been provided with the personnel file.
- 5.10.12.7 According to Dlodlu’s LinkedIn profile, she was employed at TFR as a Project Manager from May 2000 to June 2004. Furthermore, she was employed as a General Manager at Transnet from July 2006 to June 2011. We determined that this was not reported by the evaluation team and HVT team.
- 5.10.12.8 We determined that Pilane was also employed as an Operations Manager at TFR for the period May 2002 to May 2007 and he was later employed as a Senior Manager from May 2006 to December 2012.
- 5.10.12.9 We determined that the advertisement in respect of the 1064 tender was issued in July 2012 and the briefing session was held on 14 December 2012. We further determined that Pilane was still in the employ of TFR when the tender advertisement was issued and when the briefing session was held.
- 5.10.12.10 We determined that this was not reported by the evaluation team and HVT team.

**5.10.13 Kopano Ke Matla Investment Company**

- 5.10.13.1 We determined that Kopano Ke Matla is COSATU’s (trade union) investment arm.
- 5.10.13.2 We determined from background searches conducted that Kopano Ke Matla Investment Company (Pty) Ltd with registration number 1996/003807/07 was registered on 27 March 1996 and is currently listed as in business.
- 5.10.13.3 The entity had eight (8) registered directors (as per the databases used for the purposes of this investigation). As demonstrated in the table below, five (5) directors have since left the company / resigned:

Name	Status	Appointment date	Resignation date
Motshwane, Lindiwe Martha	Active	21 October 2016	Still active

Name	Status	Appointment date	Resignation date
Nhlapo, Vusi Herbert	Active	21 October 2016	Still active
Reinecker, Koop De Vries	Active	21 October 2016	Still active
Badal, Prabir	Resigned	13 July 2013	13 July 2017
Maisela, Maxwell	Resigned	25 November 1996	01 September 2004
Matjila, Marake Collin	Resigned	01 April 2000	16 May 2016
Motsisi, Tumelo Montlhodi	Resigned	25 November 1996	01 September 2004
Nkosi, Muzikayifani Khehla Joseph	Resigned	01 September 2004	Not established

5.10.13.4 A search on the directors reflected common links relating to some of the directors as follows:

Director	Other business interests / Links
Prabir Badal	<ul style="list-style-type: none"> <li>Endinamix (Pty) Ltd</li> </ul>
Marake Collin Matjila	<ul style="list-style-type: none"> <li>Endinamix (Pty) Ltd</li> </ul>

#### 5.10.14 Lineta Investment

5.10.14.1 We determined from background searches conducted that Lineta Investments CC with registration number 2007/141542/23 was registered on 25 July 2007 and is currently listed as in business.

5.10.14.2 Lineta Investments CC has one (1) registered member (as per the databases used for the purposes of this investigation). As demonstrated in the table below, he is an active member of the close corporation:

Name	Status	Appointment date	Resignation date
Nobanda, Mpumelelo Julius	Active	25 July 2007	Still active

5.10.14.3 A search on the member reflected common links relating to some of the companies we have performed searches on:

Member	Other business interest/Link
Nobanda, Mpumelelo Julius	<ul style="list-style-type: none"> <li>• Endinamix (Pty) Ltd; and</li> <li>• Global Railway Africa (Pty) Ltd.</li> </ul>

#### 5.10.15 Makana Investment Corporation (Pty) Ltd

5.10.15.1 Based on background searches conducted, we determined that Makana Investment Corporation (Pty) Ltd with registration number 1997/011411/07 was registered on 16 July 1997 and is currently listed as in business.

5.10.15.2 The entity had seventeen (17) registered directors (as per the databases used for the purposes of this investigation). As demonstrated in the table below, fourteen (14) directors have since left the company / resigned:

Name	Status	Appointment date	Resignation date
Mehana, Vukile Charles	Active	13 February 2007	20 February 2012
Ngwenya, Sibusiso Peter-Paul	Active	16 July 1997	Still Active
Samuel, John Michael	Active	13 February 2007	20 February 2012
Gonsalves, Roberto	Resigned	11 April 2006	08 July 2016
Barkai, Ram	Resigned	11 April 2006	20 February 2012
Buthelezi, Norbert Sfiso	Resigned	11 April 2006	17 August 2016

Name	Status	Appointment date	Resignation date
Dambe, Patience Lindiwe	Resigned	16 July 1997	18 September 2003
Goodger, Mark Alexander	Resigned	01 December 1999	Not established
Larsen, Svein	Resigned	01 June 2001	Not established
Moisi, David Motshwane	Resigned	18 October 2003	Not established
Nassel-Henderson, William John	Resigned	01 November 1998	31 August 1999
Ndukwana, Sothomela	Resigned	16 July 1997	18 September 2003
Seboni, Mpho Solomon	Resigned	20 March 2000	01 September 2001
Selvan, David John Proctor	Resigned	06 June 2000	10 September 2001
Shaw, Fraser Charles	Resigned	21 February 2012	07 March 2016
Tyikwe, Mpumelelo	Resigned	01 December 1999	18 October 2004
Xate, Lulamile Lincoln	Resigned	11 April 2006	25 July 2016

5.10.15.3 A search on the directors reflected common links relating to some of the directors as follows:

Director	Other business interests / Links
Roberto Gonsalves	<ul style="list-style-type: none"> <li>Endinamix (Pty) Ltd</li> </ul>
Xate, Lulamile Lincoln	<ul style="list-style-type: none"> <li>Endinamix (Pty) Ltd</li> </ul>

5.10.15.4 We determined that Sfiso Buthelezi was a director at Makana from 11 April 2006 to 17 August 2016. We further determined that Buthelezi was a member of the National Assembly from 4 April 2016.

5.10.15.5 According to the background search conducted, Buthelezi was still an active Director at Makana during the duration of the CNR contract.

### **Conclusions**

Based on the findings discussed above, we conclude as follows:

#### **Requirement for approval in terms of Section 54 of the PFMA**

5.10.15.6 Molefe failed to obtain Shareholder approval in terms of section 54 of the PFMA prior to the advertisement of the RFP for the acquisition of the 1064 locomotives as per the Board's instruction which clearly indicated that the RFPs should be issued subject to Shareholder approval.

5.10.15.7 There is no evidence that the conditions provided in Minister Gigaba's letter to Mkwanazi were complied with.

5.10.15.8 There is no evidence that the Transnet Board complied with the requirements set out in Minister Gordhan's approval.

#### **Exemption from PPPFA**

5.10.15.9 The PPPFA exemption granted by the Finance Minister relating to non-designated sectors in December 2011 excluded rolling stock and as such, Transnet was required to follow the 80/20 and 90/10 principle in terms of the PPPFA in the procurement process.

5.10.15.10 Minister Gigaba acted outside his authority in advising Transnet to continue to procure the locomotives as if the exemption of the PPPFA was in place before Finance Minister granted full exemption.

#### **Business Case for the 1064 locomotives**

5.10.15.11 Molefe and Singh misrepresented facts to the Transnet Board by indicating that the amount of R38.6 billion excluded potential effects from forex and hedging.

5.10.15.12 The misrepresentation by Molefe and Singh contributed to the increase in ETC by at least R6.7 billion (Escalations, Forex and Contingencies).

#### **Evaluation of the tender**

5.10.15.13 The conduct by the evaluation teams, in discussing the scoring of each bidder on one computer was in contravention of paragraph 18.2.3(d) of the 2012 PPM that required individual scoring. The said conduct compromised the integrity of the procurement process.



5.10.15.14 No justification was given for amending the evaluation scores which changed the ranking in favour of CSR.

**Request for Best and Final Offers (BAFO)**

5.10.15.15 The inconsistencies in the manner in which the request for best and final offer was applied between the 599 tender and the 465 tender compromised the integrity of the procurement process.

5.10.15.16 Gama, Jiyane, Molefe, the BADC and the Transnet Board members therefore contravened section 217(1) of the Constitution in that they failed to ensure that the procurement process was fair, equitable, transparent, competitive and cost effective.

**Splitting of locomotives per supplier**

5.10.15.17 Transnet saved at least R229 609 887.00 for splitting electric locomotives 60/40 between CSR and Bombardier.

5.10.15.18 Transnet would have saved R308 217 020.00 had they applied a 60/40 split between GE and CNR since GE's locomotives were cheaper than CNR.

**Increase in ETC from R38.6 billion to R54.5 billion**

5.10.15.19 Molefe, Singh and any other role player may have received gratification for the role they played in the increase of ETC from R38.6 billion to R54.5 billion.

5.10.15.20 Molefe and other Transnet officials contravened section 57 of the PFMA in that they failed to take effective and appropriate steps to prevent irregular expenditure and fruitless and wasteful expenditure

5.10.15.21 Transnet Board members failed to act in the best interest of Transnet when they ratified the increase of ETC for the acquisition of 1064 locomotives from R38.6 billion to R54.5 billion.

5.10.15.22 The Board members contravened section 51(1)(a)(iii) of the PFMA in respect of its general responsibilities relating to ensuring appropriate procurement and provisioning systems that are fair, equitable; transparent, competitive, and cost effective.

**Penalties**

5.10.15.23 CSR, Bombardier, CNR and GE failed to deliver the locomotives on the specified timelines in line with the schedule contained in the LSA.

5.10.15.24 GE paid R80 million in penalties whereas TFR failed to collect penalties from other OEM's for late deliveries.

## **Recommendations**

Based on the conclusions discussed above, we recommend that Transnet Board considers the following:

- 5.10.15.25 Recovery of penalties from CSR, CNR and Bombardier for late deliveries of the locomotives.
- 5.10.15.26 Take appropriate disciplinary steps against the officials who are still employed by Transnet.
- 5.10.15.27 Report be provided to the DPCI to institute criminal investigations for possible receipt of gratification and contravention of section 34(1) of the Prevention and Combating of Corrupt Activities Act against the following:
  - 5.10.15.27.1 Singh;
  - 5.10.15.27.2 Sharma;
  - 5.10.15.27.3 Molefi;
  - 5.10.15.27.4 Regiments;
  - 5.10.15.27.5 Smit;
  - 5.10.15.27.6 Pita;
  - 5.10.15.27.7 Jiyane;
  - 5.10.15.27.8 Mdletshe;
  - 5.10.15.27.9 Nair;
  - 5.10.15.27.10 Laher;
  - 5.10.15.27.11 Gama; and
  - 5.10.15.27.12 Any other role player.
- 5.10.15.28 Report to be provided to the DPCI to institute criminal investigations against Transnet Board members for possible dereliction of their duties in terms section 76(3) of the Companies Act and section 86 of the PFMA for failing to act in the best interest of Transnet.

## **Shareholder Minister**

- 5.10.15.29 Monitor the implementation of the recommendations to ensure that all remedial actions are implemented.

- 5.10.15.30 Recommend that Cabinet consider restricting the officials who resigned before being disciplined from employment by an organ of state for a period of five years.
- 5.10.15.31 Recommend that Cabinet consider restricting the officials who resigned or dismissed for SCM related misconduct from doing business with any organ of state for a period of five years.

## **6 THE APPOINTMENT OF TRANSNET VIP PROTECTION SECURITY ON BEHALF OF MINISTER MALUSI GIGABA.**

### **6.1. Background**

6.1.1. During the course of our investigations we received allegations that the then Minister of Department of Public Enterprises, Minister Gigaba was lenient to Molefe because he provided special protection to the Minister using Transnet personnel

### **6.2. Request for security personnel**

6.2.1. Following the said allegations relating to the provision of security personnel to then Minister Gigaba, we requested Transnet to provide documents relating to such protection services.

6.2.2. During a review of the said documents we determined that on 17 May 2013, Rodney Toka ("Toka") who was an employee in charge of Security Services at Transnet at the time, prepared a memorandum to the then Transnet Group Chief Executive ("GCE"), Brian Molefe ("Molefe") for the appointment of two new Close Protection Officers.

6.2.3. The memorandum from Toka further reflected the purpose of the said appointment as to mitigate the potential risk that may be posed to the Transnet's Group Executive ("GE") members.

6.2.4. The request further indicated that a personal risk assessment was conducted on the Executives and it was identified that the Group Executive members needed immediate attention.

6.2.5. Toka's memorandum indicated that various methods of personnel protection would be utilized in ensuring the safety of Executives within the Transnet Group Executives.

6.2.6. Toka's memorandum recommended that Molefe appoint the following individuals:

- David Moribula Machete ("**Machete**"); and

- Bongani Alson Zwane (“**Zwane**”).

- 6.2.7. Toka’s memorandum does not indicate how the individuals were identified and selected.
- 6.2.8. Toka’s memorandum further reflected that the financial implications in relation to the appointment of the two officials was an amount of R300 000.00 per security officer per annum.
- 6.2.9. Nonkululeko Sishi, Group Executive, Human Resources, and Molefe supported and approved the appointment of Machete and Zwane on the same day as Toka’s application i.e. 17 May 2013, respectively.

### **6.3. Appointment of David Machete**

- 6.3.1. From documentation provided to us we determined that Machete was appointed on 11 June 2013. According to his letter of appointment dated 11 June 2013, Machete was appointed for a position of Close Protection Officer based in the Security Management Unit. The commencement period is reflected as 17 June 2013.
- 6.3.2. We determined that the remuneration as indicated on the offer of employment letter was R337 209.00 per annum and not the amount of R300 000.00 reflected on the memorandum submitted to Molefe by Toka.
- 6.3.3. We further determined that Machete’s probationary period was indicated as three months.

#### **6.3.4. Secondment Agreement**

- 6.3.4.1. We determined that there was a secondment agreement entered by Transnet, the Department of Public Enterprises (“**DPE**”) and Machete as the seconded employee. An annexure to the said agreement reflected that it was signed on 8 July 2013 by Toka and Machete.
- 6.3.4.2. The secondment agreement reflected that Machete was authorised to utilise Transnet’s vehicle with registration number CN22PLGP to perform his close protection duties to the then DPE Minister, Malusi Gigaba.
- 6.3.4.3. Machete’s provision of protection services to Minister Gigaba commenced on 8 July 2013 as per the pool vehicles annexure 3 form authorising Machete to use a company vehicle.

6.3.4.4. We determined that the secondment of Machete was two months after his appointment at Transnet, and further that he was still on probation.

6.3.4.5. Machete's secondment at DPE was until 1 January 2014.

#### **6.4. Appointment of Bongani Zwane**

6.4.1. Zwane was appointed through a recommendation prepared by Toka on 17 May 2013, signed by Molefe on the same date. Zwane's commencement of employment as a Close Protection Officer was on 17 June 2013.

6.4.2. We determined that Zwane's remuneration package was R330 000.00 per annum with the probationary period reflected as three months.

#### **6.4.3. Secondment agreement dated 6 August 2013**

6.4.3.1. We determined that on 6 August 2013 the Chief of staff, TJ Msomi and Toka approved Zwane's secondment to DPE. The agreement indicated that it was entered into between Transnet, DPE and Zwane. The secondment indicated that Zwane's position will be a VIP Protection officer for a period of six months beginning 6 August 2013 until 1 January 2014.

6.4.3.2. The agreement did not indicate the place of work, however during the review we determined that Zwane was seconded to provide security for DPE Minister, who at the time was Minister Gigaba. We further determined that Zwane's remuneration was for an amount of R337 209.00.

6.4.3.3. We determined that the pool vehicle allocated to Zwane was CN22PSGP.

6.4.3.4. The pool vehicle utilised by Zwane was a Transnet leased vehicle which was hired by Transnet.

#### **6.5. Transnet's version relating to the appointment of security personnel for Minister Gigaba**

6.5.1. During our consultations with Nokuthula Khumalo, the current Transnet company secretary, she indicated that the fact that the security personnel was provided to Minister Gigaba at Transnet expenses was never disclosed to the Transnet Board.

**6.6. DPE's version relating to the appointment of security personnel for Minister Gigaba**

- 6.6.1. We consulted with Matsietsi Mokholo ("Mokholo") who was Deputy Director General at the time of Gigaba as Minister of DPE. Mokholo indicated that she was not aware of the fact that then Minister Gigaba had security provided by Transnet.
- 6.6.2. Mokholo referred us to Isaac Manyathela who she indicated was the head of Security at DPE at the time. He indicated that he is no longer in public service.
- 6.6.3. Manyathela stated that at some stage during Gigaba's tenure as DPE Minister, he indicated to DPE security team that there were threats to his life. Manyathela further stated that based on the said threats he and Gigaba had a meeting with the SAPS' VIP Protection Unit in Cape Town where the issues of Minister Gigaba's security was discussed.
- 6.6.4. Manyathela stated that SAPS indicated that they would commence with their security assessments and get back to the DPE with their report. Manyathela indicated that the Minister felt that SAPS was taking longer to complete their assessments and approached Transnet and requested that he be provided with additional security.
- 6.6.5. Manyathela stated that the Ministry approached Transnet and he was informed of the decision afterwards as Head of Security, but played a lesser role in the communications with Transnet.
- 6.6.6. Manyathela stated that the SAPS never provided him or DPE with the results of the security assessment on Minister Gigaba. Manyathela indicated that there would be no documentation at DPE relating to the arrangement of security for Minister Gigaba through Transnet as such matters are always handled with confidentiality.

**6.7. Minister Gigaba's responses to the Transnet security personnel provided to him**

- 6.7.1. We requested Minister Gigaba to provide us with written answers relating to the allocation of security personnel by Transnet.
- 6.7.2. In his responses Minister Gigaba indicated that during his tenure as the Minister of DPE, he was allocated SAPS VIP Protection Officials. He further indicated that there was a point whereby there was a huge increase of threat to his personal safety. Due to the said threat, his security needs were re-evaluated

and assessment conducted. Gigaba indicated that he was advised based on the assessment that he needed additional backup security.

- 6.7.3. Minister Gigaba stated that at the time of the said assessment he could not be provided with the required security by the SAPS as SAPS did not have enough resources at the time. Minister Gigaba stated that SAPS suggested that an alternative solution be looked into.
- 6.7.4. Minister Gigaba indicated that he was advised that a request was addressed to Transnet to provide the said backup as an interim measure until SAPS had enough resources. Minister Gigaba stated that the Transnet services were only for backup as he still used the SAPS VIP Protection.
- 6.7.5. Minister Gigaba further indicated that Transnet protection services did not endure for a year and thereafter SAPS provided him with VIP protection officials.
- 6.7.6. The version provided by Minister Gigaba is in contradiction with the version provided to us by the then Head of Security at DPE, Manyathela. While Manyathela confirmed that there was a security assessment by SAPS on the provision of additional resources to Minister Gigaba, he (Manyathela) indicated that Minister Gigaba and the Ministry's staff approached Transnet and sourced security personnel for the Minister.
- 6.7.7. Manyathela indicated that after the Minister had approached Transnet, two security personnel were allocated to the Minister from Transnet, utilising Transnet provided vehicles and on Transnet payroll.
- 6.7.8. When Transnet sourced the employment of the two security personnel, the reasons provided were that the Transnet Group Executives needed additional Services.
- 6.7.9. The said reasons by Transnet could not have been valid as the two security personnel were seconded to DPE to provide security services to the Minister, at Transnet costs, within two months of them being appointed at Transnet.

## **6.8. SAPS INVOLVEMENT**

- 6.8.1. We approached SAPS to determine if they conducted a security assessment and whether they recommended that Minister Gigaba approaches a state entity to arrange for additional security.

- 6.8.2. We communicated with General Shitlabane and Colonel Lamola who are both based in the National Commissioner's office and requested them to provide us with the relevant information relating to the above matter. As at date of this report we had not yet received any comments from SAPS

## 6.9. CONCLUSIONS

- 6.9.1. Transnet appointed Zwane and Machete without following the Transnet Recruitment processes in that the appointments of the two security officers were not advertised and further that there were no interviews conducted.
- 6.9.2. Zwane and Machete were handpicked under the pretext that there was an urgent need for the provision of security services to the Transnet Group Executives.
- 6.9.3. There is no evidence that there was any assessment done on any of the Group Executives to determine their need for additional security personnel.
- 6.9.4. There is no evidence that Transnet Board was aware or approved this arrangement.
- 6.9.5. Zwane and Machete were appointed under the pretext that they were going to provide security services to the Transnet Group executives when in truth and in fact they were appointed to provide security services to Minister Gigaba.
- 6.9.6. Zwane and Machete were seconded to DPE even prior to completing their probation at Transnet, and prior to providing any security services to any of the Transnet Group Executives, for whom they were allegedly appointed to provide security services to.
- 6.9.7. There is no proof that SAPS advised Minister Gigaba or his head of Security to look for alternative security personnel at Transnet or anywhere else.
- 6.9.8. The allegations that Minister Gigaba was lenient to Molefe may have stemmed from Molefe taking questionable various decisions which included inter alia Transnet's acquisition of the 95, 100 and 1064 locomotives which were later ratified by the Board.
- 6.9.9. Minister Gigaba signed as a witness when Molefe signed the contract between Transnet and China South Rail at the signing ceremony for the acquisition of the 95 locomotives on 22 October 2012.
- 6.9.10. The expenditure incurred should be regarded as fruitless and wasteful.



**6.10. RECOMMENDATIONS**

- 6.10.1. Transnet Board should quantify the amount of fruitless and wasteful expenditure and recover it from the relevant parties.

Should you have any queries relating to this report please do not hesitate to contact Ernest Nekhavambe on 011 403 2526.

**Yours faithfully**



Ernest Nekhavambe

**Managing Director: Fundudzi Forensic Services (Pty) Ltd**