

THE ARMS PROCUREMENT COMMISSION OF INQUIRY
(THE STRATEGIC DEFENCE PROCUREMENT PACKAGES)

INQUIRY INTO ALLEGATIONS OF FRAUD

**SUBMISSION OF THE INTER-MINISTERIAL COMMITTEE ON
MATTERS RELATING TO PHASE ONE OF THE INQUIRY BY THE
ARMS PROCUREMENT COMMISSION INTO THE STRATEGIC
DEFENCE PROCUREMENT PACKAGES**

Introduction and context

1. The President of the Republic of South Africa established the Arms Procurement Commission (“the Commission”) in 2013. Its purpose was to investigate the procurement of the strategic defence procurement packages (“SDPP”).

2. With reference to the role of the members of the Inter-Ministerial Committee (“IMC”), the Commission’s task is to:
 - 2.1. establish the rationale for the SDPP including the affordability of the SDPP programme;

- 2.2. find out whether any person within or outside the Government of the Republic of South Africa improperly influenced the award or conclusion of any of the SDPP contracts;
 - 2.3. establish whether any of the contracts awarded in the SDPP is “*tainted by fraud or corruption capable of proof, such as to justify its cancellation, and the ramifications of such cancellation*”;
3. These submissions represent the shared views of the IMC¹ that was charged by Cabinet² in 1998 to oversee the SDPP process at a policy level and to make appropriate recommendations to Cabinet. The constitutional mandate of the National Executive can be found, *inter alia*, in section 85 of the Constitution.
4. The policy framework relevant to the mandate and terms of reference of this Commission includes the White Paper on Defence that was developed by the new democratic government that assumed office in 1994, as well as the National Industrial Policy.

¹ The members of the IMC were then Deputy President (later President) TM Mbeki (who was chairman of the IMC), Minister of Finance T Manuel, Minister of Defence Minister J Modise, and later Minister M Lekota), Minister of Public Enterprises, S Sigcau later, JT Radebe,) Minister of Trade and Industry A Erwin. Deputy Minister R Kasrils, who gave testimony before the Commission, was not a member of Cabinet and attended the deliberations of the IMC by invitation.

² President NR Mandela was the Head of State and National Executive at the time the SDPP was discussed in Cabinet and when the decisions on the SDPP were taken.

Scope of these submissions

5. In relation to the terms of reference of the Commission, the testimony of the members of the IMC traverses the rationale for the SDPP, and where relevant, they deal with the allegations of fraud and corruption that certain critics of the SDPP have persistently made.

6. It must be emphasised, as appears from the evidence tendered, that though each member of the IMC dealt with his or her particular area of responsibility (in terms of the executive functions assigned to that member), the decisions taken and recommendations made represented the collective wisdom of the IMC members.

7. It bears pointing out at this juncture that in presenting their evidence, the members of the IMC sought to make it clear that they were constituted as a sub-committee of Cabinet. As such they:
 - 7.1. Understood that they were tasked with taking charge of a project that was of strategic value to South Africa, in that, it was recognised that the reach of the SDPP had to extend beyond the Department of Defence to encompass trade and

enterprise development benefits³ and advantage the country as a whole;

7.2. Were guided by the values and principles of the Constitution, in particular, sections 1 and 2 of the Constitution read with the provisions of Chapter 11 thereof;

7.3. Were duly authorised to focus on the objectives that the National Executive sought to achieve with this strategic defence acquisition;

7.4. Gave effect to new policies that were adopted by the National Executive, including the new policy on defence that reflected the values and principles of the new Constitution⁴;

7.5. Called for reports, including the Affordability Report⁵ and reports from officials⁶;

³ The testimony of Minister A Erwin and that of the DTI traversed the objectives of government to use the SDPP as a means of enabling investment and promoting trade and enterprise development.

⁴ It is common cause that a review and restructuring of the Department of Defence was undertaken from about 1996, and that there was an extensive public participation process that led to the adoption of the White Paper on Defence in 1996. Reference has also been made in the testimony of Minister A Erwin and that presented by officials from the DTI on the National Industrial Policy and the National Industrial Policy Programme (NIP) that was developed and applied to the non-defence aspects of the SDPP process.

- 7.6. Used their collective expertise and wisdom to consider the reports they received and incorporated these into the recommendations they made to Cabinet;
 - 7.7. Presented Cabinet with reports on the SDPP as and when appropriate;
 - 7.8. Made recommendations to Cabinet on the available options for the procurement of defence equipment that formed part of the SDPP;
 - 7.9. On 18 and 25 November 1998 participated in the taking of the final decisions by Cabinet.
8. In essence and without being unnecessarily prolix, what the IMC submissions traverse is the material that was placed before the Commission for purposes of fulfilling the terms of its mandate, i.e. to enquire into and establish whether there is any merit to the allegations

⁵ Minister T Manuel and Andrew Donaldson's testimony before the Commission dealt extensively with this report.

⁶ It is common cause that throughout the preparatory work that led to the final decision of Cabinet on the SDPP, officials from, *inter alia*, the Department of Defence, the National Treasury (then the Department of Finance) and the DTI interacted extensively with members of the IMC, both individually and collectively. It is also common cause that the International Offers Negotiating Committee ("IONT") was established to advise the IMC on various matters relating to the SDPP.

of fraud, corruption, impropriety and irregularity that have, over the years, been levelled by critics of the SDPP⁷. The members of the IMC have understood that the task of the Commission extends to making findings, reporting on and making recommendations to the President on the matters that they were charged to investigate.

9. The members of the IMC unequivocally submit that there has been no evidence of wrongdoing on the part of any one of them, or in relation to their collective functions. As stated by Minister Manuel,

*“The IMC has always maintained that, as a subcommittee of Cabinet, it acted within the framework of the law. The court challenges to the 18 November 1998 decision of Cabinet to procure defence armaments under the SDPP, which have been adjudicated to finality by our courts, have found no merit in the complaints lodged in those court proceedings. This is essentially due to the fact that the executive decisions taken were in accordance with the precepts of the law and the Constitution, in particular”.*⁸

⁷ We make specific submissions on the veracity of the allegations made by these critics later in this document.

⁸ Written submission of Minister Manuel at para [20].

10. It is further submitted that the decision of Cabinet to procure the SDPP was rational, the processes adopted in arriving at the decision were authorised and thorough, and pass constitutional muster.
11. The above submissions are anchored in the testimony of various witnesses, including the critics of the SDPP. Not one of those critics was able to produce **evidence** of fraud, corruption, impropriety or irregularity in the decision-making process.
12. The submission that we advance is that insofar as the critics of the SDPP programme tendered evidence that was based on allegations/suspicious/probabilities of impropriety/corruption, in the nature of commissions of enquiry, the **facts and not conjecture** is what is required.
13. We proceed to summarise the relevant facts that emerged from the testimony of witnesses.

The decisions taken by Cabinet

14. On 18 November 1998 Cabinet took a decision to procure the SDPP. This decision was an in principle one in that Cabinet required a further

interrogation of the cost and risk elements of this strategic acquisition.⁹ Minister Manuel was tasked with, *inter alia*, looking into the most practical, efficient and affordable method of servicing the financial obligations that were anticipated with respect to the SDPP.

15. On 25 November 1998 and after an affordability review had been undertaken and negotiations with identified suppliers embarked upon, the SDPP was finally approved.¹⁰

16. In giving context to the collective decision-making functions of Cabinet, including those of the IMC, President TM Mbeki (“President Mbeki”) explained the following:

16.1. Cabinet is the senior committee that considers information placed before it and takes final decisions;

16.2. Cabinet received reports from the IMC in the same manner as it would normally receive reports and recommendations from

⁹ APC Public Hearings 17 July 2014 at p. 7363 – Evidence of President Mbeki.

¹⁰ Written submission of Minister Manuel at para [31] – [32].

particular Ministers and thereafter take a final decision on the matter tabled in Cabinet¹¹;

16.3. These standard processes of Cabinet did not change during their consideration of the SDPP.

17. In the result, Cabinet's collective wisdom was applied to the final decision to purchase the various items of equipment that made up the SDPP.

18. We now turn to address the rationale for the SDPP.

Rationale

19. We have elected to make the submissions on rationale using the testimony of President Mbeki as the chairman of the IMC. The views articulated by him are similar to those expressed by the other members of the IMC. We use those of President Mbeki simply as a focal point and in an effort to avoid prolixity and repetitiveness. Where apposite we

¹¹ APC Public Hearings 17 July 2014 p. 7309 – 7310. See also APC Public Hearings 18 July 2014 p. 7529 where President Mbeki explained that it was normal practice that by the time that the members of the National Executive take decisions on reports received from officials, those officials would have been excused.

illustrate the points made by President Mbeki by referring to the evidence of his Cabinet colleagues.

20. The major issues that comprise the material traversed under the question on the rationale of the SDPP are:

20.1. How Cabinet arrived at the decision to extend the purchase of defence equipment beyond the purchase of the corvettes. It is common cause that the purchase of corvettes for the Navy had been considered within the pre-democratic government structures (such as the State Tender Board), that were charged with the purchase of such equipment.

20.2. The socio-economic and developmental objectives that informed and/or influenced the taking of the decision to acquire the SDPP.

20.3. The affordability of the SDPP and the risk analysis that was undertaken to ensure that the procurement of the identified defence equipment would be affordable.

- 20.4. Whether or not, once the decision on the SDPP was made, the expenditure framework of government prejudiced the delivery of services such as education and health because government spending was skewed in favour of Defence.
- 20.5. The strategic nature of the SDPP programme. This programme was informed, in part, by the developmental objectives of government. This becomes evident in, for example, the testimony presented on how the SDPP could be used to move away from the pre-1994 government's industrial development policies that were focused on separate development.
21. What is evident from the testimony of the members of the IMC is that Cabinet (and the IMC) operated at a policy development and implementation level, as enjoined by section 85(2)(b), (c), and (e) of the Constitution.
22. We submit that there was a constitutional imperative to equip the defence force in a manner consonant with the functions and obligations with which it was charged under the Constitution.
23. In presenting their testimony the members of the IMC referred the Commission to the White Paper on Defence, which, *inter alia*, clearly

indicated that the National Defence Force required re-equipping¹². The testimony presented was that the equipment that they had was obsolete and had to be replaced.

24. More pertinently, and as stated by Minister Kasrils and President Mbeki, Cabinet was sensitive to the fact that the new democratic government had to “*reposition the national defence force in the eyes of the people of the country*”¹³. In essence, the government had to ensure that the National Defence Force had the necessary capability and functionality to discharge its constitutionally mandated functions.
25. President Mbeki, Minister Erwin and Minister Manuel gave further context with respect to the rationale in their testimony on the imperative to address the socio-economic rights that the Constitution expected government to respect, protect, promote and fulfill, and, in so doing, assist the majority of the population to realise.
26. Minister Erwin referred to the socio-economic objectives that were informed by the need to attract foreign direct investment and to create jobs. He clearly stated that he understood, as the executive authority of the Department of Trade and Industry:

¹² See by way of example the evidence of President Mbeki - APC Public Hearings 17 July 2014 at p. 7300-7302

¹³ APC Public Hearings 17 July 2014 at p. 7301-7302; Written submission of Minister R Kasrils para [6] – [9].

*“the imperative of leveraging the opportunities created by Government’s procurement programme to sustain South Africa’s economic growth, leverage foreign direct investment, create jobs, and so forth. Put differently, the focus of our industrial participation policy was on finding and creating opportunities for economic growth and development at a broad societal level and the SDPP, being the largest procurement process Government had ever undertaken, seemed to present the appropriate opportunity to put Government’s industrial policy imperatives and strategies to the test”.*¹⁴

27. In this context Minister Erwin testified on the policy-related purposes of the non-defence packages (NIP) of the SDPP in the context of the National Industrial Policy and the National Industrial Participation Programme (NIPP). In his testimony he also touched on the benefits that were realised and the challenges that the NIP presented in the implementation of the SDPP.

28. On affordability Minister Manuel pointed to the balance that was attained in ensuring that, regardless of the decision to sign the SDPP

¹⁴ Written submission of Minister Erwin at para [42]; See also para [70] of his written submission where he supports his views by explaining that: *“In a situation where available funds were scarce to support industrial policy, the application of the NIPP to the SDPP made eminent sense”.*

contracts, service delivery by government departments remained optimal¹⁵.

29. The testimony of President Mbeki on this aspect is that at no stage did the IMC take any decision without reference to cost.¹⁶ President Mbeki also confirmed under cross-examination that the affordability report was discussed by the IMC and by Cabinet, which latter body accepted the report. His testimony was that the whole procurement process was discussed within the context of the other national challenges.¹⁷

30. With respect to whether or not the expenditure framework of government prejudiced the delivery of services, we submit that the evidence of National Treasury, Minister Manuel and President Mbeki is a complete answer to this issue.¹⁸

¹⁵ Written submission of Andrew Donaldson under the heading “*The cost to budget of the procurement decision*” and in particular para [76] thereof which Minister Manuel supported at para [63] of his written submission. See further the APC Public Hearings transcript of Minister Manuel’s testimony at pg. 7188 – 7189 and 7201 - 7203. Further reference is made to these socio-economic objectives and the achievement of the best possible results for the country in the testimony of President Mbeki at p. 7303 - 7304 where he pointed out that the government in fact reduced quite sharply expenditure on defence.

¹⁶ APC Public Hearings 17 July 2014 at p 7348 – 7349, 7351 - 7354.

¹⁷ APC Public Hearings 18 July 2014 at p. 7509 – 7523.

¹⁸ APC Public Hearings p 7386 – Evidence of President Mbeki read with footnote 15, above.

31. The broader developmental objectives of government that underpinned the strategic objectives of the defence procurement process are referred to in, *inter alia*, the evidence of Minister Erwin and President Mbeki.¹⁹
32. We submit that the material set out above and placed before the Commission clearly indicates that the recommendations of the IMC and the decisions of Cabinet were fully informed. President Mbeki says as much in his testimony at this Commission, that is, that “*the Inter-Ministerial Committee and Cabinet did not ignore anything*”.²⁰
33. We further submit that the rationale has been firmly established by, *inter alia*, the testimony of the members of the IMC as summarised in the evidence of President Mbeki under cross-examination.²¹ President Mbeki’s submission was that “...*certainly as government we thought the decision was very rational.*”²²
34. We now turn to deal briefly with the collective testimony of the critics of the SDPP.

¹⁹ Written submission of Minister Erwin at para [92] – [93]; APC Public Hearings 17 July 2014 at p 7386 – Evidence of President Mbeki.

²⁰ APC Public Hearings 17 July 2014 at p. 7368.

²¹ APC Public Hearings 18 July 2014 at p. 7509 – 7523.

²² APC Public Hearings 18 July 2014 at p. 7516; 7574 – 7576.

The absence of any evidence of wrongdoing or irregularity.

35. Our final submissions relate to whether or not the allegations/suspensions/probabilities of impropriety/corruption that were levelled by critics of the SDPP were supported by evidence that:

34.1 established that a person within or outside the Government of the Republic of South Africa improperly influenced the award or conclusion of any of the SDPP contracts;

34.2 established that one or more of the contracts awarded in the SDPP is *“tainted by fraud or corruption capable of proof, such as to justify its cancellation, and the ramifications of such cancellation”*.

36. With respect to the members of the IMC, in particular, we have not been able to find any material in the evidence before the Commission that supports the allegations made by certain critics of the SDPP.

37. The members of the IMC who presented evidence before this Commission responded to the allegation that were brought to their attention. They dealt with these allegations, in particular, those relating to the reasons for the defence review process and the decision to

broaden the procurement of defence equipment beyond the purchase of corvettes.

38. The criticisms relating to the NIPs was also ventilated and responded to by the DTI and Minister Erwin.

39. President Mbeki was cross-examined at length about matters relating to the recommendations of the IMC and the decisions of Cabinet. He was also asked about corruption and bribes being paid to certain parties who were involved in the SDPP. He responded fully to those questions stating, *inter alia*,

“...I am not aware of one single fact that has been produced by anybody to say the Inter Ministerial Committee took any decision in a corrupt manner. That the Cabinet took any decision in a corrupt manner. I am not aware of this. That in the process... that the process of determining for instance, the preferred bidders that that decision was influenced by corrupt interventions”²³

40. None of the witnesses who had made these allegations were able to support any of them with facts. In fact, Ms De Lille, Dr Young, Dr

²³ APC Public Hearings 17 July 2014 p. 7490. See also p. 7461.

Woods, Col Du Plooy and General Meiring were amongst those who categorically stated that they had no factual evidence of wrongdoing on the part of any member of the IMC.

Conclusion.

41. We submit, in conclusion, that the inquiry by this Commission has been wide-ranging and thorough. Interested parties who sought to assist the Commission were given a full and adequate opportunity to do so.
42. The members of the IMC who appeared voluntarily before this Commission did so in an effort to assist the Commission in discharging its mandate under the Terms of Reference. The Evidence Leaders of the Commission assisted in the preparation of their submissions and led their evidence.
43. Other than Minister Erwin, the members of the IMC were cross-examined on the role they played both individually and collectively. As members of Cabinet, as it was then constituted, they were able to shed light on the decision-making processes of Cabinet and on how Cabinet arrived at the particular decisions that related to the SDPP.

44. We submit that, on a conspectus of all the admitted evidence, oral and documentary, it has been conclusively demonstrated that there was a sound and constitutionally compliant rationale for the SDPP and that the SDPP was affordable.
45. Furthermore, we submit that there is absolutely no evidence that any person within or outside the Government of the Republic of South Africa improperly influenced the award or conclusion of any of the SDPP contracts. Hence, the question of their cancellation does not arise.
46. The decisions taken by Cabinet were consistent with the obligations of Government as set out in section 200 to 204 of the Constitution.
47. In particular, the IMC and Cabinet sought to comply fully with the injunction in section 200(2) of the Constitution which states:

“The primary object of the Defence Force is to defend and protect the Republic, its territorial integrity and its people in accordance with the Constitution and the principles of international law regulating the use of force.”

48. We recognise that the Commission is conscious of the fact that this is not the first probe into the SDPP. We submit that none of the other probes or court proceedings have found merit in the allegations that the decisions taken by Cabinet on the SDPP were not rational. There is no gainsaying that the decisions of Cabinet were strategic in nature and policy laden. One of the functions of the National Executive as set out in section 85 of the Constitution is to develop and implement national policy, including defence policy.
49. In the result, and in the absence of any evidence of malfeasance on their part, we submit that there can be no finding of impropriety, irregularity, fraud or corruption by members of the IMC or the Cabinet that was headed by President Nelson Mandela at the time that the decisions on the SDPP were made.

MTK MOERANE SC & L GCABASHE

CHAMBERS, DURBAN

10 JUNE 2015.

