

By email

17 June 2014

Mr Justice W Seriti
Arms Procurement Commission

Copy to:
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Head of Legal Division
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Dear Judge Seriti

ACCESS TO DOCUMENTS AND OTHER PREPARATION FOR APPEARANCE

1. We are aware that the Commission is rapidly approaching the end of the evidence in Phase I of its hearings. Our clients need to take steps to put themselves in a position where they are able to give evidence to the Commission in Phase II.
2. At the hearing on 12 June 2014, you stated that we should provide you with a letter setting out the documents which we have requested from the Commission. We do that in this letter. Before we do so, we explain the reason for the requests which we have made. That reason arises from the nature of the function of the Commission, and the role of witnesses such as our clients.
3. As we understand the position, it is the function of the Commission and its staff, in carrying out the mandate of the President, to seek out and obtain information which may be relevant, to consider its relevance, and to make it available to interested parties so that its accuracy and other evidence may be properly tested and assessed. It is the Commission which has the statutory duty to investigate the arms procurement, and which has been given powers of compulsion in order to enable it to carry out that duty. This is not a trial, in which the burden is on interested parties to produce evidence. The burden is, we respectfully submit, on the Commission to ensure that all relevant evidence is made available and assessed.
4. In accordance with that understanding, our clients have made suggestions to the Commission as to documents which it should obtain, examine, and make available to interested parties. It is plainly not adequate to rely exclusively on the interested parties to produce the documents which they wish the Commission to consider. This is so because:
 - 4.1. interested parties which were involved in the arms procurement cannot reasonably be expected or relied upon to produce documents which reflect adversely on their conduct; and
 - 4.2. interested parties which were not involved in the arms procurement (such as our clients) are not in a position to compel the production of documents which show what happened in the procurement process.
5. The production of documents at the instance of the Commission, and making them available, is also necessary in the interests of fairness. Interested parties which were involved in the arms procurement have a variety of documents in their possession. They will use certain of those documents in order to cross-

examine our clients. It leads to fundamental unfairness to our clients, and may prevent the truth from emerging, if all relevant documents in the possession or under the control of interested parties, and other relevant documents, are not produced and made available to our clients for the purposes of their evidence and for cross-examination.

6. As matters currently stand, a party involved in the procurement can select those documents which favour its version, fail to make available to our clients those documents which do not favour its version, and then assert that our clients' critique is invalid. That is neither fair nor conducive to establishing the truth. Fairness and truth-seeking require that the Commission require that all relevant documents be procured, and that our clients be given access to all documents relevant to their evidence. To do otherwise disables our clients from doing what they seek to achieve, namely to promote the public interest by seeking to assist the Commission in the performance of its function.
7. We point out that, consistently with this approach, paragraph C(4) of Annexure A to the subpoenas issued by the Commission on 16 January 2013 gave each of our clients the right to 'inspect documents that the Commission has which may be relevant to your testimony'.
8. Since then, our clients have made repeated requests that they be permitted to inspect documents which appear to be relevant to their testimony. We set out below the requests which we have made, and which have not been answered.
9. Before we do so, there is a further preliminary matter which we wish to raise. Our clients were originally informed of when they would be expected to give evidence, and that Adv Aboobaker SC would be their evidence-leader. They then made an arrangement to consult with him. After that:
 - 9.1. Adv Aboobaker SC was instructed by the Commission not to consult with our clients. The appointment they had made with him was accordingly cancelled.
 - 9.2. Adv Aboobaker SC subsequently resigned from his position.
 - 9.3. Our clients asked on 14 April 2014 who will now be their evidence-leader. They have not been given any answer to this enquiry.
 - 9.4. The dates when our clients will be expected to give evidence have been changed, but our clients have not been told what the new dates are.
10. The result is that as matters currently stand, our clients have had no opportunity to consult with their evidence-leader, they do not know who the evidence-leader is, and they do not know when they will be expected to give evidence. This situation is greatly prejudicial to our clients, two of whom are resident outside South Africa. We shall be grateful if the Commission would urgently take steps to remedy this situation.

Documents requested and not provided

11. For the past 17 months, since February 2013, we and our clients have engaged in on-going correspondence with the Commission in an attempt to obtain access to documents which either are in the Commission's possession, or which the Commission can (and, we submit, should) obtain in order to carry out its enquiry. To date, our clients have only been provided with documents appended to the witness statements of those witnesses who have given evidence. No other requests have been fulfilled.
12. We attach as Annexure A a table consolidating our unanswered requests for documents still outstanding, their relevance, and the dates on which we have requested these documents. In summary, we draw attention to the following:

13. On 15 February 2013 we requested access to specified documents held by the Department of Trade and Industry, mutual legal assistance requests by South African law enforcement bodies, minutes of meetings of specified committees with regard to the arms deal, and other reports held by South African law enforcement agencies:
 - 13.1. This request was repeated in 25 February 2013 at a meeting with the secretariat of the Commission; on 18 March 2013; on 16 July 2013; on 9 September 2013; on 14 October 2013 at a meeting with the secretariat; and on 17 January 2014. It was not answered.
 - 13.2. Most recently, this request was repeated in our letter of 30 April 2014. We have not received any reply to this letter or the request.
14. On 29 October 2013 we requested a copy of the 'Supply Terms Agreement', including approximately 20 annexures, which had been referred to in the witness statement of Mr Robert Vermeulen:
 - 14.1. The Commission acknowledged receipt of the request, but has not provided the requested information.
 - 14.2. This request was repeated in our letter of 30 April 2014. We have not received any reply to this letter or the request.
15. On 29 October 2013 we requested a copy of the 'Debevoise Plimpton Audit', which reveals from the inside alleged bribery and corruption by one of the successful bidders (Ferrostaal). The document is available on the website of the Mail & Guardian, but we understand that the Commission will not accept this as admissible evidence. This is therefore a document which the Commission itself should seek to obtain, acting in terms of the powers which the President has conferred upon it.
 - 15.1. The Commission acknowledged receipt of this request, but has not provided the document.
 - 15.2. We are not aware of any steps which the Commission has taken to obtain this document.
 - 15.3. The request was repeated in our letter of 30 April 2014. We have not received any reply to this letter or the request.
16. On 29 October 2013 we requested all documents before the Commission setting out the 'procurement system' which is required by section 217(1) of the Constitution:
 - 16.1. The Commission acknowledged receipt of this request, but has not provided the requested information.
 - 16.2. The request was repeated in our letter of 30 April 2014. We have not received any reply to this letter or the request.
17. On 17 October 2013 we requested the 'Final Report on an Impact Assessment Undertaken at Denel Saab Aerostructures (Pty Ltd related to an aerospace project within the Industrial Participation Programme Vols 1 and 2, 2010, NAD Auditors Incorporated':
 - 17.1. We are in possession of only a redacted version of this document. The Department of Trade and Industry has confirmed that it has no objection to the use of the whole document.
 - 17.2. On 4 February 2014 we were permitted to hand up and refer to only two pages of the document. The reason given by the Commission was that it already has too many documents in its possession.
 - 17.3. Our request for a full copy of the document has not been answered.

- 17.4. This request was repeated in our letter of 30 April 2014. We have not received any reply to this letter or the request.
18. On 20 February 2014 we requested the documents that form part of the investigation by the Directorate of Special Investigations. The Commission has publicly undertaken, in response to an enquiry by *City Press* in August 2013, to digitise and analyse these documents:
- 18.1. On 26 March 2014 the Commission stated that the documents are in the possession of Armscor, and a request in this regard should be made to Armscor.
- 18.2. On 30 April 2014 we pointed out that these documents are fundamental to the enquiry which the Commission is mandated to undertake. We respectfully requested that you advise:
- 18.2.1. whether these documents are in the possession of the Commission;
- 18.2.2. If not, what steps the Commission will take to obtain them, and when such steps will be taken;
- 18.2.3. If the Commission will not take steps to obtain them, why it will not do so.
- 18.3. We have received no response to this enquiry.
19. In our letter of 30 April 2014, we stated that we assumed that all of the documents listed in Annexure A to that letter (most of which are referred to again in Annexure A to this letter) are in the possession of the Commission, as they are directly relevant to the enquiry which the Commission is required to undertake:
- 19.1. We respectfully requested that you advise:
- 19.1.1. whether these documents are in the possession of the Commission;
- 19.1.2. If not, what steps the Commission will take to obtain them, and when such steps will be taken;
- 19.1.3. If the Commission will not take steps to obtain them, why it will not do so.
- 19.2. We have received no response to this enquiry.
20. It is not possible for our clients to prepare their witness statements which are to be placed before the Commission without access to documents relevant to their testimony. We submit that fairness requires that if the Commission is in possession of material that either confirms or contradicts our clients' evidence, they must be given access to these documents before they prepare their witness statements or give evidence.
21. We now repeat the requests set out in this letter and Annexure A. We shall be obliged if the Commission would kindly respond to these requests within 14 days of the date of this letter. If no adequate response is received, our clients will have to consider their position. All of their rights in this regard are reserved.

Yours sincerely,

LAWYERS FOR HUMAN RIGHTS

Per:



pp.
DAVID COTE