IN THE ARMS PROCUREMENT COMMISSION OF INQUIRY

BEFORE TRIBUNAL

THE HONOURABLE MR. JUSTICE SERITI – CHAIRPERSON

THE HONOURABLE MR. JUSTICE MUSI (RETIRED) – COMMISSIONER

WRITTEN SUBMISSIONS OF EVIDENCE LEADERS

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A. **QUO VADIS SOUTH AFRICA – POST APC**

"*Now lastly with regard to … he mentioned that one of the [indistinct] turned down the request to appoint judicial commission of enquiry as part of this process of mishandling whatever. The evidence leader here this morning, Chairperson, you will recall that he spoke about a document which had inadvertently ben circulated which was responses that I have made to that [indistinct], to various Parliamentary, or in fact two Parliamentary questions. Once of them … let me explain that it had been inadvertently distributed and really was not part of the record, then indeed Chairperson you responded to that, but that one of these questions was about the setting up of this Commission, I do not want to really [indistinct] but at the centre of my argument Chairperson about this matter, was that there had been a very thorough investigation by state organs here in which the Government had full confidence, in other jurisdictions and in other investigations like in Germany, [indistinct] in contact with us and asked for legal assistance and this and that and the other, and in the end they dropped prosecutions against members of the German Frigate Consortium. I do not know where this British enquiry ended up of the Serious Fraud Office, which later took matters that the Advocate mentioned about what BAE Systems might have done, but I am saying in the end, there is this huge volume of work that has been done about this. An enormous number of documents and I am talking about Chairperson and I am very clear about this, I am talking about decisions taken by the Inter*

Ministerial Committee and decisions taken by Cabinet and I kept saying and I repeated this in Parliament, that if anybody, if anybody has got any evidence despite all of this investigation that has taken place, if anybody has got any new evidence I suggest ah we should do this by all means, we shall set up a judicial commission, but where is this evidence."[1]

1. Since the procurement of the equipment forming the Strategic Defence Packages (hereinafter referred as "the SDPP") by the South African Government in December 1999, involving the payment of large amounts of public funds, various allegations of impropriety, regarding the acquisition thereof have been made by a number of people.[2] In this regard, no less than 7 books have been written relating to allegations of some or other form of impropriety by government officials and some members of the cabinet involved in the procurement process at the relevant time.[3] Furthermore, countless articles and opinions have appeared in various media platforms regarding the SDPP.

2. In the course of writing their books about the SDPP, or the making of commentary and the expression of opinion in various media platforms

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[1] Former President Thabo Mbeki ("Mbeki"): transcript p7487 line 18 – 7488 line 24.

[2] See eg. Joint Submission of Andrew Feinstein and Paul Holden to the APC dated January 2013 [5x Arch lever files]; Submission by Dr. R.M Young [undated ± 10 x Arch lever files]; and Submission Terry Crawford-Browne, dated 13 June 2012, annexure "TCB 1A" at p69.

[3] "Eye on the Money", T Crawford-Browne; "After the Party", A Feinstein; "The Arms Deal in your Pocket", P Holden; "The Shadow World", A Feinstein; "The Devil in the Detail", H Van Vuuren and P Holden; "Eye on the Diamond", T Crawford-Browne; and "Up in Arms", R Taljaard.

by the different writers, the pointed criticism that was being made by the and commentators related, *inter alia*, to:

2.1 the rationality of the procurement of the equipment under the SDPP, when there were other socio-economic rights guaranteed by the Constitution which needed to be addressed urgently;

2.2 the use of offsets as a selection criterion for the award of government procurement contracts, as the substantial offsets that had been promised to flow from the procurement, it was claimed, were not likely to materialize and may become an obstacle to transparency;

2.3 the excessive costs that had to be expended by government in order to acquire the equipment forming the subject matter of the SDPP during a time when South Africa had no known enemies, nor was it under threat of war; and

2.4 the payment by some of the bidders of excessive amounts to certain South African citizens who were seen to be close to politicians, who were to be involved in the decision to award the various tenders.

3. Over and above what has been written about the SDPP, there has also been substantial litigation, both criminal and civil, arising out of

allegations of impropriety regarding the process that was under taken to award tenders to certain bidders and conclude contracts with them.[4]

4. It is a result of the criticism set out in the various writing referred to above and the outcome of the court cases that have been alluded to above, that momentum was gained by the critics to have a commission of inquiry to investigate into these allegations. One of the arguments raised in support of the call for the establishment of this commission of inquiry was the inference that some people close to the process may have unlawfully benefited from the acquisition under the SDPP.[5]

5. The Commission offers us a platform to interrogate whether the allegations and inferences made in the books and in the various newspapers referred to above, and those expressed in the various opinions that have been published, properly tested, make for a

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[4] Shabir Shaik, the brother to the DoD Chief of Acquisition, at the relevant time, was convicted, together with the companies he was a member of, by the Durban High Court during June 2005, for facilitating bribery payments on behalf of Thompson CSF (Thales) a member of GFC. The conviction aforementioned was in respect of charges relating to money laundering, corruption and fraud in circumstances where the trial judge states the following: "*The State's case was that draft fax spoke for itself. The arrangement discussed between Shaik and Thétard on 30 September 1999 was that the payment of the sum of money to Zuma in return for his help in the possible difficulties that they were facing; that this was put by Thétard to Perrier on his visit to Paris on 30 November and that thereafter at the meeting of 11 March of Thétard and Shaik with Zuma this was either put to and accepted by Zuma or to confirm to Thétard his acceptance of the suggestion already made to Shaik. In return for the sum of money offered he agreed to protect Thomson's interest* ***in any official investigation of irregularities into the Sitron programme, which it is common cause, was a reference to armaments suites of the corvettes,*** *and thereafter to promote Thomson's interest in its bids for more Government – driven public works in the future.*" (Du Plooy's statement at pp22 - 23.)

[5] Former Deputy Minister of Defence, R Kasrils ("Kasrils"): transcript p 7090.

compelling argument to justify a recommendation to be made for a proper investigation by competent investigative agencies to be conducted, with a view of bringing these allegations to a proper determination. This is more so that the inferences and allegations that have been made repeatedly over time appear to have metamorphosed to a point where they have almost become fact.

6. Important as it must be that the Commission should establish, *inter alia,* "*whether any person/s, within and/or outside the Government of South Africa, improperly influenced the award or conclusion of any of the contract awarded and concluded in the SDPP procurement process*", it would be of limited value if this process was not used to examine the full gamut of the SDPP. More importantly, this Commission must help government, through its various departments, with its procurement processes, especially where large amounts of public funds are to be expended.

7. It is instructive to note that the Terms of Reference, notwithstanding the inferences that someone may have unlawfully benefited from the acquisition process relating to the SDPP, are not confined only to allegations of impropriety in influencing the award or conclusion of any contract awarded and concluded in the SDPP, also seek to establish if the best decisions were made for the correct reasons, aimed at fulfilling the DoD's constitutional mandate as described in section 200 of the Constitution.

B. **THE APPOINTMENT OF THE COMMISSION**

8. On 4 November 2011, and following an application instituted by Terry Crawford-Browne in the Constitutional Court, the President established the Commission of Inquiry (hereinafter referred to as "the Commission")[6] and appointed the Commissioners with the mandate to enquire into, make findings, report on and make recommendations concerning the following, taking into consideration the constitution and relevant legislation, policies and guidelines:

8.1 the rationale for the SDPP;

8.2 whether the arms and equipment acquired in terms of the SDPP are underutilized or not utilized at all;

8.3 whether job opportunities anticipated to flow from the SDPP have materialized at all and:

8.3.1 if they have, the extent to which they have materialized; and

8.3.2 if they have not, the steps that ought to be taken to realize them.

8.4 whether off-sets anticipated to flow from the SDPP have materialized at all and:

[6] Government Gazette No. 34731, notice No. R926 of 4 November 2011.

8.4.1 if they have, the extent to which they have materialized;

8.4.2 if they have not, the steps that ought to be taken to realize them; and

8.5 whether any person/s, within and/or outside the Government of South Africa, improperly influenced the award or conclusion of any of the contracts awarded and concluded in the SDPP procurement process and, if so:

8.5.1 whether legal proceedings should be instituted against such cancellation, and the ramifications of such cancellation.

9. In these submissions we deal with the terms of reference set out in paragraph 8.5 above.

C. **APPROACH IN THE CONDUCT OF COMMISSIONS**

10. It is important, at this stage, to allude to the principles relating to the purpose of commissions of inquiry; the procedure to commissions; and the receipt and treatment of evidence by commissions, in particular, in contrast to those of other *fora* such as criminal courts, civil courts and inquests.

11. At the outset, we point out that a commission of inquiry, as is apparent from the name, is meant to be inquisitorial rather than adversarial. Its focus is an enquiry to establish facts. Its task primarily to gather information what is relevant to its mandate. The outcome of its process does not result in the passing of a verdict on the evidence adduced before it. In this regard, Human J stated the following in **State v Sparks NO and Others**:[7]

"*A court of law is bound by rules of evidence and the pleadings, a Commission is not. It may inform itself in any way it pleases – **by hearsay evidence** and **from newspaper reports** or even through submissions or representations or representations on submissions without sworn evidence. It also appears from the decision in **Bell v Van Rensburg NO** 1971 (3) SA 693 (C) at 707A that the audi alteram rule does not apply before a Commission…*"[8] (Emphasis supplied)

12. The value of a commission of inquiry is that it serves as an important tool of government to interrogate matters of vital public interest and importance; it provides the means of arriving at a balance between public and private good; it assists the government to formulate policy; it enables an examination of conflicting expert opinions; and it tests the strength of opposition to a project by giving more individuals and groups an opportunity to express their views. Public enquiries provide the public authority with a more precise appreciation of the public's

[7] 1980 (3) SA 952 (TPD).
[8] At 961C-D.

requirements and expectations and from citizen's point of view, commission of inquiry providing an opportunity to participate in the process of decision-making which affects their lives.[9]

13. In explaining the nature of commissions' function, Van den Heever JA, stated "*the proper function of a commission of inquiry is to find the answers to certain questions put (by the State President) in the terms of reference. A Commission is itself responsible for the collection of evidence, for taking statements from witnesses and for testing the accuracy of such evidence by inquisitorial examination – inquisitorial in the Canonical, not the Spanish sense*".[10]

14. It is also stated that the functions of a commission of inquiry are generally not truly judicial, because there are no facts in issue to be decided judicially, therefore the rules of evidence may be relaxed.[11] This is more so that the majority of the witnesses who gave evidence in this Commission were either the very government employees, alternatively, officials who are alleged to have conducted themselves unlawfully during the procurement process. It is therefore inescapable that those making the allegations of impropriety would not have independent knowledge or firsthand information of the allegations they make as they would not have participated in the processes complained

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[9] AJ Midleton: Notes on the nature and conduct of commissions of inquiry: South Africa, Comparative and International Law Journal of Southern Africa 1986, vol. 19, p252 *et seq*.
[10] Bell v Van Resnburg NO 1971 (3) SA 693 (C) 707H.
[11] (1982) 45 Tydskrif vir Hedendaagse Romeins-Hollanse reg 390 at 393/5.

of, themselves. Accordingly, to exclude hearsay evidence on which they rely would be akin to subverting the very purpose for which the Commission was established.

15. As has often been stated, a commission of inquiry is in fact nothing more than an advisory body to the executive authority.[12] And, as caution would dictate, a commission should not become the "*grey and penumbral arm of criminal justice*".[13]

16. While an objection may be advanced with regard to the reliability of hearsay evidence, it has been accepted that within the context of a commission of inquiry such objection would only relate to the weight to be attached to such evidence, rather than its admissibility, which should be determined by the commissioners when evaluating all the evidence that has been gathered during the fact finding process.[14]

17. We submit that the only constraint which forms a limitation to evidence that a commission of inquiry may accept is its terms of reference. Consequently, any evidence that may be relevant to the Commission's terms of reference ought to be admitted.

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[12] State v Mulder 1980 (1) SA 113 (T) 120F.
[13] (1980) 19 New Zealand Law Journal 425, at 424.
[14] See: Footnote 6 above.

18. On a different, but related subject, is the issue relating to the admissibility of the Debevoise & Plimpton report dated 13 April 2011,[15] in respect of which confidentiality and attorney and client privilege had been claimed, notwithstanding that the document has been in the public domain for several years. In this regard, the dictum of Price J in the case of **Andersen v Minister of Justice**,[16] in relation to the question whether the privilege such as the one claimed regarding this report still applies in an instance where the privileged document had been lost or stolen is instructive. The learned Judge states the following in this regard:

"*Mr McEwan contends that when a privileged document has by compulsion been removed from the possession of an attorney or client, it does not lose its privileged character. Admittedly,* ***when such a document is negligently lost or negligently communicated to some other person, the privilege is lost****.*"[17] (Emphasis supplied)

19. It will be argued later in these submissions that the dictum set out above, constitutes good law and that there can be no conceivable basis why the Debevoise & Plimpton report, amongst other documents submitted to the Commission by the various witnesses who gave evidence, should not be considered by the Commissioner insofar as it

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[15] See: TCB4 of Terry Crawford-Browne's statement at p173. This is a final compliance investigation which was commissioned by Ferrostaal, a member of the German Submarine Consortium ("GSC") that was awarded the contract to supply the DoD with 3 submarines.
[16] 1954 (2) SA 473 (NPD).
[17] At 479C-D.

may be relevant to the role played by Ferrostaal in the GSC, in their bid for the submarines procured under the SDPP.

D. **LEGAL FRAMEWORK**

20. Apropos the terms of reference addressed in these written submissions, there is a number of legal instruments, including policies and guidelines which apply to the issues that arise in this Commission. We refer only to those that pertinent to the submissions we make, below. It is also worth mentioning that the bulk of the evidence setting out processes, procedures and policies that were applied within the DoD family in relation to the acquisition of category 1 defence material were David Griesel of ARMSCOR,[18] Capt. J. De La Rey Jordan of the DoD,[19] and Barry De Beer, of ARMSCOR.[20]

The Constitution

21. Section 1 of the Constitution identifies the foundational values of the Constitution, *inter alia*, in the following terms:

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[18] Transcript: pp1820 – 1938.
[19] Transcript: pp 1408 – 1705.
[20] Transcript: pp 4489 – 4669. The policies dealt with by De Beer in his evidence were, *inter alia*, A-POL-6100: Policy in respect of Defence Industrial Participation as approved on 28 July 1997. See statement: p8, para 6.1-6.5.6; A-PROC 008: Defence Industrial Participation Procedures as approved on 28 July 1997. See statement: p10, para 6.1 and 6.2. These policies regulated the requirements which Defence Industrial Participation Bids had to comply with and also how such bids were to be evaluated by the responsible officials.

"*1. The Republic of South Africa is one, sovereign, democratic state founded on the following values:*

…

(c) Supremacy of the Constitution and the rule of law.

… ."

22. The Constitution is the highest law. The supremacy clause in the Constitution is contained in section 2. It expresses the principle of constitutional supremacy forcefully in the following terms:

"*This constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the duties imposed by it must be performed*."

23. **In Albutt v Centre for the Study of Violence and Reconciliation**,[21] the Constitutional Court noted that "*[it] is by now axiomatic that the exercise of all public power must comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of the rule of law.*" [22] In Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council,[23] the Constitutional Court held that in terms of this principle of legality, "*the exercise of public power is only legitimate where lawful*".[24] Furthermore, the court found that it "*seems central to the conception of our constitutional order that the Legislature*

[21] 2010 (3) SA 293 (CC).
[22] At para 49.
[23] 1999(1) SA 374 (CC).
[24] At para 56.

and the Executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law."[25]

24. The Constitution creates an ethos of accountability. The state and its officials, where appropriate, must be called to answer their action and must be subjected to critical scrutiny.[26]

25. The Constitutional Court has expressed the vision of the Constitution in the following terms:

"*What is perfectly clear from these provisions of the Constitution and the tenor and spirit of the Constitution viewed historically and teleologically, is that the Constitution is not simply some kind of statutory codification of an acceptable or legitimate past. It retains from the past only what is defensible and represents a radical and decisive break from that part of the past which is unacceptable. It constitutes a decisive break from a culture of apartheid and racism to a constitutionally protected culture of openness and democracy and universal human rights for South Africans of all ages, classes and colours. There is a stark and dramatic contrast between the past in which South Africans were trapped and the future on which the Constitution is premised. The past was pervaded by inequality, authoritarianism and repression. The aspiration of the future is based*

[25] Ibid para 58.
[26] See: Section 195.

on what is 'justifiable in an open and democratic society based on freedom and equality'. It is premised on a legal culture of accountability and transparency. The relevant provisions of the Constitution must therefore be interpreted so as to give effect to the purposes sought to be advance by their enactment."[27]

26. The Constitution was intended to be a "*ringing and decisive break with a past which perpetuated … arbitrary governmental and executive action*".[28]

27. Section 217 of the Constitution regulates procurement of goods and/or services by organs of state, *inter alia*, in the following terms:

> "*(1) When an organ of state in the national, provincial or local sphere of government, or any other institution identified in the national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and costs-effective*."

28. The effect of the aforegoing is, we submit that:

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[27] Per Mahomed DP (as he then was) in Shabalala & Others v The Attorney General of the Transvaal & Another 1996 (1) SA 725 (CC) at 740C-F, para 26.
[28] S v Mhlungu & Others 199 (3) SA 867 (CC) at 873-4, para 8 (per Mahomed J as he then was).

28.1 A "*system*" of procurement which is "*fair, equitable, transparent, competitive and cost-effective*" has to be put in place by means of legislation or other regulation.

28.2 Once such a system is in place and the system complies with the constitutional demands of section 217(1), the question whether any procurement is legally valid must be answered with reference to that legislation or regulation.[29]

The Armaments Development and Production Act No. 57 of 1968 ("the 1968 Act")

29. The Armaments Development and Production Corporation of South Africa Limited (hereinafter referred to as "ARMSCOR") was established in terms of section 2 of this Act. This Act was repealed in 2003 by the Armaments Corporation of South Africa Limited Act 51 of 2003.

30. When the 1968 Act was repealed in 2003, ARMSCOR continued to exist in terms of the repealing Act (hereinafter referred to as "the 2003 Act").

31. The 1968 Act applied during the acquisition of the SDPP.

[29] Chief Executive Officer, South African Social Security Agency and Others v Cash Paymaster Services (Pty) Ltd 2012 (1) SA 216 (SCA) para [15].

32. In terms of section 2 of the 1968 Act, ARMSCOR was established as a body corporate capable of suing and being sued in its corporate name and "*of performing subject to the provision of this Act, all such acts as are necessary for or incidental to the carrying out of its objects, the exercise of its powers and the performance of its functions*".

33. In terms of section 3 of the 1968 Act, ARMSCOR's objects were "*to meet as effectively and economically as may be feasible the armaments requirements of the Republic, as determined by the Minister, including armaments required for export*".

34. Of importance, ARMSCOR had the power to enter into any contract or perform any act, whether in the Republic or elsewhere, which might be necessary for, or incidental or conductive to the attainment of any of its objects or which was calculated directly or indirectly to enhance the value of the services which it might render in respect of any of the activities contemplated in the 1968 Act or which the Minister of Defence might from time to time determine.

35. In terms of section 5 of the 1968 Act, the affairs of ARMSCOR were to be managed and controlled by a board of directors. This is still the position under the 2003 Act, which endures to this day.

36. Furthermore, in terms of the 1986 Act, ARMSCOR was appointed as the Defence Matériel Acquisition Tender Board. Accordingly, the

authorization of contracts and the appointment of preferred suppliers, in terms of the 1968 Act were to be made by ARMSCOR. To this extent ARMSCOR developed its internal standards tendering and contracting processes which will be alluded to in the paragraphs below. It ought to be stressed though that in the tendering processes, the ARMSCOR Tender Board was responsible for all phases in the process.

E. **THE EXCHEQUER ACT 66 OF 1975**

37. Mr P.D Steyn, the Secretary for Defence, at the relevant time, gave evidence regarding the applicability of this Act during the acquisition process of the SDPP.[30] He testified that the provisions of this Act were applicable to him in his capacity as the accounting officer of the DoD.

38. In its long title, the stated purpose of this Act is, *inter alia*, to provide for the regulation of the collection, receipt, control and issue of the State moneys and the receipt, custody and control of other state property.

39. Section 15 makes provision for the appointment of, and the duties of an accounting officer of a government department in the following terms:

> "*(1) There shall be an accounting officer for each vote who shall be charged with the responsibility of accounting for all State moneys received, all payments made by him and the acquisition, receipt, custody and disposal of all State property.*

[30] Statement, paras 4.4 and 4.5; transcript: pp5995 – 6002.

(2) An accounting officer shall exercise the powers conferred upon him and perform the duties assigned to him by law, by regulation, by Treasury Instructions or by the Treasury."

40. Under section 38(1), it is provided that the further duties and responsibilities of accounting officer will include:

40.1 determining within the limits of the moneys which have been or could be made available the priority which should be given to the provision of a particular service;

40.2 determining and planning the most economical means by which a service can be effectively provided;

40.3 undertaking the most advantageous utilization of the moneys allocated to him in the approved estimates; and

40.4 accounting for all expenditure from state moneys under his control, and for ensuring that appropriate authority existed for all payments made by him and on his behalf.

SDPP Procurement Policies

41. Notwithstanding the legislative instruments which regulated procurement with the DoD as described above, various policies were

formulated which were intended to regulate the acquisition of the defence equipment by the DoD and ARMSCOR.

42. According to the evidence of Griesel and Jordan, The following ARMSCOR policies and practices were used during execution of the SDPP process:

KB 1000 – ARMSCOR Policy: Acquisition and Weapon System Management Support dated 1 May 1995.

43. This document provides for the policy for the management of military acquisition programmes that dealt with the acquisition of product systems and products. It is a high level ARMSCOR policy document that describes the technical baselines to be approved by ARMSCOR and is completely aligned with the DoD Acquisition Policy, VB1000. Where VB1000 describes the project governance milestones at level 6 of the Systems Hierarchy, KB1000 focuses on the technical baselines at level 5 of the Systems Hierarchy, being an ARMSCOR responsibility. It furthermore describes the composition of Baseline Review Boards which have the responsibility to approve each identified baseline and to authorize projects to continue to the next phase. The ARMSCOR level 5 baselines are aligned with the DoD level 6 milestones.

A-PROC-097 – Practice for the selection of contractual sources, Issue 2, dated 12 November 1997.

44. This document established the practice for the selection of contractors that could:

44.1 best meet ARMSCOR's needs as described in the Relevant Requests for Proposal ("RFP"); and

44.2 ensure the source selection process for the impartial, equitable and comprehensive evaluation of each offeror's proposal and minimize the cost of the selection process.

45. The document contains other provisions relating to, the roles and responsibilities of evaluators and process assurers, guidelines with respect to the determination of evaluation criteria and generation of an RFO and subsequent evaluation of the received offers.

46. In the SDPP process, the guidelines were used in the development of value systems and RFO's, but there were deviations in respect of the responsibilities of the ARMSCOR Program Manager and Project teams. The practice dictates that the process would be led by ARMSCOR and only provides for participation by the DoD on evaluation panels. In the SDPP process, some of the value systems and evaluation reports were finally approved and signed off by the DoD and not by ARMSCOR, thus constituting a deviation from the formal process.

KP021– Practice for the RFP's, Quotations and Order, Issue 2, dated 1 June 1993

47. This document sets out standard procedures and guidelines in accordance with which differentiated conditions of acquisition could be applied to ARMSCOR's various acquisition activities, to stipulate responsibilities in this regard and to ensure continuous control.

48. The issuing and management of a Request for Offer ("RFO") was also regulated by this practice document.

KP019 – Delegations.

49. The decision-making powers and delegations within ARMSCOR were described in this document. In terms of KP019, the ARMSCOR Board of Directors being the Tender Board, is the sole authority that can determine preferred bidders and also authorize contracts to be placed on identified preferred bidders. In the case of the SDPP's the preferred bidders were recommended by the Ministerial Committee and eventually authorized by Cabinet and the subsequent contract placement was also authorized by Cabinet, thus constituting a deviation from the legislated ARMSCOR process.[31]

[31] VB 1000 – General policy for the management of Category 1 Materiel Acquisition Process, Issue 2, dated 20 April 1994, the DoD and ARMSCOR proceedings relating to proper acquisition management were incorporated into the VB 1000, by merging LOG 12 Pamphlet 2 of the DoD AND KP 1000 of ARMSCOR.

VB 1000 – General policy for the management of Category 1 Matériel Acquisition Process Issue 2, dated 20 April 1994.

50. At the time of soliciting offers for the SDPP, the acquisition policy in use was the VB1000, dated 20 April 1994. VB1000 is an acquisition policy that was jointly developed and used by ARMSCOR and DoD. This document contains amongst others, the mandates and roles of ARMSCOR and the SADF in the acquisition process, as well as the policy to be applied with regard to the management of the acquisition process of armaments that is Category 1 Matériel though all the phases of the process.

51. Thee basis for the VB1000 policy related to risk abatement during the transformation of an operational needs statement, through conceptual design, detailed design development, culminating in industrialization and the eventual manufacturing of the product. The policy in essence as created to control and encourage locally designed and developed weapon system products.

52. The VB 1000 policy document sets out in its terms that the only 2 non-negotiable milestone documents of the project are the Staff Target and the Acquisition Plan. Submission of all other prescribed milestone documents is a derivative of the nature of the programme undertaken. It should be noted that the milestone documents contemplated in VB1000, were SADF (DoD) governance documents, and did not constitute mandatory ARMSCOR hold points. For example, the

mandatory AP in the SADF (DoD) environment did not constitute a hold point that from a policy perspective prevented ARMSCOR to authorized the financial ceiling for issuing a FA to ARMSCOR, without which ARMSCOR would normally not be in a position to consider authorization of a contract on a preferred bidder.

53. It should also be noted that this policy did not reflect the organizational structures that were formed post 1994 as an output of the MODAC1 process, namely Armaments Acquisition Control Board ("AACB"), AASB and AAC, and also did not sufficiently provide guidelines for foreign acquisitions of the nature of the SDPP.

54. The distinction with the SDPP was that each product system (save for the corvettes which were to incorporate the "*nominated*" local combat suite into a foreign main contract) was essentially for existing, foreign-designed and developed weapon system products that required certain adaptations or modifications to meet the unique South African requirements. It was accordingly necessary to adapt and interpret VB1000 so that it was integrated with a foreign procurement programme of this nature.

55. The SDPP was a unique acquisition management programme in that 7 cardinal project systems had to be brought to a common starting baseline. This required extensive interaction within the DoD with regard to individual authorization procedures. Approvals and

recommendations were obliged to be submitted to the DoD and ARMSCOR to corporate level for final approval and execution.

MODAC

56. Although both Griesel and Jordan had contended in both their statements and evidence that the VB 1000 was used during the acquisition of the SDPP, it became apparent that the unique nature of the acquisition sought to be made under the SDPP, new policies had to be formulated. This was necessitated by the fact that the acquisition sought to be made under the SDPP was to be acquired from foreign countries, had been initiated by foreign suppliers and, in any event, the international defence equipment offers there had been made fell outside of the scope of the existing policies. It is as a result of the aforegoing that the MODAC policies were formulated.

57. The MODAC policies that were eventually approved by the Minister of Defence in August 1996, briefly provided as set out below:

57.1 MODAC 1 - Technology and Armament Acquisition Management in the Department of Defence: The MODAC 1 report defined the roles of different parties within the Department of Defence, and established a new acquisition management process and approval structure. This included the establishment of the AACB, AASB and the AAC which replaced the existing mechanism namely the Project Control Board, the Defence

Command Council and the Defence Planning Council. This report was approved by the steering committee on 10 February 1995;

57.2 MODAC 2 – Defence Industry Policy: This policy deals with acquisition, industrial development and arms trade. The policy also mentions that all major foreign procurement contracts should contain countertrade agreements. This report was approved by the steering committee on 26 September 1995; and

57.3 MODAC 3 – The Organizational Structure of the Defence Acquisition Programme Management Organisation: The organisational structure of the Defence Acquisition Programme Management Organisation was investigated. A standard value-analysis methodology was used to analise alternative structures. The MODAC 3 analysis was presented to the steering committee on 31 May 1996 and the Minister decided that ARMSCOR would continue to operate as a state-owned company with statutory powers.

DoD Policy Directive No. 4/147: MoD Policy for Dealing with International Defence Equipment offers in the MoD

58. This policy only addresses the defence equipment offers of foreign initiated, international government-to-government cooperation

proposals. The structure of these proposals dictates the scope of interdepartmental involvement. In essence the policy intended to establish whether there was any strategic advantage in the multi-equipment proposals that had been received. It also provide, in broad terms, for the evaluation of such offers in order to identify individual projects that could eventually be handled in accordance with the VB 1000 policy. Non-government supported single product proposals are not addressed in this policy.

59. While the policy was drafted and subsequently discussed at the meeting of the CoD on 8 August 1997, with the intention of having it approved for application by the DoD and ARMSCOR, such approval was not forthcoming from the AAC, as it was initially intended. In any event it was not approved by the CoD.[32] Notwithstanding that this policy was never approved, it appears to have been widely applied by DoD officials, largely on the basis that it had not been withdrawn after it had been distributed at the conclusion of the meeting of 8 August 1997.

60. Furthermore, while the policy provides for a multi-tier approach in the evaluation of the offers, the evidence such as that the first, second and third orders evaluation processes did not materialize for the proper implementation of the policy.[33]

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[32] See: Steyn statement: p13, para 6.9 – 6.11. See also "PS5" to Steyn's bundle at pp151 – 157.
[33] See: Transcript

61. It is against the backdrop of the regulatory framework set out above that the various members of the joint project teams, and later SOFCOM, proceeded to deal with the various RFOs that had been submitted by the various suppliers of defence equipment that has been acquired under the SDPP.

F. ALLEGATIONS OF IMPROPER INFLUENCE IN THE LIFT/ALFA PROGRAMME

62. In this section we attempt to address the question whether any person or entities were in a position to influence the selection of the prime contractor, which, in terms of this programme the Hawk was eventually appointed the winner.

63. It appears to be common cause that the Hawk is one item of equipment that was acquired under the SDPP which did not win during the evaluation rounds due to its excessively high costs.

64. It is also common cause that when the rounds of evaluation of all responses to the RFO commenced, these evaluations were to be undertaken in accordance with a value system that have been approved and had been secured by the ARMSCOR secretariat. Consequently, when the different suppliers of equipment responded to the RFO, they had a legitimate expectation that their bids would be evaluated in terms of what appeared in the RFO and approved value

system. It is important to note that each of the suppliers was required to include the cost of supplying the equipment which would also be evaluated, and would be an important consideration towards determining the successful bidder.

65. The aforegoing notwithstanding, minutes of the joint AASB/AAC meeting of 30 April 1998, reflect at paragraphs 8 and 9 thereof that the project team presented the meeting with an affordability analysis of lift contenders.[34]

66. The minute reflects without cost considerations, the selection process was biased towards the higher performance category of aircraft, which are significantly more expensive to acquire, operate and maintain. The members of the project team indicated that unless additional funding could be found to support the acquisition of a more superior aircraft, the Air Force would have to take cognizance of budgetary constraints in the selection process.

67. At paragraph 9 of the minute, it reflects that the Minister of Defence, at the time the late Joe Modise, cautioned the meeting that a visionary approach should not be excluded, as the decision on the acquisition of a new fighter trainer aircraft would impact on the RSA defence industry's chances to be part of the global defence market through partnership with major international defence companies, in this case

[34] See: Steyn's bundle "PS19", p234-236.

European companies, with this vision the most inexpensive option may not necessarily be the best option. The minister requested that the DoD acquisition staff should bear this vision in mind during the selection process.

68. After the discussion recorded in the minute set out above, the Minister of Defence instructed the project team to issue RFOs to a shortlist of approved contenders, namely:

68.1	Aermacchi	-	MB 339FD
		-	YAK 130
68.2	Aero Vodochody	-	L159
68.3	British Aerospace	-	HAWK 100

69. At the AASB meeting of 8 July 1998, a report was made on the progress relating to the response to the offers which had been sent to various approved shortlisted suppliers. With regard to the lift programme two options were provided as follows:

LEAD IN FIGHTER TRAINEE: COST OPTION RANKING:

1. ITALIAN MB 339FD (100)
2. BRITISH HAWK (96.5)
3. CZECH L159 (84.3)
4. ITALIAN YAK 130 (77.5)

NON COST OPTION RANKING

1. BRITISH HAWK (100)
2. ITALIAN MB 339FD (87.5)
3. CZECH L159 (86.3)
4. ITALIAN YAK 130 (4.6)

70. It is beyond dispute that while the issue of the Hawk and the MB 339FD cost lot of controversy between the secretary for defence, on the one hand, and the chief of acquisition, the Minister of Defence, and the Deputy Minister of Defence, on the other hand, the final decision relating to which aircraft would be awarded the contract rested with Cabinet. It, however, depended on the information that would be placed before it by those who would have conducted the requisite evaluation rounds.

71. At the CoD meeting of 21 August 1998 the purpose of which was to brief members of the CoD with the offers received, evaluated, and costed, a discussion ensued as presented by the chief of acquisition, Shamin Shaik, regarding the effect that each of the equipment would have on the budget. With regard to the lift programme, the minute of that meeting records the following:

"*7.3.7 If the Hawk aircraft is chosen instead of the MB 339 THE Air force has a deficit of R2 986 billion instead of R618 million. The Hawk increased the total expected deficit to R9 716 billion instead of R7 349 billion. The strategic decision required is do we choose the MB 339 or the Hawk. The recommendation of the AASB is the cheaper option namely the MB339.*

7.3.8 The Secretary for Defence remarked that the Hawk doubled the cost of the LIFT aircraft for an increase in performance of

approximately 15% hence the AASB recommendation that the cheaper option be recommended.

7.3.9 The Minister enquired as to what the recommendation of the Minister of Trade and Industry was. The availability of funds was secondary. The amount of investment coming in was of primary importance. The business plan was all important. That is why so many of the companies involved are trying to improve of their bids. From the very beginning we knew we did not have the funds to pay for the packages. That is why we opted for the way we have been operating – not through a normal tender process but through an option of partnerships in which the participating countries empower us through investments and favourable deferred payments to buy their equipment."[35]

72. At the special briefing of the Ministerial Committee on 31 August 1998, the two options that were proposed regarding the lift were presented, and the committee decided to recommend the Hawk to Cabinet for consideration in respect of the lift programme.

73. From the minutes of the AAC set out above, the inference, we submit, is inescapable that that the visionary approach influenced the decision for the choice of the Hawk in respect of the lift programme, based on their visionary approach that was initially proposed by the Minister at the meeting of 30 April 1998, to consider the shortlist of the contenders

[35] See: Steyn's bundle "PS24" p317-319.

for the lift, and again emphasized by the Minister at the meeting of 21 August 1998. It is also common cause, we submit, that in terms of a value system in terms of which the offers presented by the approved shortlisted suppliers, the "*visionary approach*" that was proposed by the Minister could not be quantified in any objective manner to allow for proper valuation. Furthermore, the proposal does not appear to admit itself to principles of procurement by organs of state within the contemplation of section 217 of the Constitution.

74. By virtue of the circumstances set out above, we submit that the Minister of Defence maybe viewed as the person within the government of South Africa who influenced the award and the conclusion of a contract regarding the lift programme to the BAE Hawk.

75. There is no direct evidence that suggests that in making the proposal that would benefit BAE to be awarded a contract for a lift programme, the Minister of Defence may have been induced to do so. In fact, all of the witnesses who testified before the Commission disavowed any suggestion that the members of the inter-ministerial committee had acted in a corrupt manner in recommending the BAE Hawk over the MB 339 for the lift programme.

76. Having said the aforegoing, however, a bitter taste is left in the mouth if one has regard to the various documents that were presented before the Commission regarding the plea agreements that were concluded by

BAE Systems plc during 2011 with the United States Department of State Bureau of Political Military Affairs, in respect of charges relating to "*causing unauthorized brokering, failure to report the payment of fees or Commissions associated with defence transactions, and the failure to maintain records involving ITAR – controlled transactions*".[36]

77. In the summary of the proposed charging letter dated May 2011, the summary of investigation provided records, *inter alia*, the following:

"*In 1995, Respondent formed a joint venture with SAAB AB, Sweden by the name of SAAB-BAE Systems Gripen AB. The primary purpose of the joint venture was to leverage Respondent's expertise in marketing and selling aircraft and providing after-sale services for the JAS-39 Gripen aircraft. Subsequently in 2002, Respondent and SAAB AB formed Gripen International KB for similar reasons. Respondent's subsidiary, BAE System (Operations) Ltd, and SAAB AB served for a time as the contracting and payment vehicles for Gripen International KB. In 2005, SAAB AB assumed the marketing responsibility for new campaigns from Respondent, although Respondent continued from 2005 to support marketing efforts in relation to South Africa, the Czech Republic, and Hungary only and remains in full partner in the joint venture.*

From 1995-2004, eight written requests (also known as General Correspondence requests) were approved by the Department for SAAB AB to market JAS-39 Gripen aircraft, which incorporated US defence

[36] See: Cross-examination bundle of Thabo Mbeki, prepared by Lawyers for Human Rights, p140 – 219.

articles. US defence services were provided to modify the aircraft for major US Systems and sub-systems. The countries and years approved were: Hungary 1995, Poland and Czech Republic 1996, Chile and Philippines 1997, Brazil and South Africa 1998, and Thailand 2004. Respondent also engaged in brokering activities in all eight countries during this period, but did not submit any requests for approval.

From 1998-present, Respondent exported the "Hawk" Trainer aircraft to the following six countries: Indonesia 1999, Australia and Canada 2000, Bahrain and South Africa 2006, and India 2007."[37]

78. In Chapter 6 of Johan Du Plooy's statement, he set out in greater detail, and with the support of documentary evidence the involvement of BAE in a joint investigation with the Serious Fraud Office, London, United Kingdom regarding allegations of payment of overt and corvette bribes by BAE amounting to £155 million (2 billion) to secure its contract with South Africa. The documents referred to by Du Plooy in his statement also set out to whom the bribes were paid and which bank accounts in South Africa were credited. These documents further deal with payments made by BAE to various beneficiaries through a company referred to as Red Diamond Trading Company and is incorporated in the British Virgin Island.

[37] Footnotes omitted.

79. By virtue of the facts set out above, the paper trail referred demonstrates that BAE may be regarded as an entity which may have unlawfully influenced the award and contracting in respect of the Lift and Alfa programmes in the SDPP, which require further investigation.

G. **ALLEGATIONS OF IMPROPER INFLUENCE IN THE SUBMARINE PROGRAMME**

80. Again in respect of this programme there is no direct evidence that was tendered before the Commission on the basis of which allegations of improper influence may be demonstrated against either the German Submarine Consortium that eventually awarded the contract for the supply of three submarines to the South African Navy.

81. However, what raises a suspicion that a member of the GSC may have acted in an unbecoming manner in influencing the award of the submarine tender to it appears to be contained in the Debevoise and Plimpton compliance report which was prepared in respect of Ferrostaal, a member of the GSC, in 2011. In that report, it appears that Ferrostaal acknowledges that bribes of at least €37 million were paid to Shamin Shaik, the DoD's chief of acquisition at the relevant time, a certain Tony Georgiadis; Tony Ellingford and Others. We deal with the Debevoise and Plimpton report later.

82. It is of interest to note that in its report, the JIT found that the GSC came last in the tendering criteria for the sub-marine contract, but the

exaggerated off set promises placed it first in the overall selection criteria.[38]

83. While the Debevoise and Plimpton report may have been marked "*confidential*" and some form of privilege was claimed in respect thereof, we have already submitted that in view of the widespread publication of the document, whatever privilege may have attached to it was lost when the document came into the public domain. On the basis of the authority that we have cited earlier in these submissions, we wish to point to the parts of that report which are of relevance to the submissions. We do so below:

"*Offset commitments were a particularly important part of the tenders for the submarine contract. In fact, official South African government documents show that the Ferrostaal consortium won the contract because of its superior offset offer.*

The consortium agreed to deliver offset spending worth almost €3 billion. It should be noted that this did not require investment actually worth €3 billion; rather offset investments are granted multipliers by South Africa's Department of Trade and Industry (DTI), one of the contract signatories on the South African side.

The offset provider would thus invest a figure that was unknown at the start of the project but in any event significant less than €3 billion. In its internal calculations, Ferrostaal expected that it would only need to

[38] See: Statement by Terry Crawford-Browne, para 5.29, p36.

provide investment of approximately 1.5 percent to 2 percent of that amount, and indeed it ultimately spent €3 billion.

The [submarine] bid was predicated on one very large project; a stainless steel plant at Coega on the South African coast. However, between the signing of the contract in December 1999 and its coming into force in July 2000, it became clear to Ferrostaal that it would not be able to proceed with the Coega project. The DTI at that stage then agreed that Ferrostaal could fulfil its offset obligations through other projects.

In order to find and invest in these other projects, Ferrostaal established a new South African subsidiary, FERISA. Between 2001 and 2010, Ferrostaal AG transferred approximately €35.1 million to FERISA, most of which FERISA spent on loans and capital contributions to offset companies. Ferrostaal AG wrote off almost all of that amount.

As note, investment figures in the offset world are not as they seem as first glance. A project is proposed to the DTI, which then assesses it on a number of criteria, particularly the following three: sustainability (that the project will be long lasting and provide benefits into the future); additionally (that it will provide benefits which did not exist before); and causality (that a project would not happen without the offset partner). Other criteria include involvement of non-whites (historically

disadvantaged individuals in South African government terminology) and the expected amount of exports to be generated.

Ferrostaal employees referred us to the frequent use of a "non-refundable loan" to make offset investments. Functionally, there is no difference between this and a straightforward grant, which was confirmed by the accounting and tax personnel interviewed in the course of the investigation.

Examples [cited] illustrate that Ferrostaal was prepared to support and invest in projects, including through such loans, and that it seemed to have had little interest in succeeding. One former manager responsible for offsets said that this just confirmed the questionable nature of the offset business, in which DTI credits were the only real factor driving Ferrostaal's investment decisions."[39]

84. The JIT report had also indicated, with regard to various suppliers of the sub-marines, including GSC, that they had not complied with the DIP evaluation requirements, in that:

"*(i) No confirmation by bidder form was submitted with the proposal, a fact that was also confirmed by the bidder during his presentation.*

(ii) In terms of the RFO requirements, a critical requirement was not met.

[39] See: Terry Crawford-Browne's bundle, TSB4 at 173.

(iii) Furthermore, due to the absence of this 'Bidders Confirmation' there was no confirmation that a guarantee had been supplied, which again is a critical element not met.

(iv) A formal presentation to explain their business plan to meet the DIP, was made by GSC on 15 May 1998. During this meeting the bidder tabled the missing Bidders Confirmation', dated 12 May 1998.

(v) The bidder was told clearly that this constituted a late submission as well as additional documentation which will not be considered for evaluation purposes, and that the matter will be referred to higher authorities for confirmation.

(vi) The bidder also committed himself to:

Direct DIP 7% ($59 million)

Indirect DIP 12% ($102 million)

However, in both cases this was on a collective basis, i.e. they could not relate to any specific project or activity as required by the RFO.

VII) A number of presentations highlighting some very promising projects (ie Siemens and STN ATLAS) as well as various other activity elements were mentioned with regard to direct DIP but no offset values were or could be allocated to any activity.

(viii) accordingly, no business plan as required was submitted to detail how the DIP commitment will executed.

(ix) GSC confirmed that, at that stage, they were not in a position to allocate any values to any specific activities.

(x) It needs to be mentioned that a large number of MoUs, all relating to programmes still to be finalized, were submitted.

(xi) No specific details were given on how they planned to fulfill the indirect DIP, although there were many intentions.

(xii) GSC again confirmed that, at that stage, they were only prepared to commit themselves to a firm 7% DIRECT DIP ($59 million) and 12% INDIRECT DIP ($102 million) as overall figures without any allocation to any individual activity, although they felt confident that they could exceed these figures as time passed."[40]

85. Despite a legal opinion furnished by ARMSCOR suggesting that the GSC and the other entities ought to be disqualified for their failure to comply with the requirements aforementioned, it appears that SOFCOM, without having the authority to do so took a decision to allow the non-compliant proposal to be evaluated and for the bidders to remain in the competition.[41]

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[40]See: RMY111, pp1324 – 1325.
[41] See: Berry de Beers statement, at paragraphs 15.12 – 15.15 and BD14 .

86. From the facts set out above, it does appear that the GSC, had the procurement rules, especially the DIP evaluation requirements been properly applied, the GSC would not have been awarded the tender to supply the three submarines, at worst and, at best the tender would have been re-advertised subsequent to which they would have been required to comply strictly with the terms of the tender.

87. We submit that as the SOFCOM constitution, which was never adopted in the first place, did not give it any authority to make any decision, the decision purportedly made by it to allow the non-compliant proposal to be evaluated may be regarded as an improper conduct that influenced the award of the submarine tender to the GSC, when it was not, by right, still entitled to be participating in the evaluation process. Consequently, it is our view that those members of SOFCOM who made the decision would be liable for having improperly influenced the award of the submarine to the GSC.

H. **ALLEGATIONS OF IMPROPER INFLUENCE IN THE CORVETTES PROGRAMME**

88. Again, with regard to the DIP requirements in respect of the corvettes, Berry de Beer record instances of non-compliance regarding the GFC as follows, that its DIP bid:

88.1 did not comply with 50% DIP requirement in respect of Confirmation of Bidder form;

88.2 did not comply with the 60% requirement for the combat suite; and

88.3 did not supply DIP Business Plan and Target Planning Schedule; a number of smaller deviations were also noted.[42]

89. Rather than disqualify the GFC bid it was allowed for further evaluation by SOFCOM. We submit that similar consideration as submitted with regard to the GSC bid should apply with equal force in respect of this programme.

90. The bulk of the allegations regarding the improper influence in the award of the corvette programme to the GFC were made by Dr Richard Young. The basis of these allegations is found in annexures “RMY52” to “RMY55” of Dr Young’s witness statement.

91. Annexures “RMY52” to “RMY55” make various allegations of improper payments made by one of the members of the GFC. Whilst the Commission is not bound by Dr Young’s interpretation and analyses of these documents, we submit that the documents contain serious allegations that require proper interrogation. The issue of the various

[42] Ibid.

MLA's referred to by Mr Du Plooy lends credence to the view that these allegations require further consideration and investigation.

INDUSTRIAL PARTICIPATION

92. Paragraph 1.4 of the Terms of Reference of the Commission, enjoins the Commission to inquire into:

92.1. Whether off-sets anticipated to flow from the SDPP have materialised at all and:

92.1.1. if they have, the extent to which they have materialised; and

92.1.2. if they have not, the steps that ought to be taken to realise them.

93. Two kinds of Industrial Participation obligations were applicable to the SDPPs:

93.1. Defence Industrial Participation ("DIP"), administered by ARMSCOR; and

93.2. The National Industrial Participation ("NIP"), which is administered by the Department of Trade and Industry ("DTI").

DEFENCE INDUSTRIAL PARTICIPATION

94. Mr Barry De Beer and Mr Peter Daniel Burger testified on behalf of ARMSCOR on the DIPs.

95. Mr De Beer provided a synopsis of the history of offsets in the defence industry in South Africa and the policy development in this regard over the years. It is common cause that DIP obligations of up to 50% are applicable to all defence/military acquisitions and procurement contracts placed on foreign suppliers by Armscor where the contract value exceeds USD 10 million. In regard to the SDPP the threshold of at least 50% was stipulated.[43]

96. The DIP Terms stipulated that the DIP contracts could include a combination of six DIP activities (including local industry participation, technology transfer, exports, equity investments etc.

97. Both witnesses confirmed that the DIPs were delivered in accordance with the DIP Terms and the Umbrella Agreements and no modification and/or amended was effected.

98. The DIP Obligations were contracted for in accordance with the DIP Terms. Mr De Beer testified that within the SDPP context, a total number of 111 local companies were included in the DIP Business Plans, with a combined value of R14,4 billion in 1999 economic terms.

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[43] Witness statement, Mr Burger, p15 para 9.2

This represented just over 50% of the combined contract value of R29 billion (1999 economic terms)[44].

99. Mr De Beer testified that as at 31 March 2013 the DIP Obligations were at 93,83% complete. As at this date, all the sellers had fully complied with their DIP Obligations, except for GFC which was at 68.28% completion. This was as a result of a contractor to the Combat Suite, MBDA of France, that had at that date not discharged its obligations in full.[45]

100. Mr Burger advised the Commission that Armscor was in discussion with MBDA to resolve the matter and to tender a proposal to Armscor for the discharge of the outstanding obligations.

101. The testimonies of Messrs De Beer and Burger were not challenged through cross-examination. No witness has tendered evidence that is inconsistent with theirs insofar as the management and performance of the various NIP Obligations are concerned.

102. We submit that the evidence of these witnesses stands unchallenged and the Commission ought to accept it without qualification.

103. In the premises, it is our considered view that sufficient evidence has been placed before the Commission that demonstrates that the DIPs anticipated to flow from the SDPP have materialized, with a completion

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[44] Witness statement Mr De Beer, p 47, para 20.1
[45] Transcript, Mr De Beer 06 March 2014, p4774 line 9 to p 4775 line 3; Transcript, Mr Burger 12 March 2014 p 4860 line 20 to p 4861 line 17

percentage of 93.83%. The outstanding obligations of MBDA are being pursued by Armscor.

104. Armscor must take all reasonable steps to ensure that MBDA delivers on its outstanding obligation.

NATIONAL INDUSTRIAL PARTICIPATION

105. During 1997, the Cabinet approved the *National Industrial Participation Programme* of the DTI. The Policy prescribes that all government and parastatal purchase contracts with an imported content equal to or exceeding US$10 million (or the equivalent thereof) are subject to an Industrial Participation Obligation[46]. It is common cause that at the conclusion of the SDPP contracts this was the applicable policy in relation to Industrial Participation ("IP").

106. The Policy contemplates the award of credits for the attainment of specified NIP objectives. The nine objectives for which credits are awarded are stipulated in the Policy, indicating the applicable factor in determining the credits to be awarded the respect of each. These nine objectives were described by Mr Rustomjee as essentially capturing the main policy objectives of the DTI[47].

107. It is common cause that the IONT resolved to assess NIP projects on three of the nine criteria – commitment to investments, exports and local sales. The effect of this was that bidders would not be eligible for

[46] A copy of the Policy is attached to Dr Jourdan's statement as annexure "PPJ6"
[47] Transcript 20 January 2014, p 3982 lines 14-15

credits for the other six criteria, even if they delivered on them. This was the contracted position.

108. It is also common cause that the above position adopted by the IONT was accepted by the bidders and became a term of the Agreements concluded with the bidders. All the witnesses of the DTI confirmed this and stated they were aware that in terms of the SDPP NIP Agreements, credits would only be awarded for investments, exports and local sales[48].

109. The NIP Terms stipulated the applicable credit calculation methodology that would entitle the Seller to claim NIP projects. In this regard the Terms provided that 1 NIP credit would have a value of 1US Dollar. The NIP Terms further prescribed the aggregate credits in respect of investments, exports and local sales respectively, which aggregates the seller undertook to achieve, and prescribing the monetary value in respect of each of the three criteria.

110. The NIP Terms specifically provided that the Umbrella Agreements and these Terms constitute the whole agreement between the Parties relating to the NIP Obligations.

111. Where parties have decided to embody their agreement in a written document, the document itself becomes the sole memorial of the terms

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[48] Dr Jourdan – Transcript 20 January 2014, p3937 lines 20-21
Dr Rustomjee – Transcript 20 January 2014, p 3985 lines 14-25; p4007 lines 9-16
Mr Zimela – Transcript 21 January 2014, p4127 lines 14-18

of the transaction which it was intended to record. On signature of the Agreements and the NIP Terms, the provision relating to the criteria for which credits would be awarded became a material term, binding on the parties. Neither party could, without the express consent of the other, amend such a material term.

112. The NIP Terms did not contemplate a change to the three stipulated criteria for which credits would be awarded. Neither did they contemplate a deviation from the prescribed credit calculation methodology nor the awarding of credits other than as provided for therein.

113. Dr Philip Paul Jourdan, the former Deputy Director General of the DTI and member of the International Offers Negotiating Team ("IONT"), stated in his statement that it was an express agreement between the IONT and the obligors that credits would only be given at a 1:1 ratio, and subject to causality and additionality[49]. This was a departure from the credit methodology that is set out in the NIPP Policy and effected with the full knowledge of the obligors.

114. This was also confirmed by the various other DTI witnesses. In fact Mr Pillay categorically stated that:

> *"With the full knowledge of all the bidders the credit methodology was changed so that investment would be calculated on a non multiplier basis….and the same for exports and sales. The standard guideline for NIP would no longer apply*

[49] Statement of Dr Jourdan, paragraph 9

in relation to the credits methodology contained in the guideline".[50]

115. During his testimony Mr Pillay unequivocally stated that the agreements concluded were clearly on the basis of one-to-one credit methodology and the contract is absolutely clear on this.[51]

116. As the NIP Terms specifically provided that the Umbrella Agreements and the Terms constituted the whole agreement between the Parties relating to the NIP Obligations, the DTI could not rely on any other internal departmental policy for the discharge by the obligors of their NIP obligations.

117. Notwithstanding the provisions of the NIP Terms, the DTI deviated therefrom, with the result that credits were awarded:

117.1. Based on criteria other than the three stipulated in the DIP Terms;

117.2. On the basis of a multiplier credit calculation methodology in direct contravention of the Terms; and

117.3. Through a system of upfront package deals not contemplated in the NIP Terms.

118. The former Minister of Trade and Industry, Mr Alec Erwin, states in his witness statement that the negotiating strategy adopted by IONT in regard to the NIPs did not override the policy objectives of NIP or the

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[50] Vanan Pillay - Witness statement para 14
[51] Mr Pillay, Transcript 21 January 2014, p 4048 lines 7-12

larger NIPP. He further states that as Minister he always interpreted this to allow the DTI to implement the NIP in terms of the department's overall policy. In so doing, he stated, the department was making a policy choice[52].

119. We submit with respect that the Minister conflates issues. The issue is not whether the DTI could make policy choices in relation to the negotiating position adopted by the IONT, nor is it whether the DTI could persuade IONT to permit the award of credits to all the nine criteria. All these matters are addressed before the terms are agreed to by the parties. Once agreed to, they become binding. The real issue is whether the DTI complied with and ensured the implementation of the SDPP NIP obligations in accordance with the NIP Terms as contracted for by the Government of the Republic. The answer to this enquiry must be in the negative.

120. None of the DTI witnesses has testified that the NIP Terms and/or Umbrella Agreements, insofar as they relate to NIP Obligations, were amended by the parties and reduced to writing. Not only was such evidence tendered, there has been no offer of copies of amended agreements and/or Terms. The Commission must accept that the NIP Terms as agreed in 1999 were never amended.

121. All deviations were as a direct result of the view adopted by the DTI, that the department or the Minister had a residual power to override the NIP Terms. The former Minister states that:

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[52] Witness Statement, Mr Alec Erwin, paragraph 84

> *"…the principled approach was that of using the National Industrial Policy to inform the negotiations of the NIPP. The policy was sufficiently broad to accommodate the application of discretion in adjusting the nine criteria or credits that obligors were expected to meet."*[53]

122. Mr Erwin has not stated the source of the discretion to ignore contractual stipulations. It is definitely not in any of the Policies. The NIP obligations were contracted for and made specifically subject to the NIP Terms. The Umbrella Agreements and the NIP Terms were the only legally binding instruments relating to the NIP Obligations. It is our submission that the NIP Terms and/or Umbrella Agreements did not confer such a discretion on the Minister. There is no factual or legal basis to assume that such a discretion existed.

123. Mr Zimela justified the deviation from the NIP Terms thus:

> *"My understanding with the NIP terms, that is through my involvement as part of the ITCC is, has been that where credits were concerned the credits should be awarded one-for-one for investment, one-for-one for sales and one-for-one for export sales. But my understanding as participating in the Committee has always been that where there are imperatives to deviate from the NIP terms the unit, it IPS has always had the right to apply to the Minister to make some deviations in order to achieve certain strategic objectives of the DTI"*

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[53] Witness Statement, Mr Alec Erwin, paragraph 100

…….

"That was my understanding as part of the IPCC and the part of the unit that as long as there was authority from the Minister who signed the contracts we should, we could deviate from the SDP to fulfill certain DTI objectives or government objectives".[54]

124. This view is clearly erroneous and without any basis and falls to be rejected. Mr Zimela claims that his understanding was that where there are imperatives to deviate from the NIP terms there was a right to apply to the Minister for the deviation. Mr Zimela does not explain what gives rise to such understanding. Furthermore, he has not shared with this Commission which 'imperatives' would justify such deviations. This is a bald and unsubstantiated claim and cannot pass muster.

125. On the basis that the credits were awarded in contravention of the Umbrella Agreements and the NIP Terms, such awards are invalid.

126. Mr Zimela testified that investments by the Sellers in respect of each programme and the credits awarded (converted into Rands) were as follows[55]:

126.1. BAE: Total investment of all products of R 5 083 053 221; the investment by the obligor is R1 927 159 648 and credits awarded of R15 375 599 620;

[54] Mr Zimela, Transcript 21 January 2014, p 4137 lines 4-25
[55] Mr Zimela, Transcript 24 November 2015, pp 8933 line 17 to 8934 line 20

126.2. GFC: Actual investment of R1,325 billion; the investment by the obligor is R339.5 million and total credits awarded is R15,755 billion;

126.3. GSC: Total investment of R1,356 billion; the investment by the obligor is R614.4 million and total credits awarded is R28.3 billion;

126.4. Thales: Total investment of R1.067 billion; the investment by the obligor is R478 million and total credits awarded is R6 billion

126.5. Augusta: The conversions in respect of Augusta were not available on the day the witness gave evidence.

127. What is clear from the foregoing is that the credit calculation methodology as prescribed by the NIP Terms was not utilized. It is clear from the testimony of the DTI witnesses that projects were substituted. The NIP Terms prescribed a process of substitution. It is unclear whether the substitutions in all cases were in accordance with the NIP Terms and the Umbrella Agreements.

128. It is necessary that an independent audit of all NIP obligations be undertaken to determine whether:

128.1. To establish whether the DTI was compliant in substituting projects, where this happened, and if not the impact of such non-compliance; the NT amended the NIP system for the

purpose of the defence procurement to avoid such exaggeration of benefits;

128.2. The change to the credit calculation methodology and the awarding of credits to criteria other than those contracted for in the NIP Terms, the use of package deals and multipliers resulted in the exaggeration of benefits claimed with the result that South Africa was prejudiced and to determine the extent of such prejudice. Further, whether the changes to the contractual terms were permissible in law;

128.3. The Sellers have discharged their NIP Obligations as contemplated in the NIP Terms and the Umbrella Agreements, and if not what steps are open to South Africa to ensure full discharge of the obligations.

129. Mr Zimela indicated that two independent audits were conducted to determine the economic performance of the NIP Programme. These audit reports have never been placed before the Commission[56]. Some confusion seems to surround the question whether an independent audit was ever conducted:

129.1. During the cross-examination of a document referred to as the Denel SAAB Aerostructures transaction completed by

[56] Mr Zimela, Transcript 24 January 2014, p 4189 lines 2 to p4190 line 7

NAD auditors at the request of the DTI was sought to be introduced and relied upon in cross-examination.[57]

129.2. This document is considered as an audit report.

129.3. During the testimony of Ms De Risi, she clarified that the document is actually not an independent audit report, but an impact assessment report commissioned by the DTI to investigate whether SAAB had delivered on its NIP Obligations.[58]

130. From this the Commission can accept that there is currently no evidence that a full and independent audit has been conducted on all the NIP Obligations. It is our considered view that it is imperative to conduct such an audit. It is only on the basis of this audit that a proper determination of whether off-sets anticipated to flow from the NIP have materialised at all and if so, the extent to which they have materialised; and if they have not, the extent to which they have not materialised and the steps that ought to be taken to realise them.

[57] M Zikode, Transcript 4 February 2014 p4482 line 12 to p4483 line 12
[58] Ms De Risi, Transcript p 4539 lines 8-20

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