

IN THE MATTER RELATED TO:

**THE STATE PORTFOLIO COMMITTEE'S OVERSIGHT INQUIRY INTO
CORPORATE GOVERNANCE AT STATE OWNED ENTERPRISES – CORPORATE
GOVERNANCE AT ESKOM HOLDINGS SOC LIMITED ("ESKOM")**

and

CHAIRPERSON: MS LUNGI MNGUNGA-GCABASHE

INDEX

ITEM	DOCUMENT	PAGE NO.
1.	Statement of Dr. Baldwin Ngubane	1 – 29
2.	Annexure "BN1": Duvha Unit 3 Court Order dated 30 June 2018	30 – 31
3.	Annexure "BN2": Eskom Board Tender Committee Terms of Reference	32 – 44
4.	Annexure "BN3": Eskom Request for Proposal for Duvha Boiler Refurbishment	45 - 67
5.	Annexure "BN4" Resolution of the Board Tender Committee ("BTC"), dated 20 January 2017 re: Eskom Duvha Unit 3 Recovery Project	68 – 69
6.	Annexure "BN5": Procurement and Construction Evaluation Report Rev 1 re: Eskom Duvha Unit 3 Recovery Project	70 - 105
7.	Annexure "BN6": Eskom's Submission to the BTC Meeting on 08 March 2017 re: Eskom Duvha Unit 3 Recovery Project	10 - 112

8.	Annexure "BN7" : Extract from the Approved Minutes of the Eskom BTC Meeting held on 08 March 2017 and signed on 19 March 2017 re: Eskom Duvha Unit 3 Recovery Project	113 - 114
9.	Annexure "BN8" : Eskom's Submission to the BTC: Status Update and Contract Award Notification for Duvha Unit 3 Recovery Project, dated 27 March 2017	115 - 120
10.	Annexure "BN9" : Letter from Dr. Ngubane to Minister Lynne Brown re: Appointment of Group Chief Executive Officer	121 - 122
11.	Annexure "BN10" : Letter from Minister Lynne Brown to Mr. B Molefe re: Appointment as Chief Executive Officer and Ex Officio member of the Eskom Board of Directors, dated 02 October 2015	123 - 131
12.	Annexure "BN11" : Letter from Minister Lynne Brown to Dr. Ngubane re: Remuneration of Mr. B Molefe: Chief Executive of Eskom, dated 01 November 2015	132 - 133
13.	Annexure "BN12" : Letter from Dr. Ngubane to Minister Lynne Brown re: Retirement Arrangements – Mr. B Molefe, dated 25 November 2015	134 - 135
14.	Annexure "BN13" : Extract of the Minutes of the Board of People and Governance In-Committee Meeting held on Tuesday 9 February 2016	136 - 138
15.	Annexure "BN14" : Letter from Mr. B Molefe to Dr. Ngubane re: Early retirement, dated 11 November 2016	139
16.	Annexure "BN15" : Letter from Dr. Ngubane to Mr. B Molefe re: Early Retirement, dated 24 November 2016	140 - 141

IN THE MATTER RELATING TO:

**THE PORTFOLIO COMMITTEE'S OVERSIGHT INQUIRY INTO CORPORATE GOVERNANCE
AT STATE OWNED ENTERPRISES – CORPORATE GOVERNANCE AT ESKOM HOLDINGS
SOC LIMITED ("ESKOM")**

CHAIRPERSON: MS LUNGI MNGUNGA-GCABASHE

STATEMENT OF DR BALDWIN NGUBANE

1. Introduction

- 1.1 The Chairperson of the Portfolio Committee's Oversight Inquiry into Corporate Governance at State Owned Enterprises ("**the Committee**") has invited me, in my capacity as the former Chairperson of the Board of Directors of Eskom ("**the Board**"), to appear before the Committee and give evidence on certain issues relating to governance at Eskom.
- 1.2 I have been requested to provide information to the Committee by way of a written submission and to further prepare to answer certain questions to be posed by members of the Committee in relation to the issues contemplated above. I note that no specific or direct questions have been made available to me or raised as part of the Committee's invitation to direct my preparation for the hearing.
- 1.3 A set of eight broad issues have been identified and presented for my attention. One of such issues¹ has a sub-set of two further broad issues.
- 1.4 The issues in question are stated as follows in the Committee's invitation:
- 1.4.1 The procurement process of IT services to replace the then service provider, namely T-Systems, including the Board's knowledge of the circumstances surrounding the suspension of Mr Sal Laher;
- 1.4.2 The procurement process of the Duvha Boiler Refurbishment and the award of the tender to Dongfang (the decision to award this tender was set aside by a Court) (sic), including:

¹ See para 1.4.2

- (a) The involvement of the Board and its Committees in the procurement process; and
- (b) The internal processes which led to the apparent irregular selection of Dongfang.

1.4.3 The circumstances surrounding the suspension of Messrs Tshediso Matona, Matshela Koko, Dan Marokane and Ms Tsholofelo Molefe and the reasons for the termination of services of the various executives who left Eskom;

1.4.4 The employment of Mr Molefe as Group Chief Executive at Eskom;

1.4.5 The construction and the eventual payment of pension benefits to Mr Molefe;

1.4.6 The employment of Mr Anoj Singh as Financial Director at Eskom;

1.4.7 Eskom's response to the Public Protector's Report on the State of Capture, dated 14 October 2016; and

1.4.8 The purchase of Optimum Coal Holdings by Tegeta from Glencore.

1.5 I deal with each of the identified issues in paragraph 2 below in the order as set out in paragraph 1.4 above, which is also the same order appearing in the Committee's invitation sent to me dated 21 November 2017.

1.6 I express my gratitude to the Committee for accommodating my request for an extension to enable me to prepare for the hearing. I have made a reasonable effort, under the circumstances, to utilise the time afforded me as well as I could, in order to assist the Committee in the best manner possible in its inquiry.

1.7 Taking into account the abovementioned issues, it is imperative for me to provide the Committee with the timeline of the tenure of my position as the former Chairperson of the Eskom Board as this appears to be the focal point of the hearing. My submission has, accordingly, been prepared taking this context into account.

1.8 In relation to my statement, as indicated in the invitation by the Chairperson of the Committee, I am the former Chairperson of the Board. I was appointed as a member of the Board in December 2014. I then served as the Chairperson of the Board from October 2015 until June 2017. Before then, I had been appointed as the Acting Chairperson of the Board from 15 March 2015. As such, my understanding is, as

already indicated above, that the context of the Committee's invitation is concerned with and limited to this period, that is between 15 March 2015 and June 2017, which is inclusive of my acting period.

- 1.9 Due to the open and broad nature of the issues that I am required to provide answers to, I have made an effort to focus on providing the Committee with as much of the information that falls within my personal knowledge in the said capacity as former Chairperson of the Board to the best of my recollection.
- 1.10 I wish to point out, however, that for various reasons, some of the issues raised in the Committee's invitation unfortunately fall outside of my personal knowledge as the former Chairperson of the Board. Some of these issues may, for example, have arisen prior to my tenure and/or, by virtue of Eskom's delegation of authority and materiality framework, did not require either the Board's approval or my direct involvement as the former Chairperson of the Board.
- 1.11 Furthermore, it is important to note that as part of Eskom's governance structure as a public entity or state-owned company/enterprise, the Chairperson of the Board (including myself at all relevant times, was) is not part of the procurement process and there may also be those issues that would be referred to the Board for purposes of noting only, and not necessarily for deliberation and/or approval. I am saying this whilst remaining cognisant of the Board's roles and responsibilities in the overall control and management of Eskom.
- 1.12 For better context, where possible, I illustrate my explanation by way of documentary evidence at my disposal. Otherwise most of the documents I rely on in this submission may already be before the Committee and/or are in the public domain and/or may be obtained directly from Eskom upon request.
- 1.13 For the reasons more fully set out below, I respectfully bring it to the attention of the Committee that I could not, however, collect and collate all of the documents which I refer to in this statement and which may become relevant during the hearing. Further, I may also not be able to recall all of the requisite details relating to some or all of the pertinent issues as my role as the Chairperson of the Board was not operational or executive in nature.
- 1.14 In certain instances, it is possible that some of the information I may provide for the purpose of this inquiry may have already been shared with the Committee by some of the former Board members and/or Eskom's executives, either by way of written submissions to, and/or question-and-answer sessions with any such former Board members and/or executives during the hearing before, the Committee. To the extent

that it is not inconsistent with, or contradictory to, what is contained in my statement and my entire evidence to the Committee, I respectfully submit that such information (including supporting documentation thereto, where applicable) may remain relevant to, and have to be taken into account as an integral part of, my submission.

- 1.15 In light of the abovementioned reasons, I may not be (fully) equipped to provide specific answers to specific questions which may only arise or be posed by members of the Committee, for the first time at the hearing.
- 1.16 Under the circumstances, I respectively reserve all the rights that I may have in terms of the Constitution of the Republic of South Africa, any other applicable law, including common law, rule of law and/or natural justice. This includes, without limitation, the opportunity, if and to the extent appropriate, or required or so advised, to consider any new information which may only be brought to my attention or become accessible to me at or after the hearing and to supplement my written submission to the Committee.

I now proceed to deal with each matter as raised by the Committee below.

2. Issues raised by the Committee

2.1 **The Procurement Process of IT Services to replace the then Service Provider, namely T-Systems, including the Board's knowledge of the circumstances surrounding the suspension of Mr Sal Laher**

- 2.1.1 To the best of my knowledge, the procurement process which was aimed at replacing T-Systems commenced before I was appointed as an ordinary member of the Eskom Board. My understanding is that in February 2015, the Executive Committee Procurement Sub-Committee ("EXCOPS") made a determination to cancel the procurement process of IT services aimed at replacing T-Systems.
- 2.1.2 EXCOPS' motivation for the abovementioned cancellation was presented before the Eskom Board Tender Committee ("BTC"). In my capacity then as an ordinary non-executive member of the Board, I chaired the meeting at which such presentation was made. This meeting took place on 24 February 2015.

2.1.3 During the presentation, the reasons for EXCOPS' motivation for the cancellation of the intended replacement tender process were articulated to the BTC as being the following:

2.1.3.1 Around December 2014, more than 50% of senior Eskom employees, who were critical to the management of the Eskom IT Division, accepted voluntary severance packages, an option which at the time had been made available to Eskom employees in general, and left Eskom;

2.1.3.2 The departure of the said employees resulted in depletion of skilled resources and thus a lack of requisite capacity within the IT Division of Eskom, as the affected positions were quite senior. This negatively affected Eskom's Generation Division;

2.1.3.3 By virtue of the crisis in Eskom's Generation Division, as manifested in persistent load shedding at the time, the view was then formed that bringing in a new IT service provider, which would be unfamiliar with the Eskom Generation business, would simply exacerbate the electricity supply problem which was already prevalent during that entire period;

2.1.3.4 T-Systems' continued involvement, as the then existing IT service provider, which was already familiar with the power station system in Eskom² would be in both Eskom's and the country's best interests; and

2.1.3.5 That under the circumstances, it made commercial sense for Eskom to extend T-Systems' contract, and to cancel the procurement process which was then aimed at replacing them.

² I am advised that T-Systems used to be known as arivia.kom, a subsidiary of Eskom, Transnet and Denel. Arivia.kom was established following a merger of the IT divisions of the said 3 (three) state owned companies. Its main object was specifically to service the IT requirements of Eskom, Transnet and Denel. It was subsequently sold as a going concern and became known as T-Systems.

- 2.1.4 On the strength of the abovementioned motivation by EXCOPS, the BTC approved the recommendation for cancellation of the procurement process to replace T-Systems. The procurement process was then cancelled upon the BTC approving EXCOPS' recommendation as supported by the abovementioned presentation.
- 2.1.5 My understanding was and still remains that in terms of the Eskom SCM Procedure, Eskom was (and still remains) entitled to cancel any procurement processes. Paragraph 3.4.5.7 of the SCM Procedure states, *inter alia*, that *Cancellation/re-issuing of tenders may occur any time after the tender has been issued to the market and before contract award*.
- 2.1.6 I point out, however, that these events, which formed part of EXCOPS motivation, occurred before my appointment to lead the Eskom Board. Save for what is stated herein, I did not have any (other or further) role to play in this procurement process.
- 2.1.7 Please note that I have no personal knowledge relating to Mr Sal Laher's suspension. The only knowledge I have is based on the records I have seen, including statements made by some of my former co-members of the Board at Eskom.
- 2.1.8 In the said context, the understanding I have is that Mr Sal Laher was suspended by Eskom in November 2014 on the basis that he had failed to follow procurement processes. I do not have any knowledge as to what such procurement processes related to. My understanding is also that there was a negotiated settlement between Eskom and Mr Sal Laher, based on which he accepted, and was then paid, a settlement amount.
- 2.1.9 As already mentioned, save for the above, I have no personal knowledge of the circumstances surrounding Mr Laher's suspension. This matter arose and was settled prior to my time as the former Chairperson of the Board.

2.2 The Procurement Process of the Duvha Boiler Refurbishment and the award of the tender to Dongfang (the decision to award this tender was set aside by a Court) (sic), including (a) the involvement of the Board and its committees in the Procurement Process and (b) the internal processes which led to the apparent irregular selection of Dongfang

- 2.2.1 Prior to providing the Committee with details regarding the procurement process relating to the Duvha Boiler Refurbishment as well as the involvement of the Board and its Committees in this regard, I wish to clarify the factual inaccuracy contained in the Committee's invitation.
- 2.2.2 On 28 March 2017, Eskom awarded Tender Corp 3571, to Dongfang. Aggrieved by Eskom's decision to award the Tender to Dongfang, Alstom S & E Africa (Pty) Ltd ("Alstom") and Murray & Roberts/Shanghai Electric Consortium ("MRSEC") instituted litigation proceedings on or during April 2017, in the High Court of South Africa, Johannesburg. The litigation proceedings are categorised into two parts, namely, the Urgent Interdict (Part A) and the Review Application (Part B).
- 2.2.3 In part A, both Alstom and MRSEC sought to urgently interdict Eskom and Dongfang from implementing the award of the Tender, pending the final determination of the relief sought in part B of the legal proceedings. In part B, Alstom and MRSEC seek an order reviewing and setting aside Eskom's decision to award the Tender to Dongfang and remitting the submissions to Eskom for re-adjudication. Part A was heard by Judge Makume on 23 June 2017 and the outcome handed down on 30 June 2017.
- 2.2.4 For the convenience of the Committee, and although such document is publicly accessible, I attach hereto a copy of the court order handed down by Judge Makume on 30 June 2017 marked as annexure "BN1". On perusal of the court order, you will note that in paragraph 2, Judge Makume held that:

"2. Pending final determination of the relief sought in part B of this application and part B of the intervening application, the First and Second Respondents are interdicted from taking any steps to implement or execute any contract pursuant to the award of the Tender advertised under RFP Corp 3571

pertaining to the manufacturing, factory acceptance testing, procurement shipping and delivery to site, installation, testing and commissioning of the pulverised coal fired boiler as part of the return to service of Unit 3 at Duvha Power Station (the tender)."

- 2.2.5 For the purpose of this submission, it is not necessary for me to deal with the allegations of Alstom and MRSEC, which allegations are currently being defended by Eskom in court. I am advised that the Review Application, being the main application in which the court will consider the process adopted by Eskom in awarding the Tender to Dongfang for the purpose of assessing its compliance with the relevant statutory and policy framework, is still to be heard. As such, **the decision to award the Tender to Dongfang, has not, as at the date of this submission, been set aside by a court of law.**
- 2.2.6 For the purpose of adequately addressing the Committee's question regarding the involvement of the Board and its Committees in the procurement of Duvha, I find it necessary to briefly explain the powers and responsibilities of the BTC, which committee was responsible for overseeing this transaction.
- 2.2.7 In terms of clause 22.6.2 of the Board Charter, the Eskom Board may from time to time, by resolution, establish such other Committees of the Board to assist in the discharge of its responsibilities. One of the Committees established by the Board is the BTC.
- 2.2.8 According to the Terms of Reference of the BTC, which Terms I annexe hereto marked "BN2", the BTC was **established to assist the Board in its responsibility in making commercial process decisions to the benefit of Eskom.** In fulfilling its mandate, the BTC is required to apply the relevant King Code Principles.
- 2.2.9 In terms of paragraph 2.4.2.5 of the Terms of Reference, **the BTC is authorised to approve tenders and contracts with a value from R750 million up to investment decision to budget.** This includes acquisition and disposal of movable and immovable property, operational expenditure and the provision and acquisition of services.

2.2.10 Paragraph 3 of the BTC Terms of Reference deals with the responsibilities of the BTC and provides that the BTC is responsible for, *inter alia*,:

- (a) approval of tenders and the awarding of contracts up to the maximum of the investment decision/budget;
- (b) approval of procurement strategies for specific transactions from R750 million up to investment decision or budget;
- (c) *ensuring that all the above are done to ensure fair, equitable, transparent, cost-effective and competitive procurement processes; and*
- (d) ensuring inclusion of provisions in the standard conditions of tender which enable Eskom to reserve its right not to award a particular tender to the highest ranked or highest scoring tenderer and/or to not award it at all, in order to ensure that it is able to leverage and maximise the socio-economic and developmental objectives that are enshrined in various government policies, provided that the evaluation factors to be considered in the exercising of this right are clearly set out in the tender invitation for proposals.

2.2.11 Having briefly set out the authority and responsibilities of the BTC, I now provide a summary of the internal process adopted by Eskom in implementing the Duvha refurbishment programme. In providing the said summary, I will also highlight the role played by the BTC in the eventual awarding of the Tender to Dongfang. In providing the said summary, I point out that in line with the BTC's Terms of Reference and Eskom's Delegation of Authority Framework, I, as the Chairperson of the Board, did not sit as a member of BTC.

2.2.12 As stated above, I reiterate the fact that the Review Application is still to be heard by the court. My understanding is that currently, there is a dispute, in court, between the parties as to the confidentiality of certain documents and/or the relevance thereof in the finalisation of the Review proceedings. As such, you will note that, in certain instances, the documents attached in relation to the Tender process have been redacted. This is for the purpose of ensuring the protection of such

confidential and commercially sensitive information of all the parties involved in this litigation.

- 2.2.13 By way of brief background, as you may be aware, on 30 March 2014, an explosion occurred at Duvha Boiler Unit 3 which caused extensive damage to the boiler and the surrounding areas. Pursuant to the damage, Eskom duly submitted a claim to its insurer³ for compensation.
- 2.2.14 After various engagements with AIG, Eskom entered into a settlement agreement with the Consortium of insurers and reinsurers, who agreed to compensate Eskom for the damage to Unit 3 at Duvha. A portion of the settlement amount in the sum of R1, 698, 959, 535.00 constituted a cost differential that Eskom would be obliged to repay to the insurers and reinsurers in the event that it was unable to conclude a binding contract for the replacement of the damaged boiler at Unit 3, by 30 March 2017. It was therefore necessary for Eskom to initiate, complete and award a tender for the replacement of the damaged boiler and conclude a contract with a supplier by that date.
- 2.2.15 Eskom, in order to urgently replace the damaged boiler, initiated its procurement process. In this regard, on 01 August 2016, the BTC, as it was empowered to, approved the procurement strategy and mandate to negotiate and conclude a contract for engineering, procurement and construction and replacement of the boiler as part of the return to service of Duvha Unit 3.
- 2.2.16 As set out above, the BTC is the appropriate authority with the power to decide on the award of a tender of this magnitude, involving as it did, an expenditure in excess of R750 million. The BTC also has the power to delegate its authority for the award of the tender, should it so decide.
- 2.2.17 On 18 August 2016, Eskom issued the RFP with a submission deadline of 1 November 2016. Two RFP clarification meetings were held with potential bidders on 13 September 2016 and 6 October 2016 and the deadline for submission was extended to 22 November 2016 based on the bidders' requests which were accepted by Eskom. The relevant

³ Duvha Unit 3 is insured by a consortium of insurers, with the lead insurer being AIG.

portion of the RFP is annexed hereto as "BN3". Paragraph 2 of the RFP describes the evaluation process and criteria for the selection of the preferred bidder.

- 2.2.18 Paragraph 1.5 of the RFP expressly drew the attention of the bidders to the relevant provisions of the Preferential Procurement Policy Framework Act ("PPFA") and informed them that Eskom reserved the right not to award the tender to the highest scoring bidder in accordance with those provisions.
- 2.2.19 The evaluation process contemplated in the RFP was a two-stage approach. The first stage was termed desktop evaluation and required the evaluation of the competing bids in order to assess, among other criteria, compliance with mandatory requirements, functionality evaluation and price and preference evaluation in order to short-list the top two bidders⁴ with whom Eskom would engage in the second phase of the evaluation.
- 2.2.20 The second stage of the evaluation contemplated negotiations with shortlisted/competing bidders. Pursuant to such negotiations, the bidders would be required to submit their best and final offers ("BAFO"), based on which Eskom would finally select the successful bidder with whom a contract would then be concluded.
- 2.2.21 By 22 November 2016, the closing date for Tender submissions, Alstom, MRSEC, Dongfang, Shany Engineering (Pty) Ltd, Sinohydro South Africa (Pty) Ltd and Rafoko SA had submitted their bids.
- 2.2.22 Eskom conducted tender evaluations for the mandatory criteria from 25 to 28 November 2016. The bids of Shany Engineering (Pty) Ltd and Sinohydro South Africa (Pty) Ltd were found to be non-compliant with the mandatory criteria and, on that basis, were eliminated from further evaluation.
- 2.2.23 Arising from phase one of the evaluation process, Eskom sought clarification from the remaining bidders concerning aspects of their bids, all of which contained several material deviations, assumptions and

⁴ This was subsequently amended by Eskom in circumstances I shall set out below.

exclusions which tended to complicate the evaluation process. Such clarification was sought to aid Eskom with price normalization.

- 2.2.24 During December 2016, Eskom sent clarification questions to Alstom, Dongfang, MRSEC and Rafako SA, all of whom had met the mandatory requirements and satisfied the functionality threshold.
- 2.2.25 On or about 22 December 2016, Eskom conducted a preliminary financial evaluation of the bids. I have already indicated that all four bids had significant exclusions and deviations. Accordingly, individual interaction was required with each of the four bidders to clarify the issues identified pursuant to the preliminary financial evaluation.
- 2.2.26 As part of this exercise, Eskom held pre-negotiation clarification meetings with Alstom, Dongfang, MRSEC and Rafako SA from 9 to 17 January 2017. At that point in time, no short-listing referred to in the RFP could be done because of the material deviations and exclusions contained in those remaining four bids.
- 2.2.27 Because of the risk associated with several deviations and exclusions contained in the remaining bids, the evaluation team resolved to approach, and accordingly made a written submission, to the BTC for the amendment of paragraph 1.4 of the RFP so as to extend the short-listing of the top two bidders to a minimum of two bidders and a maximum of four bidders.
- 2.2.28 This amendment was considered necessary and justifiable because of the possibility that the deviations and exclusions of the remaining bids could ultimately affect the successful and timely conclusion of the Tender process, resulting in the consequential exposure for the payment of the financial penalty by Eskom to the insurers and reinsurers of approximately R1.7 billion in terms of the settlement agreement.
- 2.2.29 On 20 January 2017, the BTC considered the submission of the evaluation team and resolved to authorize the required amendment of the RFP. This resolution was adopted pursuant to the powers vested upon the BTC in terms of Eskom's SCM Procedure.
- 2.2.30 Further, the amendment was made by the BTC in accordance with the provisions of paragraph 1.5 of the RFP which empowered Eskom to (a)

modify the Tender or any part thereof, at any time before the award and (b) negotiate with any one or more suppliers.

- 2.2.31 I respectfully submit that the amendment was rational and justifiable, having regard to the considerations upon which it was based and the objectives sought to be achieved thereby. That amendment is recorded in paragraph 2.2 of the resolution of the BTC which is annexed hereto and marked "**BN4**".
- 2.2.32 After the above resolution of the BTC, the evaluation team proceeded to conduct further evaluations of the remaining four bids based on the applicable evaluation criteria. The bid of Rafako was excluded from further evaluation because Rafako had indicated in writing that their submitted price was budgetary.
- 2.2.33 At the conclusion of phase one, as reflected in the evaluation report Revision 1, Eskom resolved to short-list three bidders, namely Alstom, MRSEC and Dongfang and invited them to the second stage of the evaluation, namely negotiations. A copy of the evaluation report prepared by the evaluation team (Revision 1) is annexed hereto and marked "**BN5**". All of the bidders elected to participate in the negotiations unconditionally.
- 2.2.34 In keeping with the competitive nature of the procurement process, negotiations with each of these bidders were held separately from 27 January to 27 February 2017. The details of these negotiations were set out in the invitations to negotiations addressed to each of the short-listed bidders, agenda for the negotiations and the minutes of those negotiations.
- 2.2.35 After the negotiations, Eskom invited all three bidders to submit their BAFO's on 3 March 2017. All of them did so. Those offers were then evaluated by the evaluation team which thereafter prepared a submission to the BTC on 08 March 2017. A copy of that submission is annexed hereto and marked "**BN6**".
- 2.2.36 It is important to point out that KPMG was appointed at the commencement of the procurement process in accordance with Eskom's SCM Procedure to ensure the fairness and transparency of the entire procurement process.

- 2.2.37 In its report, KPMG concluded that the process followed by Eskom was fair and in line with Eskom's SCM Procedure. It raised the concern regarding the recommendation for the award of the Tender to Dongfang on the basis that there was a need for Eskom to undertake a sensitivity analysis so as to address the risk associated with the award of the Tender to either Alstom or Murray & Roberts.
- 2.2.38 On 8 March 2017, in its resolution, the BTC noted the Duvha Unit 3 Recovery Project status and approved the recommendation to conclude a contract with Dongfang. BTC also authorised the Group Executive: Group Capital to take all the necessary steps to give effect to the above. A copy of the resolution is annexed hereto marked "BN7".
- 2.2.39 Following upon that resolution of the BTC and as informed by the issues raised in the draft KPMG proactive assurance audit report, dated 8 March 2017, Eskom appointed SekelaXabiso to assist in undertaking the sensitivity analysis to address those issues. SekelaXabiso did so and thereafter provided a report. SekelaXabiso, in its report, confirmed the rationale adopted by Eskom in arriving at its decision.
- 2.2.40 Based on the sensitivity analysis that was performed by Eskom with the assistance of SekelaXabiso, the evaluation team prepared a further submission to the BTC for noting dated 27 March 2017. Verbal feedback was given to BTC on 7 April 2017, as contained in the submission of 27 March 2017. A copy of that submission is annexed hereto and marked "BN8".
- 2.2.41 Having regard to the implementation of the Tender process as set out above, I submit that at all times, the BTC acted within the scope of its mandate and that its decision to conclude the contract with Dongfang was rational and justifiable on the basis of the information presented to it. On 28 March 2017, Eskom and Dongfang signed a written contract following upon the award of the Tender, which contract is currently interdicted from being implemented, in terms of part A, the interim interdict but is now in the process of being reviewed in part B of the legal proceedings.
- 2.2.42 I trust that the above provides clarity regarding the internal process which led to the selection of Dongfang and the involvement of the Board and its Committees in the procurement process of Duvha.

2.3 The circumstances surrounding the suspension of Messrs Tshediso Matona, Matshela Koko, Dan Marokane and Ms Tsholofelo Molefe and the reasons for the termination of service of the various executives who left Eskom

- 2.3.1 This matter falls outside of my tenure as the former Chairperson of the Board. My understanding is that Mr Tsotsi, in his capacity then as the Chairperson of the Board, motivated for the Board to urgently authorise the appointment of an independent investigation to be conducted by an external service provider.
- 2.3.2 It is also my understanding that Mr Tsotsi motivated for the suspension of certain key executives, whilst the investigation was being conducted. Apparently, he had suspected such executives of wrongdoing.
- 2.3.3 The affected positions included those of the Group Chief Executive Officer, namely, Mr Tshediso Matona ("**Mr Matona**"), Group Executive, Commercial and Technology, namely Mr Matshela Koko ("**Mr Koko**"), Group Executive Group Capital, namely Mr Dan Marokane ("**Mr Marokane**") and the Finance Director, namely Ms Tsholofelo Molefe ("**Ms Molefe**") respectively.
- 2.3.4 The investigation was eventually conducted but on different terms to those which Mr Tsotsi had initially proposed to the Board. The investigation was undertaken by a different service provider, namely Dentons Attorneys, and not Mr Nick Linnel, who had been appointed by Mr Tsotsi.
- 2.3.5 After the investigation was concluded, however, Mr Matona, who had filed a labour dispute case against Eskom, negotiated and settled his dispute out of Court and left Eskom. Mr Marokane and Ms Molefe also left the employ of Eskom. Only Mr Koko returned to his position at Eskom.

2.4 The employment of Mr Brian Molefe as Group Chief Executive at Eskom:

- 2.4.1 Mr Brian Molefe ("**Mr Molefe**") was seconded to Eskom as the Acting Group Chief Executive Officer ("**GCEO**") on 17 April 2015, for a period of 3 months. Prior to his secondment to Eskom, Mr. Molefe was a Group Chief Executive Officer at Transnet.

- 2.4.2 On 23 June 2015, I addressed a letter to the Minister, Lynne Brown, requesting her support and endorsement for the extension of Mr. Molefe's secondment as Acting GCEO for a further period of 3 months. Two further aspects were also contained in the letter, namely that a) the People and Governance Committee ("**P&G Committee**") had resolved to seek the full-time appointment of Mr. Molefe to the position of GCEO and b) Ms Venete Klein ("**Ms. Klein**") was tasked with procuring a legal opinion on the most optimal approach to follow to give effect to the appointment of Mr. Molefe.
- 2.4.3 The legal opinion was obtained from Bowman Gilfillan on 18 June 2015. Such opinion concluded that Eskom could appoint a GCEO without having to conduct an external search process and that the Board could provide the Minister with a shortlist of one candidate only, whom the Minister could elect whether to appoint or not.
- 2.4.4 On 27 June 2015, the Minister responded to my letter. In essence, the Minister agreed to the request for the extension of Mr. Molefe's secondment and also requested the Board to deal expeditiously with the appointment of a new GCEO in accordance with Eskom's Memorandum of Incorporation, Labour Relations Act and Eskom's employment policies and procedures. The Minister also requested to be provided with a copy of the complete legal opinion obtained.
- 2.4.5 On 13 September 2015, the legal opinion was transmitted by Ms. Suzanne Daniels ("**Ms. Daniels**") to Orcillia Ruthnam ("**Ms. Ruthnam**") - Chief Director: Governance of the Legal and Governance Department at the Department of Public Enterprises.
- 2.4.6 On 14 September 2015, Ms. Ruthnam responded to Ms. Daniels and enquired whether or not Bowmans had considered the "*Guidelines for the appointment of a Chief Executive Officer for a State - Owned Enterprise*". Ms. Ruthnam also enclosed a copy of the guidelines in her communication to Ms. Daniels.
- 2.4.7 On the same day, the abovementioned Guidelines were sent to Bowmans for a supplementary opinion. The issue to be reconsidered being whether or not in light of the provision of the Guidelines, the proposed process of appointing Mr. Molefe on a permanent basis as GCEO was competent.

- 2.4.8 On 15 September 2015, the supplementary opinion was received. In that opinion, Bowmans advised that the Board was actually required to make recommendations to the Minister on the top 3 candidates in the order of priority and that any proposed deviation from that requirement required the Board to notify the Minister in writing together with reasons for the deviation. On 16 September 2015, the supplementary opinion was forwarded to Ms. Ruthnam.
- 2.4.9 Ms. Klein subsequently submitted a notification of Eskom's departure from the application of the Guidelines by way of a letter to the Minister. I understand the letter was sent to her office by Ms. Daniels on 16 September 2015 with a signed version following thereafter, on 23 September 2015. I also understand that the Minister did not object to the departure.
- 2.4.10 On 10 September 2015, the Board resolved that the P&G Committee should submit a recommendation to the Minister around the appointment of Mr. Molefe as GCEO. On 11 September 2015, and pursuant to the aforesaid resolution, I addressed a letter to the Minister advising her of the Board's resolution to propose permanently employing Mr. Molefe as GCEO. A draft employment contract was annexed to the letter for the Minister's consideration and approval. I attach hereto a copy of the said letters marked "**BN9**".
- 2.4.11 On 2 October 2015, the Minister approved the appointment of Mr. Molefe as GCEO. In this regard, the Minister addressed a letter to me, copying Ms. Klein and also enclosing letters addressed to Mr. Molefe and Mr. Anoj Singh ("**Mr. Singh**"). The letters confirmed their appointments as GCEO and Chief Financial Officer ("**CFO**") respectively with effect from 1 October 2015. However, there was no indication of the duration of their respective appointments contained in such letters. Copies of the said letters are attached marked "**BN10**".
- 2.4.12 On 7 October 2015, a permanent contract of employment was prepared based on the inference drawn from the Minister's letter dated 2 October 2015 and addressed to Mr. Molefe, in that, no mention of a fixed term employment contract was made in that letter.
- 2.4.13 On 8 October 2015, Ms. Klein received an email from Ms. Daniels, drawing her attention to the exchange of email communication between

Ms. Daniels and Ms. Ruthnam regarding the term of appointment of Mr. Molefe. Ms. Ruthnam advised that the Minister had approved a five-year term for Mr. Molefe. Ms. Daniels had requested that Ms. Ruthnam verify this as Mr. Molefe's appointment letter had not stipulated a five-year term and secondly, that all previous GCEOs, at Eskom, were appointed on a permanent basis. Ms. Ruthnam advised that the five-year term was a cabinet requirement. Nonetheless, she said she would revert on whether or not the Minister would need to address the Board on the issue. According to Ms. Klein, she received no further correspondence on the issue and, under the circumstances, presumed the issue was resolved.

- 2.4.14 On 16 October 2015, I addressed a letter to the Minister on the proposed terms of Mr. Molefe's appointment and remuneration. The contents of the letter were informed by various inputs – P&G Committee from Mercer, PE Corporate and Deloitte on chief executive remuneration packages. The Board's understanding was that Mr. Molefe's employment would be on a permanent basis.
- 2.4.15 On 1 November 2015, the Minister responded to my letter of 16 October 2015, in which she approved the proposed remuneration package to Mr. Molefe, a copy of the Minister's approval is attached hereto as "BN11". The Minister further recorded that the term of Mr. Molefe's appointment was for a period of 5 years, subject to annual performance reviews. The Minister's letter was addressed to me as the then Chairperson of the Board, and was received by Ms. Daniels on 4 November 2015.
- 2.4.16 On 9 November 2015, I presented Mr. Molefe with a permanent contract of employment. For some reason or other, the Minister's letter dated 4 November 2015 sent to me and received by Ms. Daniels, did not come to my attention or the attention of the Board.
- 2.4.17 On 12 November 2015, Ms. Klein received an email from Ms. Daniels enclosing a draft offer of employment letter dated 13 October 2015 which specified that Mr. Molefe would enter into a fixed term employment contract with Eskom but the term was not specified. The Minister approved the proposed remuneration but confirmed that the term of employment would be for a fixed term of 5 years and the Board was tasked with the challenge of having to change the signed permanent contract to a five-year fixed term contract.

2.4.18 On or about 16 November 2015, Mr. Molefe was advised of the Minister's decision and various retirement issues were discussed between Mr. Molefe and myself. Following such discussions, I advised the Board that Mr. Molefe was willing to accept the five-year contract. I also advised the Board that Mr. Molefe had, however, expressed concerns regarding the perceived pension benefit which he understood to emanate from his permanent employment at Eskom.

2.5 Construction of the pension benefits for Mr. Brian Molefe

2.5.1 Upon considering the impact of losing Mr. Molefe in the event that a resolution could not be reached on the terms of his appointment, Ms. Klein and I sought the guidance of Mr Anton Minnaar ("**Mr. Minaar**") Executive Remuneration Officer at Eskom. Mr. Minaar was involved in the appointment of 7 previous GCEOs at Eskom in the then preceding six-year period. Mr. Minaar advised that all Eskom's previous GCEOs were employed on a permanent contract basis and that based on the fixed five-year term contract, Mr. Molefe would not be able to accumulate an equivalent pension benefit during his service at Eskom.

2.5.2 Based on the abovementioned advice, it was then agreed that an arrangement could be put in place to ensure that Mr. Molefe was not adversely affected in respect of his pension benefits. On 25 November 2015, Mr. Minaar assisted me in drafting a letter to the Minister, recommending that a retirement arrangement be reached with Mr. Molefe in order to allay his pension concerns, a copy of the said letter is attached as "**BN12**".

2.5.3 The arrangement proposed with the guidance of Mr. Minaar was such that:

2.5.3.1 Regardless of Mr. Molefe's age after the expiry of his five-year contract, he would be allowed to retire from Eskom's service on the basis that he was aged 63;

2.5.3.2 The penalties prescribed by the Eskom Pension and Provident Fund ("**EPPF**") for retirement prior to the age of 63 would be waived and not payable by Mr. Molefe. Eskom would then carry the costs of such penalties to be paid over to EPPF;

- 2.5.3.3 In the event that Mr. Molefe's employment contract was not extended beyond the five-year period, he would not be allowed to subscribe to any other state owned companies or government pension fund; and
- 2.5.3.4 Should the employment contract be extended, the costs of any subsequent penalties would decrease proportionately.
- 2.5.4 The effect of the abovementioned arrangement was considered to be such that Mr. Molefe would be in the same position that he would have been in had he retired from Eskom at the age of 63. The Board was in support of the arrangement.
- 2.5.5 On 25 November 2015, the terms of the arrangement were communicated by Ms. Daniels to the Minister's office. Receipt of the said letter was acknowledged and an undertaking made to bring its contents to the Minister's attention.
- 2.5.6 As at 9 February 2016, however, a formal response to the letter addressed to the Minister had still not been received and at that time, there was no formal contract of employment with Mr. Molefe.
- 2.5.7 On 9 February 2016, the P & G Committee met to deliberate on the conclusion of a contract of employment with Mr. Molefe, including the issue relating to his pension benefits. In order to better understand the distinction between appointing Mr. Molefe on a fixed term, as opposed to a permanent contract, basis and the options available to the Board for addressing Mr. Molefe's concerns, Mr. Minaar guided the Board. As already mentioned, Mr. Minaar explained to the Board that due to Mr. Molefe's short term contracts with numerous public entities in which he served at executive level, he was deprived of the opportunity to grow a pension fund in a single fund.
- 2.5.8 It was then resolved at the meeting of 9 February 2016 that:
- "7.5.1 the current EPPF rule that Employees may proceed on retirement from the age of 50 with 10 years' service remains applicable;
- 7.5.2 in cases where an Executive Director (appointed on a fixed term contract) decides to take an early retirement and there

is a shortfall regarding the EPPF 10 years' service rule, Eskom shall:

- i. bridge the gap to make up for the 10 years;*
- ii. waive the penalties applicable to early retirement; and*
- iii. refund EPPF actual costs for additional service added, plus penalties applicable to early retirement."*

7.5.3 a proposal in respect of the Chief Financial Officer to be considered and submitted to the Committee in due course."

A copy of this resolution is attached and marked "BN13".

- 2.5.9 It was the intention of the P&G Committee that the arrangement had to be structured in such a way that the benefit would only accrue to Mr. Molefe upon completion of his five-year term and that Mr. Molefe would not be able to participate in any other government pension fund after qualifying as per the resolution. Such intention was communicated to the Minister on 25 November 2017.
- 2.5.10 On 7 March 2016, Mr. Molefe signed a second contract of employment for a fixed term of 5 years with effect from 1 October 2015 and terminating on 30 September 2020. On 19 April 2016, the Board approved the resolution of the P&G Committee meeting of 9 February 2016.
- 2.5.11 On 6 September 2016, it was decided to increase the long-term incentive award for Mr. Molefe to two times the annual pensionable earnings on the basis that the amount was relatively low based on the benchmark against similar long - term incentive awards to the Chief Executives at this level.
- 2.5.12 On 24 October 2016, the P&G Committee approved the additional award in the form of an increase to Mr. Molefe's long-term incentive to two times the annual pensionable earnings.

2.6 The eventual payment of pension benefits to Mr Brian Molefe:

- 2.6.1 On 11 November 2016, Mr. Molefe formally submitted his request for an early retirement in terms of the EPPF rules read together with the resolution of 9 February 2016. In the same letter, he also indicated that his last day of service would be on 31 December 2016, copy of the said letter is attached marked "BN14".
- 2.6.2 On 15 November 2016, EPPF provided an early retirement calculation for Mr. Molefe based on an exit date of 31 December 2016. The total cost to Eskom for early retirement would be an amount of R25, 80 204.19.
- 2.6.3 On 21 November 2016, Molefe's retirement letter was discussed at a Special P&G Committee meeting. During the meeting, the terms of the letter requesting early retirement were supported.
- 2.6.4 On 24 November 2016, the response was provided to Mr. Molefe in which I approved his request for early retirement in terms of Rule 28 and Rule 21.4 of the EPPF rules. I also confirmed that all penalties would be waived and further that early retirement be on the basis that Mr. Molefe be deemed to have achieved the age of 63, a copy of my approval letter is attached hereto marked "BN15".
- 2.6.5 On 23 March 2017, the amounts paid to Mr. Molefe in respect of his salary, up to December 2016, were R575, 679.91, leave due to him in an amount of R226, 278.84 and a short-term bonus to the end of December 2016 in the amount of R2, 110, 185.00. The total amount paid to Mr. Molefe was the sum of R2, 912, 143.75.
- 2.6.6 On 19 April 2017, the Minister called a meeting to discuss Mr. Molefe's pension pay-out. It became evident at this meeting, that my letter to the Minister dated 25 November 2015 was not accepted by the Minister. The Minister stated in no uncertain terms that funds in the amount of R30, 103, 915.62 paid to EPPF in respect of Mr. Molefe's early retirement would not be permissible and should be repaid.
- 2.6.7 Following the meeting with the Minister, Ms. Klein and Ms. Daniels had a meeting later on that evening with Mr. Molefe, where it became apparent that he was already paid out 30% of the pension benefit in January 2017

and was also receiving monthly pension payments of R100, 000.00 since then.

- 2.6.8 According to Mr. Molefe, he only received R7, 700, 000.00 from the EPPF on being admitted to the EPPF and of this sum, R4, 300, 000.00 was transferred from the Transnet Pension Fund to the EPPF.

2.7 The Employment of Mr Singh as Financial Director at Eskom:

- 2.7.1 On 1 August 2015, Mr. Singh assumed the role of CFO at Eskom on secondment from Transnet where he held the position of CFO from about July 2012, having acted as the CFO since about 2009.
- 2.7.2 On 28 September 2015, the Minister announced that cabinet had approved the appointment of Mr. Singh as the CFO at Eskom in conjunction with Mr. Molefe's appointment as GCEO and my appointment as Chairman.
- 2.7.3 On 2 October 2015, when the Minister approved the appointment of Mr. Molefe as GCEO and addressed a letter to me to this effect, a copy of Mr. Singh's appointment letter was also enclosed therein. The letter confirmed Mr. Singh's appointment as CFO from 1 October 2015. However, there was no indication of the duration of his appointment. Please also see paragraph 2.4.11.

2.8 Eskom's response to the Public Protector's Report on the State of Capture, dated 14 October 2016:

- 2.8.1 The responses to issues that were raised by the Public Protector during her investigation were prepared by, and submitted to the Public Protector, by the Company Secretary and Head of Legal Services, Ms. Daniels.
- 2.8.2 The Board did not respond to the Public Protector's report. When the report was published and made available to it, the Board sought and obtained legal advice and guidance from senior counsel on what its rights and obligations were. In particular, the Board sought guidance as to whether or not it could take the report on review on the basis that the Public Protector had not given the Board and/or any of the individual directors specifically mentioned in the report an opportunity to respond to the issues raised therein in relation to them.

- 2.8.3 Senior counsel's opinion was that the Public Protector's report did not contain any findings but instead, it contained what he referred to as being observations. On that basis, he opined, the report could not be taken on review.
- 2.8.4 In amplification of his views, senior counsel pointed out that the primary remedial measure employed in the Public Protector's report was that a judicial commission of inquiry had to be established and that this remedy fits logically and appropriately with an investigation that was not as detailed as it might otherwise have been.
- 2.8.5 In other words, as counsel concluded, the impact of the report was to record a number of potential violations of law based on the information that was made available to the Public Protector and the call for a commission of inquiry to be appointed to make the final findings on these allegations of unlawful conduct.
- 2.8.6 The Board accepted senior counsel's advice. Hence no further action was taken in relation to the Public Protector's report.

2.9 The purchase of Optimum Coal Holdings by Tegeta from Glencore:

2.9.1 Pre-purchase of Coal from Optimum

- 2.9.1.1 On 8 December 2015, a round robin resolution was submitted to the Board by management. The submission was titled: Pre-purchase of Coal from Optimum Coal Mine (Pty) Ltd ("**OCM**").
- 2.9.1.2 The motivation for the round robin dealt with the security of coal supply to the Hendrina Power Station in light of the fact that OCM was placed under business rescue.
- 2.9.1.3 As part of motivating for this transaction, Mr Koko indicated that given the serious risk of security of supply to Hendrina Power Station, Komatie Power Station and Arnot Power Station (all of which are of key national interest), he considered it appropriate to bring this to the attention of the Director General in the Department of Mineral Resources. Mr Koko then requested intervention by the Department of

Mineral Resources to obtain a resolution of the problem of coal supply.

- 2.9.1.4 The Director General of the Department of Mineral Resources responded in a letter indicating that they would engage with the parties and take certain steps to assist in considering the significant risk to the country.
- 2.9.1.5 The Department requested that Eskom play an active role in supporting the rescuing of the mine and return for securing the honouring of the current contract up to 2018, to consider making a pre-payment for up to one-year coal supply. This was to ensure that supply was guaranteed and averting any national crisis.
- 2.9.1.6 It was indicated that with the funding of the pre-purchase of coal, Eskom was going to achieve a value benefit of R238.9 million. The motivation by management further indicated that the proceeds of the R1.86 billion pre-payment of coal were to be used by OCM to extinguish existing liabilities to ensure that the business continues as a going concern. It further stated that the shutdown of OCM could potentially result in thousands of job losses.
- 2.9.1.7 Pursuant to the abovementioned motivation / recommendation, the pre-purchase of coal was then approved by the Board by a round robin resolution on 9 December 2015.
- 2.9.1.8 Based on all the submissions made by management, the Board believed that this payment was for the pre-purchase of coal from OCM. The Board only learnt from the press in July 2017 that management had, in fact, converted what was meant to be a pre-payment for coal into a guarantee.
- 2.9.1.9 On the 10th of December 2017, Ms Caroline Henry who was a senior general manager for the treasury department in Eskom decided that instead of laying out the R1.6 billion in cash, she would prepare a note and rather request that a guarantee in favour of Tegeta be issued through ABSA.

2.9.1.10 According to Mr Singh (Eskom's former CFO), "The issuance of this guarantee was brought to the attention of various treasury officials via emails... who all thus had knowledge that the guarantee was issued. This is over and above Ms Caroline Henry the Head of Eskom Treasury – by and large this was the Treasury EXCO. This evidences the fact that the issuing of the guarantee was not concealed or kept from the site of the responsible officials in any way"⁵(sic).

2.9.2 **Purchase of Optimum Coal Holdings (Pty) Ltd ("OCH") by Tegeta from Glencore**

2.9.2.1 In December 2015, the sale and purchase agreement for the sale of shares and claims ("SPA") was signed. Tegeta purchased all of the shares in the issued share capital of OCM and purchased claims against OCM from OCH for an amount of R2, 100, 000, 000.00

2.9.2.2 The suspensive conditions of the SPA were, *inter alia*, that-

2.9.2.2.1 Eskom must consent to the sale and purchase of shares by Tegeta;

2.9.2.2.2 Release of the guarantee provided by OCH to Eskom;

2.9.2.2.3 Tegeta to issue a guarantee to Eskom in respect of its obligations in the CSA; and

2.9.2.2.4 Cession and assignment of rights in CSA to Tegeta.

2.9.3 To my knowledge, Eskom was not involved in the purchase of OCH by Tegeta (which was a commercial transaction between two private companies), nor the negotiations of the terms of the SPA. The role which was played by Eskom was to secure its interest in the coal supply by OCM (Pre-purchase of coal from OCM by Eskom) and to that extent, the

⁵ Written Narrative of Evidence to be presented by Anoj Singh on 5 December 2017 – Para 82 & 83

conditions precedent mentioned above, were inserted to protect Eskom's interests.

2.9.4 My understanding is that, Eskom's involvement in the sale and purchase of shares and claims by Tegeta from the Business Rescue Practitioner of OCM was limited to the approval of the cession and assignment of the coal supply agreement from OCH to Tegeta and this was confirmed by the Public Protector in page 251 of her report.

2.9.5 My understanding is further that on 8 April 2016, Tegeta made an offer to supply additional coal for the Arnot Power Station from OCM over a period of five months. This offer was made subject to a pre-payment to be made by Eskom for the supply of such coal.

2.9.6 The Board was advised that the purpose of pre-payment was to secure coal for Eskom, more particularly, of the high quality that was required by Arnot Power Station and further to ensure Tegeta's ability to meet the production requirements for both Hendrina and Arnot Power Stations in the short term.

2.9.7 In line with the above, on 11 April 2016, Eskom management approached the BTC to consider, on an urgent basis, the purchase of coal from Tegeta to supply Arnot Power Station for five months. The benefits for extending these Short-Term Contracts were presented to the BTC as including the following:

2.9.7.1 the fact that the coal was being mined and could be delivered without delay;

2.9.7.2 to alleviate the coal shortfall at Arnot Power Station due to the closure of Arnot colliery;

2.9.7.3 to alleviate the shortfall of coal requirements at Kriel Power Station due to the underperformance of Kriel Power Station Underground mine; and

2.9.7.4 by procuring this coal for Arnot and Kriel Power Station, it would assist towards building stock days.

2.9.8 The abovementioned requested approval by management was made in terms of Eskom's SCM Procedure, which provides, *inter alia*, that whilst Eskom does not encourage the provision of advance payments, an

advance payment may be an acceptable strategy for Eskom in certain circumstances. For example:

2.9.8.1 in cases where the supplier will have to make a big capital outlay before starting with the contract; and

2.9.8.2 it will only be issued on condition that the relevant contractual provisions relating to advance payments also need to be included in the contract.

2.9.9 The BTC approved pre-payment to Tegeta in the requested sum of R659, 558, 079.38 (six hundred and fifty-nine million five hundred and fifty-eight thousand and seventy-nine rand and thirty- eight cents) inclusive of VAT. The approval was made subject to the following conditions:

2.9.9.1 Eskom had negotiated a 3,5% discount with Tegeta;

2.9.9.2 Tegeta had obtained adequate and appropriate security for the transaction to safeguard Eskom's interests; and

2.9.9.3 Eskom management had provided a rationale for the commercial value that the transaction would have for Eskom.

2.9.10 My understanding is that in the Eskom environment, pre-payment of this nature is not necessarily unique and has been done in the past. It forms part of the procurement mandate approved by the BTC in 2008. It is used in large projects, coal mining contracts, and emergency supply contracts.

2.9.11 In this regard, it is also noteworthy that, in her report, the Public Protector stated that *"After evaluating the responses received from Eskom, it is clear that they do have the requisite policies in place which provide for a prepayment of coal to be made. This is in line with various agreements put in place by Eskom after the energy crisis in 2008."*⁶

2.9.12 However, the Public Protector also made the comment that *"Eskom had previously done extensive due diligence on OCM which formed part of the Co-Operation Agreement, they were aware of exact production*

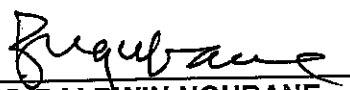
⁶ See page 310, para s) of the Public Protector's report on the State of Capture.

outputs for coal and the price of coal being supplied by OCM. At the time of concluding the contract with Tegeta for the supply of coal to Arnot power station, Eskom was fully aware that the sale of all shares in OCH to Tegeta had not gone through. It appears to not make commercial sense for Eskom to contract with Tegeta for a higher price of coal knowing exactly where the coal was being received from.”⁷

2.9.13 To that end, I point out that a preliminary legal opinion obtained by Eskom on this transaction indicated that Eskom was not in contravention of the PFMA in executing this transaction as it related to irregular and fruitless and wasteful expenditure. Financial sustainability is the overarching objective of the Eskom coal strategy – optimise value from the existing cost-plus mines (Paras 8.2 – 8.4)⁸

3. Conclusion

I trust that this submission will assist the Committee in the finalisation of its inquiry.


DR BALDWIN NGUBANE

DATE: 05/03/18

⁷ See page 311, para u) of the Public Protector’s report on the State of Capture

⁸ Submission by Board of Eskom to Portfolio Committee