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Zondo Commission – Gigaba encouraged Transnet to flout Treasury conditions

Former public enterprises minister Malusi Gigaba allegedly played the role of enabler in Transnet's contravention of government's preferential procurement law in the state-owned entity's R54-billion locomotives project, first entered into in 2012. This is one of the preliminary findings of an ongoing investigation into Transnet by Mncedisi Ndlovu Sedumedi (MNS) Attorneys, which started in 2018. Tshiamo Sedumedi, MNS managing director, is currently testifying before the commission of inquiry into state capture.

Transnet sought in 2012 to acquire 1 064 new locomotives in an ambitious project that has since been mired in corruption reports relating to inflated costs and conflict of interest in the appointment of service providers, among other factors.

The first requests for proposals (RFPs) for the tender went out in mid-2012, and Transnet received responses from several interested bidders. A business case only commenced after the RFP process, which was itself approved by the board earlier in the year, in April. "By the time this [RFP] was issued, there was no approved business case in place, but there was acknowledgement from the board that the business case is still underway," said Sedumedi.

Because of the magnitude of the project, permission had to be obtained from the shareholding state department, the Department of Public Enterprises (DPE). At the time the RFPs were issued, Treasury had given Transnet exemption from the Preferential Procurement Policy Framework Act (PPPFA) stipulation that foreign manufacturers supplying goods to government entities had to adhere to a formula that leaned towards more local content than that of the country of origin.

The exemption has been implemented since December 2011 so that Transnet's previous procurement projects, for 95 and 100 locomotives respectively, could be expedited in light of Transnet having acquired them on an urgency basis and therefore requiring confinement to secure such.

In a letter from then DPE minister Malusi Gigaba to then Transnet board chairperson Mafika Mkhwanazi, dated 7 December 2012, the former noted the soon-to-expire exemption, but instructed Transnet to proceed with the 1 064 project "as if the permission was in place", according to Sedumedi. Gigaba's position was inspired by the fact that he would be engaging Treasury on the matter, and saw no reason why it would not approve.

MNS's view on this is that the minister did not have the authority to override the law in this case, and should have instead ordered Transnet to halt the process until permission had been sought and obtained from Treasury. Transnet, he added, did not have authority to deviate from Treasury's practice note, but did so nonetheless.

Gigaba approved the business case for the project in April 2013, at which time the evaluation process over bids received could commence. This too was found by MNS to have been wanting, with several changes mid-process, to criteria.

Previous witness Peter Volmink, Transnet's executive manager of governance, told the inquiry earlier this month that state capture happens through a process that is designed to override controls. Deviation from the open bidding process, he explained, helps to facilitate capture, as it "enables those who have all sorts of nefarious motives to do what they wish to do."

Sedumedi is expected to continue testifying on Wednesday on the matter of the 1 064 locomotives project.

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