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Zondo Commission – Transnet allowed CSR to dictate terms and defy contract conditions

China South Rail (CSR) enjoyed so much clout in its dealings with Transnet during the state-owned company's procurement of locomotives between 2011 and 2015 that the company defied strict conditions set to it, with no consequences. Its second contract with Transnet, for 100 locomotives, saw CSR calling the shots after being approved on an allegedly flawed confinement basis, a high-level investigation into Transnet has found.

Mncedisi Ndlovu Sedumedi (MNS) Attorneys was commissioned by the previous Transnet board in February last year to investigate the company's multi-billion-rand locomotives contracts. According to its investigation, MNS managing director Tshiamo Sedumedi told the commission of inquiry into state capture on Tuesday, CSR was irregularly appointed and remunerated, in a gross flouting of Transnet's own procurement regulations.

The Chinese company first secured a R2.6-billion contract for 95 locomotives in 2012, after procurement evaluation criteria were altered to accommodate a shortcoming on their BBBEE status. Their next contract with Transnet, however, was for an even bigger consignment, 100 units, at a cost of R3.8-billion. Again the process initially followed an open tender approach, until in October 2013 Transnet sought to get its board's approval to go the confinement route in favour of CSR competitor Mitsui. The board gave approval, but in an about turn three months later, a second confinement was sought, this time to cancel out the Mitsui one and appoint CSR instead.

Minutes of the January 2014 board meeting show how member Iqbal Sharma appeared to motivate for the approval of CSR, citing negative media publicity associated with the earlier award to Mitsui. The impression he gave, according to Sedumedi, was that Mitsui as a contractor raised a reputational risk for Transnet, and that was the inspiration behind the change of heart to appoint CSR. The reasons on paper for the CSR proposal, however, match those used to motivate for Mitsui earlier, to a tee, an indication perhaps that Sharma's rationale was not so accurate, as Mitsui had received the same glowing assessment that was now being given to CSR.

Commission chairperson Deputy Chief Justice Raymond Zondo has asked his team to collate media articles from that period that reported on the matter, in an effort to determine if Sharma's assertion was justified. MNS found, as previous witness Francis Callard had testified, that changes were made to the memorandum requesting the second confinement to CSR, just days before the board sat for its meeting. These related to the technical specifications for the locomotives being procured.

In his testimony, Callard said then Transnet Freight Rail (TFR) CEO Siyabonga Gama, group CFO Anoj Singh and group CEO Brian Molefe, submitted a business case to the board that had material factual errors and inaccuracies. It was a misrepresentation of what both Transnet and CSR could do on their respective ends.

Sedumedi confirmed that because by its very nature a confinement proposal must be based on an element of urgency for the organisation, Molefe had to place conditions to CSR that supported this. A letter sent by Molefe to CSR informing them of their success in acquiring the contract, places conditions related to the payment and delivery schedules to be followed. Delivery, said Molefe in the letter, had to start in September of 2014 and end in March 2015. CSR however, had other ideas, seeking not only a 60% upfront payment of the contract value, but also promising to deliver its first locomotive only in February 2015, five months later than Transnet wanted. MNS found e-mail correspondence that confirmed payment from TFR to CSR in October, noted by the division's Thamsanqa Jiyane to other executives as falling outside procedure. In the e-mail, Jiyane took full responsibility for the payment, saying a second one would follow soon afterwards.

CSR also changed the condition set by Transnet in terms of the ratio of locomotives to be manufactured and assembled in China versus those to be produced locally, in contravention of a National Treasury practice note developed in 2012 to circumvent such scenarios.

According to the practice note, all government departments that wished to enter into contracts with foreign companies are required to stipulate a preference for locally manufactured goods wherever possible. Transnet was at the time fully aware of this requirement. Sedumedi noted that the contract signed between Transnet and CSR in March 2014 ignored this regulation, while the larger procurement process of 1 064 locomotives – which ran parallel to it – not only acknowledged the treasury note, but also enforced it.

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