

STATE CAPTURE INQUIRY
PARKTOWN, JOHANNESBURG

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CHAIRPERSON: Good morning everybody. Are we ready?

ADV PAUL PRETORIUS SC: Yes we are Chair, Ms Gcabashe will lead Mr Mathebula.

CHAIRPERSON: Okay, thank you. Mr Mathebula needs to take the oath or do the affirmation.

LEGAL OFFICIAL: Do you have any objection to taking the prescribed oath?

MR NDLELENI MATHEBULA: No.

LEGAL OFFICIAL: Do you consider the oath in the prescribed form to be binding on your conscience?

10 **MR NDLELENI MATHEBULA**: Yes.

LEGAL OFFICIAL: Please raise your right hand? Do you swear that the evidence you shall give shall be the truth, the whole truth and nothing but the truth, so help you God?

MR NDLELENI MATHEBULA: So help me God.

LEGAL OFFICIAL: Thank you.

CHAIRPERSON: Thank you. Ms Gcabashe.

ADV LEAH GCABASHE SC: Good morning Chairman.

CHAIRPERSON: Good morning.

ADV LEAH GCABASHE SC: Just for the record, my name is Leah Gcabashe and I am a member of the Team of Evidence Leaders attached to the Commission. I will be leading
20 this witness, Mr Ndleleni Willie Mathebula. He is the Acting Chief Procurement Officer at

National Treasury. Chairman, with your leave, I just have a fairly brief opening statement before I actually lead this witness.

CHAIRPERSON: Before you do that, I don't know what it is but I am not hearing you as clearly as I should. I don't know whether raising your voice will cure that or what will happen?

ADV LEAH GCABASHE SC: Shall we try this. There is an echo when I bring the mic closer Chairman.

CHAIRPERSON: That was better.

ADV LEAH GCABASHE SC: While that is actually better, I will also try and speak up.

10 **CHAIRPERSON**: Ja okay no, that's fine but can everybody hear me well? Okay all right thank you, that's right.

ADV LEAH GCABASHE SC: Thank you Chairman. Mr Mathebula has been at National Treasury for about 17 years. He will be assisting this Commission as provided for in Rule 6.1, read with Rule 7.1, Chairman, by taking the Commission through the prevailing Public Procurement regime in South Africa. These two Rules provide respectively that this Commission may receive any evidence that is, 1. relevant to its mandate which evidence, 2. should be significant in advancing the work of the Commission.

As will become apparent, the evidence to be tendered by this witness fall squarely within these parameters. It is contextual evidence that is intended to be one of the foundational
20 building blocks that will assist the Commission understand just by way of example the institutional arrangements that impact the regulation of Procurement in the different spheres of Government. That's just by way of example Chairman. The evidence of Mr Mathebula falls outside the parameters of Rule 3.3. He does not implicate any persons in

his statement. His testimony does not address the factual circumstances of any alleged malfeasance that may have taken place in the past. His evidence is technical and really intended to give context, nothing more. In the circumstances there is no basis in the view of the Legal Team for any party to seek your leave Chairman to cross-examine Mr Mathebula. Chairman, I beg leave to hand out a hard copy of his statement for your ease of reference. It will form part of the bundle of statements that will be handed up to you during the course of the Commission's work and in that respect I have marked it Exhibit B1.

CHAIRPERSON: Thank you.

10 **ADV LEAH GCABASHE SC**: Just to give a quick overview Chairman of the tasks of the Commission. This Commission has been tasked with inquiring into with making findings, reporting on and making recommendations to the President of the Republic of South Africa on the matters tabulated in terms of Reference 1.1 to 1.9 guided by, among others, relevant legislation, policies and guidelines pertinent to the matter under scrutiny. This is precisely where the evidence that Mr Mathebula will be tendering will be positioned with specific reference of course to the legal framework that bounds Public Procurement.

Mr Mathebula's evidence could also be of value in relation to informing the submissions that the Team of Evidence Leaders may wish to make in relation to the possible recommendations that the Chairman may want to make to the President. In due course
 20 Chairman, evidence on the procurement of goods and services by organs of State will take up much of this Commission's time. This is inevitable because one of the central allegations made in, amongst others, the State of capture report of the Public Protector as reflected in Terms of Reference 1.4, 1.5 and 1.6 is that of the unlawful award of

tenders and contracts by SOE's and Public Entities to private individuals, companies, business entities and organisations.

It is evident therefore that the testimony of Mr Mathebula which traverses this terrain from the perspective of what Section 217 of the Constitution sought to provide for, will clarify what the operational Rules of Engagement are, that give effect to Section 217 of Constitution.

This testimony will also, I hope, throw light on whether the prevailing legal framework was or is open to manipulation by public functionaries and if so, in what respect. In essence Chairman, the testimony of Mr Mathebula on the legal framework of Public Procurement is to assist this Commission in discharging its mandate of establishing whether the
10 allegations of State Capture that have been made, have merit and if so, in determining what part of Public Procurement played a defining role in the forms State Capture may or may not have taken in this country.

In closing Chairman, might I indicate that as the Commission's work gain traction, National Treasury will in all probability be in attendance again to address any other matters that are of significance to the mandate of this Commission. Today, however, the focus of Mr Mathebula will be very narrow. It is just to give context to the Commission on the procurement landscape primarily with regard to Public Procurement as well as State
20 Owned Entities and not as reported in one Sunday newspaper, to speak to the investigation reports that National Treasury has commissioned in the recent past. That's not the mandate for today Mr Chairman.

Subject to any directives from you Chairman, any matters concerning National Treasury that require further interrogation will emanate from the factual evidence that will be placed before this Commission in due course as and when necessary, National Treasury officials

can then be called to clarify relevant aspects pertaining to that factual evidence. It is possible therefore Chairman that this will not be Mr Mathebula's first and last appearance at this Commission. In light vein it is hoped that the information that Mr Mathebula will be imparting today is not the only evidence that National Treasury will be assisting this Commission with. Chairman, might I proceed to lead Mr Mathebula?

CHAIRPERSON: Just so that one understands the significance of the evidence that Mr Mathebula will give, is it correct to say it seeks to give the foundation on each any allegation that either State Capture or corruption or fraud that falls within this Commission's Terms of Reference entailed a departure from procurement processes, in other words, this evidence will say, this is what should happen in relation to procurement and if anything that happened in relation to State Capture, corruption of fraud in relation to procurement within South African Government, then it should have followed these processes and if it departed, it means it was not in accordance with these processes.

ADV LEAH GCABASHE SC: Absolutely Chairman, it's a yardstick. This framework within which the evidence that will be lead, this Commission can be compared to contest it.

CHAIRPERSON: Thank you, you may proceed.

ADV LEAH GCABASHE SC: Thank you Chairman. Mr Mathebula, is it correct that you are here to assist the Commission by explaining the Public Procurement framework that flows from the provisions of the Constitution?

20 **CHAIRPERSON**: Maybe before he responds, let me just confirm that he is happy to give his evidence in English?

MR NDLELENI MATHEBULA: Thank you Chairperson, yes I am happy to do so.

CHAIRPERSON: Thank you very much.

ADV LEAH GCABASHE SC: Thank you Chairman. You were going to respond to that question that you are here to assist the Commission?

MR NDLELENI MATHEBULA: That is true Advocate.

ADV LEAH GCABASHE SC: Thank you, and then the State.

CHAIRPERSON: I am sorry again, you will also have to try and raise your voice Mr Mathebula so that we can hear, I don't know whether I am the only one that has a problem. Maybe if I am the only one, then maybe there is something wrong with my ears. I hope that people right at the back can hear you well as well so let's try and make sure we raise our voices sufficiently for everybody to hear. Thank you.

10 **ADV LEAH GCABASHE SC**: Thank you, and Mr Mathebula, if you would please address the Chairman, I know I am asking the questions but responses go to the Chairman.

MR NDLELENI MATHEBULA: Okay.

ADV LEAH GCABASHE SC: Thank you. The statement that I have handed up as Exhibit B1, which is dated the 15th August and signed in Pretoria, is that your statement?

MR NDLELENI MATHEBULA: Thank you through you Chair, it is indeed my statement.

ADV LEAH GCABASHE SC: And is it a statement you wish to rely on in these proceedings?

MR NDLELENI MATHEBULA: It is correct Chairperson that is the statement that I will be relying on during the proceedings of today.

20 **ADV LEAH GCABASHE SC**: Please take the Commission through the salient points of your statement, starting with an introduction of yourself and your term of service within National Treasury.

MR NDLELENI MATHEBULA: Thank you Chairperson, as indicated of course in my statement, my name is Willie Mathebula and of course Ndleleni is a my African name and I am currently the Acting Chief Procurement Officer at the National Treasury of the Republic of South Africa. This is a position that I have occupied since September 2017. Now the office of the Chief Procurement Officer is responsible for regulating procurement and modernising the Supply Chain Management System across all spheres of Government. This office also plays an oversight role on procurement so as to improve efficiencies and effectiveness in the system. Included in the mandate of the OCPO is the responsibility of promoting, supporting and enforcing transparent and effective
10 management of the Supply Chain Management System.

Now, since 2002 and prior to the establishment of the office of the Chief Procurement Officer, I was employed as a Chief Director Contract Management under the Specialist Functions Division within the National Treasury. In this position I was responsible for facilitating the arrangement of transversing a term of contracts on behalf of Government. These are contracts that are cross-cutting, if I may through the Chair, just explain a little bit what transverse contracts are. These contracts of course are contracts that are common across the whole of Government. I may just make an example, if you take fuel, fuel is consumed by everybody in Government from Cape Town to Musina and vice versa. Now, this particular contract is transverse and it actually doesn't make sense to
20 allow every Government Department and the Government Institutions to have their own individual contracts for the supply and delivery of fuel in the country. But what we do, we then consolidate all volumes and facilitate one contract decentralising of costs to derive benefits out of the columns of scale and also to apply Government policy consistently. They are strategic in nature and they also cross-cutting. That's what transverse contracts are all about in a nutshell. There are many of these contracts of course in Government.

Now in 2015 I assumed the position of Chief Director as in Policy and Legal within the office of the Chief Procurement Officer at the National Treasury. In this position I was responsible for the SM Policy development including the setting of norms and standards for implementation thereof, in other words, setting the rules of the game, how the game should be played and within what roles. That's the position that I held prior to being appointed as an Acting Chief Procurement Officer.

ADV LEAH GCABASHE SC: So Mr Mathebula, you therefore are saying to us that you have an intimate understanding of Supply Chain Management processes, procedures and prescripts?

10 **MR NDLELENI MATHEBULA**: Through you Chair, thank you very much, yes I am. I understand the policies of Government in so far as Supply Chain Management is concerned and of course I discharge these responsibility with oversight, over all three years of Government that is the purpose of that particular position.

ADV LEAH GCABASHE SC: If you could just pause for a second Mr Mathebula, you speak of all spheres of Government. That would not include State entities, SOE's, etc. Just in that context, when you say all the spheres of Government.

MR NDLELENI MATHEBULA: Currently yes, all spheres, that would include the State entities as well.

ADV LEAH GCABASHE SC: And you will take the Commission through when that
20 position changed?

MR NDLELENI MATHEBULA: Exactly, I will take the Commission as a way of background.

ADV LEAH GCABASHE SC: You can do so at the relevant time if you do not mind to do it now. Please proceed and just talk to the establishment of the office of the Chief Procurement Officer.

MR NDLELENI MATHEBULA: Thank you. The office of the Chief Procurement Officer was established of course in 2015 by the then Minister of Finance to ensure that there was transparency in the system and to deal of course with issues that related to the abuse of the Public Procurement, corruption, fraud and so on that was involved. That was part of the mandate but the main mandate was to modernise the Supply Chain Management System to make sure that it is effective and also efficient. That was the
 10 main purpose of establishment of this office and I am sure it is now an open secret that there was of course a former Procurement Officer who is not with the Treasury anymore but I am acting in that position. So that was the role and the rationale behind the establishment of the office of the Procurement Officer. But this of course to ensure that all spheres of Government, I must say this, and Government Institutions may be regulated being in so far as procurement is concerned, through this particular office and that's the role that has obviously currently oversight over the public processes in Government.

ADV LEAH GCABASHE SC: Mr Mathebula, there are those who have the view that it's a stand-alone office, that is the office of the Chief Procurement Officer, is that correct? Where does it get its mandate from? How does it fit into National Treasury?

20 **MR NDLELENI MATHEBULA:** The OCPO, as we know it, the Chairperson is one of the divisions within the National Treasury and it reports to the Director General who is an accounting officer at the National Treasury and of course the Director General reports to the assertive authority who is the Minister of Finance at this point in time, so it is not a stand-alone Department, it reports to the Director General.

ADV LEAH GCABASHE SC: Yes, can we move on and deal with specifically the summary you have given under context, in particular the source of the mandate on procurement in Government. What does the source of that mean?

MR NDLELENI MATHEBULA: I think we are one of the lucky, Chairperson, countries in the world because procurement is embedded in the Constitution of this country. Section 217 which is part of Chapter 13 of the Constitution that deals with financial matters, hence procurement is also an integral part of financial management so that's where we draw our authority from and that's where procurement comes from, the Constitution is an over arching kind of authority over procurement and of course out of the Constitution we
10 have the Public Finance Management Act, we also have the Municipal Finance Management Act, we also have the Preferential Procurement Policy Framework Act which we draw the authority in terms of procurement in this country.

ADV LEAH GCABASHE SC: Can I just take you back to your paragraph, 2.1 and here you speak of Government being the single largest procurer of goods and services. You deal with the policy decisions of Government to leverage public procurement. Take the Commission through this thinking.

MR NDLELENI MATHEBULA: Thank you Chair. It is correct that Government is the single biggest procurer of goods and services in the country, that's a known fact. Now, given the size of public procurement, of course Government took a policy decision to
20 leverage public procurement to support the achievement of broader socio-economic objectives and the number of these objectives, you have Black Economic Empowerment, it's part of the Small Business Development, Industrial Development, etc. it's quite a number of objectives. However, the size of Government procurement spent does give rise to the unintended but considerable potential for abuse of the system. The

Constitution provides that when the pockets of State procure goods or services they must comply with the principles of fairness, equity, transparency, competitiveness and cost effectiveness. This means that organs of State must have reference to the above imperatives when procuring goods and services as indicating earlier on that Section 217 actually provides the basis for these imperatives the five pillars. The aim of course should be to ensure that the attainment of value for money, that is the public money, should be spent in an effective and efficient manner. In addition, those who participate in competitive bidding processes, must be treated fairly and without biases. That's the basis of Section 217.1. However, Chairperson, I must hasten to also indicate that there is

10 Section 217.2 of the Constitution and also Section 217.3 which are equally important and relevant in giving effect to the Constitutional imperatives that mandate a public procurement function. The use as a base of open public tenders, if generally regarded as a best practice, I mean here in South Africa and all over the world, that's the basis but dealing with public money, public funds, therefore, when we procure goods and services, we should do so in an open, competitive process. In the case of South Africa, the use of open competitive bidding process is considered the best way to ensure compliance with the imperatives in Section 217.1 of the Constitution and these underscore what is best practice.

ADV LEAH GCABASHE SC: Can I ask you to pause for a minute and apply your mind to

20 this question. Are you able to give us an estimate of the size in money terms of Government's procurement spend. You may want to locate it in the particular sphere, you may want to go broader than that. Just to give us a sense annually.

MR NDLELENI MATHEBULA: Okay. Mr Chairperson, the estimated procurement spent in Government is just in excess of R800 billion for goods and services. That's the figure that we are talking about on an annual basis.

ADV LEAH GCABASHE SC: Yes, thank you, proceed, you were just going to finish off with paragraph 1.7?

MR NDLELENI MATHEBULA: Yes. I wanted to say of course as indicated earlier on. The PFMA together with the MFMA, they provide a legal basis upon which a comprehensive oversight function is created. The procurement system in South Africa is underpinned by the Constitution as indicated, the PPPFA, the PFMA and the MFMA. Although there are other pieces of legislation as that have an impact on procurement, it must be noted however, that even these prescripts, this piece of legislation, must conform to Section 217 of the Constitution.

10 **ADV LEAH GCABASHE SC:** Yes. Can I then ask you Mr Mathebula to speak to us about what you refer to as the procurement architecture that you oversee?

MR NDLELENI MATHEBULA: Thank you Chairperson. The architecture of the procurement system in South Africa could be described as a centre-lead system. So in other words, the policy development is centralised whereas the execution of the policy is decentralised so policies centralised within National Treasury would determine the broader framework but the execution of that framework takes place in a decentralised format so Government departments, Government institutions, public entities, develop their own individual supply chain and procurement policies but within the broader framework which is centralised and that is why every department has its own SCM policy
20 which takes its cue from the broader framework and of course to the PFMA, the MFMA for local government and the Constitution so that's the architecture of this procurement system. Now earlier on Chair, I spoke about transversal contracts and I think I must go back to this particular issue. To say the National Treasury currently does facilitate the arrangement of the transversal term contract as indicated earlier on that you put together

the volumes and therefore go out into the open market to derive the economy benefit and out of economies of scale. So but however, the day to day procurement of goods and services elsewhere outside the National Treasury is conducted through the SCM units, these are Supply Chain Management units within individual organs of State, Public Entities and Departments. Now, the distinct rules that govern individual procurement, are formulated at an entity or department level as part of the Supply Chain Management policies and these are the responsibilities of the entities accounting officers in the cases of Government departments and the accounting authorities in the case of public entities because you are talking about boards. However, these accounting officers and authorities

10 are also tasked with the responsibility to ensure compliance with the rules of the game as set out in the broader framework.

ADV LEAH GCABASHE SC: So when one looks at the history of procurement prior to the PFMA and the PPPFA, we have a State Tender Board Act. Where are the differences between we had under that regime and this regime where you have devolved decision-making to entities lower down the trail from National Treasury. Just draw those distinctions and explain why there was this change from the State and the Board regime to the current PFMA, PPPFA regime?

MR NDLELENI MATHEBULA: Thank you Chairperson, I think I must just spend some time here so to explain this particular issue properly. Now, in 2001 there was a division

20 within Treasury just as a wave background whose mandate was to replace the outdated rule driven procurement and provisioning system under the now defunct State Tender Board and replace it with a new procurement system in keeping with the Constitution, the PPPSA, the PFMA and later on in 2003 with MFMA. So one would always recall that the State Tender Board acted self was enacted in 1968, this is years before the Constitution and surely the State Tender Board Act was inconsistent with the Constitution and this is

one of the reasons why the shift from the State Tender Board framework to the Public Finance Management System, that's one is the first reason. The second reason is that the statement of what act in itself conflicted with the PFMA because the PFMA was enacted in 1999 and the State Tender Board Act was still in operation at that particular time so you had the PFMA that granted powers to accounting officers and accounting authorities to manage procurement but at the same time, you had the State Tender Board which was a body that would come every two weeks and then they sit at National Treasury and to adjudicate on tenders from Cape Town to Musina and vice versa. Now the problem was that the service delivery was impacted because this was a body of men
10 that would come and ladies would come and sit there and adjudicate and if they don't adjudicate favourably, with the recommendations of various state institutions, now the decisions of the board had to be communicated back to those departments and you can imagine the delay and this was done through and by the time you received clarification, service delivery was impacted so that's the reason why the State Tender Board had to be phased out by the way although the State Tender Board Act exist in the statute books, the board itself was dissolved finally by the Minister of Finance in 2008 and equally the Provincial Tender Board who also existing at the time were dismantled to make way for managers, accounting officers, accounting authorities to take the responsibility in terms of procurement decisions and manage their entities. That's basically the difference between
20 what has happened. So accountability as we speak now, vests with accounting officers and accounting authorities. That includes of course the procurement decisions apart from other decisions that accounting officers and authorities are responsible for.

ADV LEAH GCABASHE SC: I suppose want to know so assume that this decentralised approach that was adopted in the PFMA and later legislation, really was also aligned to the change in provinces after 1994 because then you could actually devolve decision-

making more readily to the nine provinces as opposed to what the old South Africa might have had. So all these statutes were really trying to align a new way of thinking, this is what I would surmise, is this correct?

MR NDLELENI MATEBULA: Truly Chair, it's correct because there was the PFMA whose letter and the spirit of course advocated for the devolvement of powers to accounting officers and to all the regions to make their own decisions. On the other hand you had the State Tender Board which was centralised, your decisions were taken at a central point so then the decision was of course to align the procurement system with the PFMA and also the Constitution so the State Tender Board had to give way to accounting
10 officers to make those decisions in various regions of this country and all spheres of Government. I think the MFMA of course applies at Local Government sphere.

ADV LEAH GCABASHE SC: With the problems that have the set Government in relation to the abuse of these powers that have been devolved, are there any elements within the old State Tender Board Act or system that might still be of some value to South Africa of today. I ask you this just in the context of widening the debate around how to stem the abuse that all of us know has been taking place in different forms really, I am not even talking about State Capture, just generally, irregularities.

MR NDLELENI MATHEBULA: Chair, I think we are fortunate in the sense that the State Tender Board Act I am sure has got certain elements that we can always draw for in
20 crafting the new revised procurement system as we abuse now with the review of the procurement system. There are certain useful elements that we can obviously draw from that system.

ADV LEAH GCABASHE SC: I note that under the heading, Legislative Framework, you detail a number of statutes. Maybe just give us the salient points around those and how

these speak to one another alternatively how you have oversight over what is done in terms of these pieces of legislation?

MR NDLELENI MATHEBULA: Thank you very much Chairperson. An overview of the National Regulatory landscape reveals at least ten distinct pieces of legislation apart from the Constitution dealing in direct and significant manner with the regulation of aspects of public procurement in general. These are the PPPFA, your Preferential Procurement Policy Framework Act which is informed of course by Section 217.3 of the Constitution, the Public Finance Management Act as we all know it, the PFMA, the Municipal Finance Management Act, the State Tender Board Act of 1968 that I have already alluded to, the

10 Broad Based Black Economic Empowerment Act of 2003, the Prevention and Combatting of Corrupt Activities Act of 2004, the Construction Industry Development Board Act of 2000, the National Land and Transport Act of 2009, the National Supplies Procurement Act of 1970 and of course the State Information Agency Act. Now, all these pieces of legislation of course as indicated must be consistent with the Constitution and of course the Constitution itself gives the National Treasury the authority to oversee procurement processes and to regulate procurement in the country so there is a piece of legislation are still subjected to the Constitution and of course by oversight, the National Treasury. Now, there are others procurement legislation which are specific to entities and sectors, industry or products. In addition, well in greatly varying degrees of specificity, the

20 procurement functions of particular organs of State and/ or in relation to the specific issues, these include the Financial Management of Parliament and Provincial Legislatures Act of 2009, the Road and Traffic Management Corporation Act of 1999, the Armaments Corporation of South Africa Ltd Act of 2003, that's ARMSCOR, the Administrative Adjudication of Road and Traffic Offences Act of 1998, the Nursing Act, the Public Audit Act, the Health Professions Act, the Housing Act, Disaster Management

Act and the Correctional Services Act. Now why these statutes regulate procurement across a range of organs of State, there are a significant number of statutes that deal with procurement by particular entities and there are also statutes addressing procurement in relation to a particular centre industry or product as indicated earlier on. Now, in most cases, these statutes prescribe procurement rules in addition to the rules that would apply to the procurement activities mentioned above in terms of the more general legislation above. In some instances, however, the specific legislation operate to the exclusion of general rules such as indicates of the financial management of Parliament and provincial legislatures at which governs public procurement by Parliament to the

10 exclusion of the PFMA.

ADV LEAH GCABASHE SC: In fact, I know you have explained this to me that in terms of Courts as well, they too are excluded from the PFMA. Will you just take us through them?

MR NDLELENI MATHEBULA: Chair, as indicated, Courts and judicial officers are excluded from the Constitution.

CHAIRPERSON: I am sorry, from?

ADV LEAH GCABASHE SC: From what part of the Constitution?

CHAIRPERSON: I am sorry, can you just repeat something. You said the courts and judicial officers are excluded from?

20 **MR NDLELENI MATHEBULA**: In fact let me just rephrase Mr Chairperson here. Section 217.1 on its own terms, does not apply to all organs of State as defined in Section 239 of the Constitution. Now, Section 239 of the Constitution excludes the Courts and Judicial officers so that's the point that I am trying to clarify.

ADV LEAH GCABASHE SC: So you do not have control as National Treasury, direct control over those particular areas.

MR NDLELENI MATHEBULA: Thank you Chairperson, because they are not defined as an organ of State in terms of Section 239 of the Constitution.

ADV LEAH GCABASHE SC: In your statement you also make the example of ARMSCOR in paragraph 4.3.5.

MR NDLELENI MATHEBULA: 3?

ADV LEAH GCABASHE SC: 4.3.5 as being authorised to procure for a particular type of State entity.

10 **MR NDLELENI MATHEBULA:** Thank you very much Chair through you. Now as indicated earlier on that the Armaments Corporation of South Africa Act, provides a procurement system for the procurement of Defence material and it's applicable to Defence. Now this particular Act also rises the Corporation that is ARMSCOR to establish a system for tender and contract management in respect of a defence material and the defence material is defined as any material, equipment, facilities or services used principally for military purposes. The Corporation is also authorised to procure commercial material, that is goods and services other than defence material for the Department of Defence and/or any other organ of State in terms of a Service Level Agreement between the Corporation and such organ of State.

20 **ADV LEAH GCABASHE SC:** Now Mr Mathebula just explain this to the Chairman. What then is the control or the oversight role that National Treasury would have in those circumstances?

MR NDLELENI MATHEBULA: As indicated earlier on, all these pieces of legislation are subject to the Constitution, Section 217, and also are subject to the PFMA which grants the National Treasury an oversight role in so far as procurement is concerned so that is a role that you play in as much as these pieces of legislation exist but they exist within the Constitution and the PFMA takes the precedence of some of this and that is where Treasury is then responsible for regulating to make sure that all these pieces of legislation conform to the principles of fairness, equity, cost effectiveness, competitiveness and transparency.

10 **ADV LEAH GCABASHE SC**: Could you then proceed to take us through your submissions in paragraph 4.4 of your statement.

MR NDLELENI MATHEBULA: Chairperson, there are other laws which are relevant for procurement. They are very important when dealing with procurement and these are PAIA as we know it, the PAJA and also the Local Government Municipal Systems Act of 2000. So they are also very important because they form part and parcel of the procurement processes.

ADV LEAH GCABASHE SC: Mr Mathebula, you have made reference to the Constitution and in paragraph 4.5 you then take the stance that there are particular reasons why the Constitution, certain Section 217, it's framed in the manner that it is. Please take us through that thinking that you have reduced to writing it 4.5.1?

20 **MR NDLELENI MATHEBULA**: Chairperson, as indicated, the Constitution is the authority over procurement processes in the country, Section 217, there are a number of reasons why this special and fairly detailed attention needs to be given to the Constitution in setting out the regulatory regime applicable to public procurement in South Africa. The first reason is a supremacy of the Constitution which has the result that all other law is

subject to the Constitution's prescripts and must be formulated and interpreted in a way that accords with the Constitution. The second reason is that the Constitution expressly creates the foundation for public procurement regulation in South Africa. The third reason is that while the Constitution provides the supreme basis for public procurement regulation, it does so only in broad principled terms to the extent that the public sector relies on public procurement to give effect to this Constitutional mandate, the Constitution is thus of much broader relevance to public procurement, generally than simply the provisions dealing specifically with public procurement regulation. The Constitution contains a number of provisions that can be viewed as creating the framework for public procurement regulation. Now given the pervasive nature of public procurement involving in essence all State functions and all public institutions, it follows that the vast majority of provisions in the Constitution are relevant to public procurement in one way or another for example. Since the public procurement necessarily involves the spending of public funds, the whole chapter 13 of the Constitution is relevant likewise since public procurement inevitably tied up with the public administration, the whole chapter 10 of the Constitution is of relevance to public procurement. Now however, if one focuses on those Constitutional sections that can be said to govern public procurement in a specific way to the extent that they may be viewed as facilitating the regulatory regime applicable to public procurement, the following constitutional provisions are of direct relevance: Section 217 of the Constitution, Section 33 which sets out the basic requirements for Constitutionally valid administrative action and consequently the ground upon which administrative action may be reviewed by the Courts of this country and of course Section 195 which sets out the Constitutional values for public administration in South Africa.

ADV LEAH GCABASHE SC: If you would then Mr Mathebula just speak to the issue of the scope of the application of Section 217 with emphasis on what you have referred to

as entity involvement and transactions concluded. You will find this on page 11 of your statement.

MR NDLELENI MATHEBULA: Thank you Chairperson. The scope of application of Section 217 is determined by two factors: 1.The entity involved, and 2.The transaction concluded. Now we have spoken about this earlier on around how does it cover organs of State, latter defined in Section 239 of the Constitution and also those that are not covered in terms of Section 239. Now, if I may with your permission Chair, just deal with Section 33.

ADV LEAH GCABASHE SC: That's fine, you may proceed.

- 10 **MR NDLELENI MATHEBULA**: Thank you Chair, the second Constitutional provision that is of particular importance for public procurement regulation is Section 33 of the Constitution which sets out the fundamental right to administrative justice. Section 33 requires all administrative action to be lawful, reasonable and procedurally fair. Section 33.2 grants a person affected by administrative action of public functionaries the right to written reviews for such action. Maybe I should end here Chairperson and not further elaborate on what Section 33 provides but of course it is the basis for the Promotion of Administrative Justice Act as we know it, PAJA, and Section 195 which is another Section, the final Constitution section of particular relevance for public procurement is this particular section, Section 195. This section sets out the basic values and principles
- 20 governing public administration in South Africa. Now given the centrality of public procurement in public administration, it follows that this section is also of foundationally importance for public procurement, moreover among the values and principles listed in Section 195, there are a number of that particularly apt in a procurement context and I

can go on and talk to them but I mean it is also clear in Section 195, I may just end here for now.

ADV LEAH GCABASHE SC: That's quite in order. You have mapped out the broad landscape of Section 217 of the Constitution, Section 33, Section 195 of the Constitution and given the Commission a view of how these are integrated, how these are land but of course what flows from that is what you have here in your statement referred to as the specific regulatory instrument and one of the most central ones is the PPPFA. Could you please within the context of the work of this Commission help the Commission understand why the PPPFA is such a central piece of legislation?

- 10 **MR NDLELENI MATHEBULA**: Thank you Chairperson. The PPPFA or the Preferential Procurement Policy Framework Act, is directly informed by Section 217.3 of the Constitution. Section 217.1 of course lays those five basic principles but Sections 217.2 provides that there is nothing prohibiting organs of State from developing a procurement policy that would take care of those who were historically disadvantaged by unfair discrimination in the allocation of Government contracts. That's what 217.2 says and of course 217.3 talks about this national legislation and if this national legislation that we are talking about is this PPPFA. It is directly from the Constitution. Now, as with the PFMA and MFMA, the PPPFA mandates organs of State to formulate their own preferential procurement policies and to procure on behalf of those policies. However, the PPPFA
- 20 significantly narrows down the scope for variation in individual Preferential Procurement Policies by providing for a set framework within which individual policies must be formulated and procurement be done. Now, this framework essentially prescribes a preference point system for adjudication of contracts and tenders in terms which certain categories of leaders are given preference, applies to bid adjudication in general and is thus not restricted to only the preferential dimensions of public procurement. Now, the

preferential point system in terms of this Act, prescribes a 90/10 preference system where the 90 appoints for price and where the 10 appoints for preference to advance the historically disadvantaged individuals. The 80/20 also the same, the 80/20 preference system, the 80 being the price appoints for price and the 20 being points for the preferences that are allocated and then when you take the 80 and the 20 together, then you come out with a total number of points and of course the same with the 90/10 preference system. However, Chair, I must also hasten to say that once we take this particular preference system into consideration, there are also other special conditions that those who bid for Government contracts must comply with, we have got functionality, the technical competency of a bidder to render a service in terms of a particular contract so you take all this together and then you come out with the highest scoring bidder who should be awarded a contract.

ADV LEAH GCABASHE SC: Mr Mathebula, because this is one of the areas that some people identify as the soft underbelly of procurement. Maybe it would be useful if you could take us through the criteria that would ordinarily be applied when setting up a bid evaluation committee and a bid adjudication committee because these are the instruments that I used when this preference is allocated.

MR NDLELENI MATHEBULA: Thank you Chairperson, the SEM now, I think I must just explain this because the supply chain management system is regulated of course through the PFMA and the MFMA and these are the two pieces of legislation that prescribe how bid committees should be constituted whereas the PPPSA talks to how preferences should be allocated to advance historically disadvantaged persons. Now the committees in terms of the Treasure regulations, there are three types of committees and that's what the SEM system prescribes. Your first committee is what we call the bid specification committee and this is a committee that sets the technical specification of what is needed.

Whatever you want to procure must conform to certain technical qualities and characteristics and this is the committee that sits and decides these are the needs from a technical point of view and it is the committee that should be considered by the user departments when they want to procure goods and services. Their role ends at the design of the technical specifications. Then there is another sitting committee, the bid evaluation committee. This is the committee that comes after a bid has been published and received. Their role is to evaluate that bid and we prescribe in that that at least these committees must be cross-functional in nature, in other words, you need to bring in different skills in that committee to draw at least expertise from various skills however, we

10 will also go on to say, the prescripts go on to say in all these committees there must be a supply chain/procurement person. Their role is to evaluate the bid in accordance with the criteria set in the bid specification committee and also as advertised and produce a report whether they recommend or they don't recommend and then they send their report to another committee which is a bid adjudication committee whose role of course is to adjudicate on that particular bid depending on the delegation. If that bid adjudication committee is fully delegated to make a final decision, then they do so, however, if they don't have that full delegation then they make a recommendation to the accounting officer or the accounting authority in the case of bods and then it is the responsibility of the accounting officer and the accounting authority to make a final decision in terms of the

20 recommendation of the bid evaluation committee. Again, in these committees, it is prescribed that they may draw as observers independent experts but the role of experts is simply that they provide advice but they can't take part in the final decision making of a particular contract because that would then conflict with the accountability principal which currently based with accounting authorities and of course, accounting officers. We seek

then their advice and thank you, they leave, that is the observers and the experts in terms of these bid committees. So this is what is prescribed in terms of the rules of the game.

ADV LEAH GCABASHE SC: You see, you set out what is prescribed as you put it in the rules of the game but we notice from the number of court applications that has taken up much of our courts time that there is either a systemic problem or the way the committees are constituted, there is a problem that leads to irregularities. Are you able to help this Commission understand where those issues arise in relation to these institutions or these tools that are supposed to have these Chinese walls, that are supposed to be impartial and apply set criteria, yet for whatever reason, do not do so.

10 **MR NDLELENI MATHEBULA**: Chairperson I am not so sure if I can answer but I think I understand the question. There are a number of reasons. Some of the reasons, let me just state up front, some of the reasons could be intentional to abuse the system but some of the reasons could be the interpretation of the application of the rules of the game of course based on the capacity because procurement as a system in itself does not have a professional kind of, that professionally, anybody can come and procure. You draw an HR person who may not have had a job in HR and then you throw him into procurement and these people do not understand the rules but if you look at what has been happening in the past years, I am sure one could always ascribe at least more than fifty per cent of these infractions to intentions to abuse the system.

20 **ADV LEAH GCABASHE SC**: Chairman, I notice it is just about quarter past eleven, might this be a convenient to take the tea adjournment.

CHAIRPERSON: Thank you, we will take the tea adjournment until half past eleven.

ADJOURNMENT

Session 2

CHAIRPERSON: Thank you Ms Gcabashe. Mr Mathebula, I am not going to remind you each time we have had a break, but just remember throughout that you are still under oath until you have finished evidence. Thank you. You may proceed.

ADV LEAH GCABASHE SC: Thank you, Chairman. Mr Mathebula we were dealing with the Evaluation Committees, the Adjudication Committees – those structures that take decisions and you were explaining what the criteria are. What the prescripts are and what the expectation certainly is from a legal perspective on what ought to happen in those forum. Can we continue along that line of the conversation? You have explained these
10 committees, but can I just look at a practical example. If we look at Transnet, just by way of example. In relation to the primary decision maker there. Who would it be, because you have spoken about the Bid and Adjudication Committee. You have also said the Board in some entities has authority. So I am just using Transnet just by way of example. What is the position in Transnet? Who takes the final decisions on tenders?

MR NDLELENI MATHEBULA: Thank you and through you Chairperson. Let me go back first to the Bid Committees.

ADV LEAH GCABASHE SC: Yes.

MR NDLELENI MATHEBULA: *Ja*, because I think it must be made very clear what the prescripts say. The Bid Committees are subjected to ethical standards. So in other words
20 the prescripts talk to the fact that the way bids are structured should be transparent and not biased and they go further on to say – if I am sitting in a committee and I am conflicted, as a committee member, I need to declare and recuse myself from participation in any of those committees or even if it is a member of my family who is part

of a bidding supplier. I should declare and disclose and recuse myself from participation. These are some of the ethical standards.

ADV LEAH GCABASHE SC: Can I ask you to pause – just at that point.

MR NDLELENI MATHEBULA: Ja.

ADV LEAH GCABASHE SC: What if I take a friend of mine from another board that I sit on with him or her and bring them to a board where I want certain things to go a particular way do the prescripts cater for that? Where friends or business partners or business people - who share the same objectives in terms of what they want to do – bring themselves into the same forum where decisions on huge contracts are made.

10 **MR NDLELENI MATHEBULA:** Ja. Thank you through you Chairperson. Look I am going to go back to the principal of accountability. Now the prescripts do not allow an external person to participate in the processes. So, these are Government officials who must be here, because otherwise if you allow somebody outside of Government – that principal of accountability gets lost, because then now it would look, it would seem like you are now subjecting the decision making to people who are outside and therefore the accounting authority - account officers would not be in a position to make a decision – that is why earlier on I spoke about the third party. Even if you get independent experts. Their role is simply to advise and that is it. That they cannot take part in the final decision making, but what we do pick up is that some of these specifications – it is very important that first
20 part of the Bids Specification Committee. Some of the specifications are crafted in a biased manner, because that is where it begins. If that particular area is not closed then you may as well have lost the battle, because when it goes to the next evaluation and so on. Already your specifications are tainted in one way or the other and it is a very important committee, because the prescripts also prohibit drafting specification for

instance around a particular brand or around a particular product. The specifications must be as general as possible and those that participate must be unscrupulous in their conduct – in terms of procuring. So, this there is quite a number of these ethical standards that are prescribes – that all those who participate must, you know, comply with. Now, when you are looking at the PFMA or whether you are looking at the MFMA – who is the supply chain management regulations - by the way are even more detailed that you have with the PFMA, because the MFMA is a later legislation. So, at least those regulations are much much broader in terms of how they should actually apply and now getting back to the question around an example made – the section 52(1)(a)(3) deals

10 specifically with accounting authorities, with public entities, because it also prescribes the same principles that are of course encapsulated in the Constitution of fair equitable competitive transparent and cost effective – I mean that is what it says. Accounting authority of a public – I mean the account of a public entity must have a procurement system that is fair, transparent, equitable, competitive and cost effective. So, when one look at public entities, especially these are you schedule 2 public entities, these are big public entities by the way which we - we now came to know as SOC's or commonly known as SOC's. They are listed in terms of that particular – listed in terms of that particular schedule in the PFMA.

Now if you look at the SCM the Treasury Regulations which were issued in terms of

20 section 76(4)(c) of the PFMA that Treasury Regulation the Chapter 16(a) thereof which deals with SCM issues, currently it does not cover public entities listed in schedule 2, these are your big entities, your Transnet's, your Eskom, your DENEL *etcetera*. SAFCOL you name them and also it does not apply to schedule 3(b) and 3(d) to the PFMA. Now, the 3(b)'s are your National Government Business Enterprises. And the 3(d) are your Provincial Government Business Enterprises and there was a reason why in 2003 when

we developed the Treasury Regulation – specifically the charter that deals with procurement, Chapter 16(a) we excluded these entities. The first reason was that these entities, you know, have got different government structures, that is the first thing. So, they are run by a board. Now, you would not want to box the board of directors and prescribe to them the rules – a rule driven kind of a system. You know, which is typical to - typical to a normal admin department. So, that is the first reason. Allow them flexibility and the rationale was they will exercise their fiduciary duties correctly in terms of the PFMA. That is one and because they are operating as different government structure. The second part of course was the fact that these entities operate along commercial
 10 lines. So, bottom line to them counts in as much as they have a developmental mandate but bottom line compliance. That was the reason why they were left out of that particular Chapter 16(a) in its current form. But of course – I think I will get to this point later on during my presentation. That we are now kind of trying to kind of trying review.

ADV LEAH GCABASHE SC: Yes, because my next question was going to be; how then do you manage them, because all the other institutions are monitored under Treasury Regulation 16(A). What happens in this instance? How are they held to account for the decisions that they take?

MR NDLELENI MATHEBULA: Look in as much – in as much as the Treasury Regulation which is a support legislation, but the primary legislation – which is the PFMA
 20 applies equally to them. So, they cannot escape, because we are using the PFMA. Whilst the regulations themselves exclude them, but the PFMA does not. They still need to comply with the PFMA and as custodians of course of the PFMA we play that oversight role in terms of what they need to do and the decisions that they take.

ADV LEAH GCABASHE SC: Coming back to the example I had used earlier of Transnet – I could use Eskom – I could use DENEL are you saying that their procurement systems fall outside of 16(a)?

MR NDLELENI MATHEBULA: Thank you Chair. In the current form? Yes it falls out of 16(a). However does not fall outside the PFMA. So, the PFMA. So the PFMA still applies to them equally and then we are of course the custodian of that instrument. So, we apply it to them equally to make sure that their procurement is fair – all those and transparent as well.

ADV LEAH GCABASHE SC: As the custodians of that system. Have you had cause to
10 conduct investigations as National Treasury into the irregularities that may have occurred in those particular entities and I just happen to pick on three, right now. It is Transnet, Eskom, and DENEL. There are others I have really just used those to illustrate the point.

MR NDLELENI MATHEBULA: Thank you through Chair. Look I think it is an open secret that – Yes of course Treasury has commissioned some investigations into, you know, irregularities – specifically in procurement of specific goods and services within some of the these, you know, large public entities.

ADV LEAH GCABASHE SC: In that instance, because this is the Commission and we are trying to do a particular piece of work. Are you able to tell the Commission where it might get hold of these particular report, because by the sound of things they could assist
20 the Commission, quite significantly?

MR NDLELENI MATHEBULA: Thank you Chair, I think we have taken a view – I mean I have taken the position as the National Treasury that the Commission must be supported in all respects and to that extent all relevant reports that are in possession of

the National Treasury would be provided to this committee – I mean to this Commission to of course discharged its responsibility.

ADV LEAH GCABASHE SC: Is that by the DG's office or via your office?

MR NDLELENI MATHEBULA: Well everything goes via the DG the accounting officer. So, we channel everything to the DG for consideration and then it comes through to the Commission, through that particular route.

ADV LEAH GCABASHE SC: We have just touched on irregularities in SOC's and state entities, but there is of course also multitude of problems in the other spheres of Government and I am not exonerating national – the sense I get is that you think you are
10 on top of what happens at national level. What is it that National Treasury does to monitor what goes on in the other spheres of Government and what steps are being taken to stem any possible abuse - any irregularities that are taking place in the other spheres of Government.

CHAIRPERSON: Before you answer Mr Mathebula, please do not forget the question. I just want to say that whatever attempts may have been made during the tea break to address my difficulties in hearing counsel do not seem to have been successful and we are still in the same situation. I can hear Mr Mathebula quite well but there is difficulty hearing counsel. So, if the problem is technical then please during the lunch try and address it, but in the meantime we will continue. It may be that it is not about raising your
20 voice but when you do raise it, it is better.

ADV LEAH GCABASHE SC: I will make a real effort, Chairman to speak much louder.

CHAIRPERSON: Ja.

ADV LEAH GCABASHE SC: Yes.

CHAIRPERSON: I think what maybe happening is what is natural. You would raise your voice, after some time it goes back to its normal level. But I suspect that the problem is – may well be technical. It might not be your voice.

ADV LEAH GCABASHE SC: It might also ...

CHAIRPERSON: You just do the best that you can without doing injustice to yourself.

ADV LEAH GCABASHE SC: It might also be, Chairman, that at my age I think I am speaking loudly while I am actually whispering. So, I will speak a little louder.

CHAIRPERSON: I do not know about the age part.

ADV LEAH GCABASHE SC: Thank you Chairman. Mr Mathebula so the question really
10 now relates to sphere of – the other spheres of Government. How do you identify. How do you monitor. How do you try to stem irregularities that may be taking place there?

MR NDLELENI MATHEBULA: Thank you through you Chairperson. I have – look there is a Directorate – we say Chief Directorate within the OCPO that deals specifically with irregularities and abuse of the system that is one. But secondly within the National Treasury as well – specifically within the office of the Accountant-General, there is a unit that deals with investigations and of course these units collaborate with law enforcement agencies, at least to deal with specific issues the police, the Hawks and that his a process that has existed over quite some time. So that is what we do – we do reviews of the tenders that have been awarded by other spheres, especially where allegations are
20 raised by interested parties and then we move in there. We collect the documentation. We assist and analyse the documentation and eventually making determination what could have gone wrong and of course I think we are enjoined by the anti-corruption act to report some of these cases to law enforcement agencies to deal with and that is what we do. But beyond – just beyond just this particular part. We also realise that there could be

some gaps in our own regulatory framework and from time to time we issue instructions, treasury instructions, to augment the gaps that may be existing in trying to deal with these things and there are quite a number of these instructions that, you know, have been issued over a long period since the introduction of a supply chain management in 2003, to deal with issues of the abuse of the procurement system in the country.

ADV LEAH GCABASHE SC: I do want us to talk about deviations and contract variations, but before we get there – maybe we should just tidy up the 20 whatever evidence you may want to give this Commission on the Preferential Procurement Regulations of the 2011 and the ones of 2017 and explain why you decided to publish
10 these and whether the objective you sought to achieve has in fact been met.

MR NDLELENI MATHEBULA: Chair through you – the Preferential Procurement Policy Framework Act, the PPPFA. Was of course enacted in 2000 and in 2001 regulations to that particular Act were promulgated by the Minister of Finance and of course we have spoken about the objective of the PPPFA earlier on. Now, these particular regulations up to 2011 at least did not apply to again to the public entities listed in schedules 2, 3(b) and (d) of to the PFMA. It only apply to Provincial and National Departments, Constitutional Institutions, as well as public entities listed in the schedules 3(a) and 3(c) to the PFMA. Now, around 2010 – 2009 and 2010 there was a discussion with social partners at
20 NEDLAC. I mean given the procurement spend by these large public entities to say they need to be brought into the picture within this legislation to ensure that they assist in the achievement of Government Socio Economic Objectives – that we spoke about earlier on. So, that is one part, but the second part was to say Cabinet has of course ruled that the PPPFA and the BBBEE, this is your Broad Based Black Economic Empowerment Act. These two acts were not aligned so they were not talking. So, you had the PPPFA that went this way and then you also had the BBBEE Act which went that way. Now,

given the importance of the Broad Based Black Economic Empowerment Act, so then the decision was - to say these two must be aligned so that when we award the contracts and tenders we will also take cognisance of the provisions of the Broad Based Black Economic Empowerment to make sure that there is transformation in the country. Now, that is the purpose why the 2011 regulations were promulgated, but that is not the only one of course the other was to say the South African market was of course – the economy was bleeding in the sense that we had a lot om imports which flooded our economy and as a result there were issues around job losses *et cetera et cetera* and that some companies in the country were closing down. So, when that decision was take, eventually, during the discussion with social partners at NEDLAC. Then we decided that that should also be part of this alignment. Therefore the 2011 regulations introduced what we called local, you know, product – local content and production to make sure that we favour locally produced goods. South African – SA goods to make sure that we retain jobs in this country apart from the fact that we needed to transform. So these are the reasons why we came up with the 2011 regulations. Now, if I would answer whether - were we successful – yes or no – in terms of the objectives. I would say yes, in the sense that: Yes to some degree, in the sense that the Department of Trade and Industry together with the National Treasury have used these particular – this particular instruments, the 2011 regulations to designate certain goods, you know and sectors of the economy for local production, because all tenders now that had to go out had to have at least a provision that in a particular designated product, those goods must be procured in the country. I can just give an example. If you look the textile. If you were to go to all those instructions the textile industry has been designated 100%. So in other words what government procures insofar as the uniform of police of the defence people, prisons all that we procure in terms of that particular sector – clothing, leather and footwear that

particular sector is designated 100% local. So, if you cannot find at least the material in the country then you have to get, of course permission from the DTI to go and import elsewhere, but production must still take place within the country to make sure that there are jobs. So, some of these sectors have been designated, you know, a 100% like this one – some are 70% etcetera. There is quite a number of them and then we monitor, together with the DTI to make sure and of course we are also helped by the public. When they see tenders that are published and without this particular condition to make sure that at least we comply with this particular condition. That is one part, Chairperson.

10 The second part which I can say we, you know I cannot say confidently that we have managed to achieve is on the transformation part. Why I am saying so. If you look at the PPPFA, in its current form, in the Act itself it prescribes the 80/20 and the 90/10 the preferent systems. So, the public has been of course raising issues and I think why the first one within the National Treasury to admit that indeed there is a shortcoming – to say but this particular piece of legislation does not go wide enough to address transformation. So, whichever way you do - whether you are tied to massage the regulations as we did in 2011, but because of the fact that the 90/10 and the 80/20 is included in the primary legislation – which only Parliament can change. It was difficult to say let us move. Some people would propose and say let us go 50/50 in other words 50 price and 50 your transformational preference points, but it – so these are debates that at least we are
20 grappling with as we speak now and which we hope that it would be addressed sooner than later. Of course we have heard South Africans – heard what they are saying and we are taking a position to address that particular issue.

So, whether you have the 2011 regulations, but you are still sitting with this 80/20 and the 90/10 that sits in the primary legislation, because you cannot change the primary legislation through the sub-ordinate legislation. So, that is the challenge that we are

having currently. That is just the one part that I think we still have got a long way to go – to make sure that we live up to what the Broad Base Black Economic Empowerment, you know. Requires of us to do.

Now, just lastly. I think I must also state that the BBBEE Act talked to transformation of sectors and of course industries and also the patterns of ownership in terms of the businesses in the country – whereas the PPPFA addresses preferences so we allocate preference because you are a level 4 or a level 3 or a level 2. A company or level 1 *et cetera et cetera*. I mean these are some of the things that we are grappling with, but I am sure in no time – we will be on top of this particular challenge.

- 10 **ADV LEAH GCABASHE SC**: I have focussed quite a bit on – O, your oversight role and your monitory role, but I know in terms of the PFMA you also have enforcement role.

MR NDLELENI MATHEBULA: Yes.

ADV LEAH GCABASHE SC: And that is also of interest to this Commission. How do you implement that role, because it would appear that very few people suffer the consequences of the transgressions that have come up in the public arena – public debates. So, enforcement. Talk to us about enforcement of these prescripts by National Treasury and maybe you should just break it down for the Chairman, maybe we should look at National, the three spheres and then if you could then deal with the entities as well as a separate category. What is your role in terms of enforcement?

- 20 **MR NDLELENI MATHEBULA**: Chair, section 6 of the PFMA is quite clear on the roles and responsibilities of the National Treasury when it comes to enforcement and the same provisions of section 6 are repeated in section 18 of the PFMA for Provincial Treasuries to assist in terms of enforcement and also the MFMA, you know, has provisions to make sure that the National Treasury enforces this piece of legislation – powers of the treasurer

quite clear there. As indicated earlier on where we pick up gaps especially where there are irregularities in the system. We issue instructions to augment the system. The question is: Are instructions on their own enough to address some of these things unless you address the behaviour – the behaviour of the people that are dealing with procurement to make sure that they live up to what the Constitution is saying.

We have of course a number of divisions within the treasury. All of us together enforce certain parts of the PFMA and MFMA. However this still remains a challenge. I must say that a challenge it is war that we are fighting to make sure that there is no abuse of the system, but of course as you may know now, that there are still these elements, but so
10 embedded in the system for intentional abuse of the system.

ADV LEAH GCABASHE SC: Yes, which is why the question is: Where you recognise and identify. That intentional abuse of the system. What steps do you take? You can use any example to illustrate the point. What is it that you take? And the reason this is important is because the Chairman at some point will be making recommendations on a variety of things. Maybe this is an area that this Commission needs to explore in detail. So that when recommendations are proposed to the Chairman he has an appreciation of where the problems sit.

MR NDLELENI MATHEBULA: Chair, in terms of or action, I mean we have done this over the years – even during the State Tender Board, is save for the fact the State
20 Tender Board was inconsistent with the Constitution. So, when we pick up abuses of the system. There are processes prescribed in terms of the public service regulations to deal with officials, because their accountability vests with the accounting officers. That is one process to take disciplinary measures and so on against the perpetrators that exists, but the second part is when we pick up that there is a problem. We have one of the following:

We investigate. We cancel the contract of course you apply rules of national justice. Cancel the contract. We also restrict in extreme cases where there is – we will restrict suppliers from doing business with Government. I know in the past, during the State Tender Board era, some of suppliers and even persons individually were sitting in our restricted list indefinitely, because that is what the State Tender Board Act says. We could restrict them indefinitely. Which I think was a bit of a problem because there is no part individual person that must be, you know, sanctioned, you know, to perpetually. So but currently what we do, because we take our queue from the Anti-Corruption Act, the combat, the Anti-Corruption Act at least it sets a limit in terms of the period – a limit in
10 terms of the period, you know for which a particular supplier or individual must be restricted from doing business with Government.

Now, there is a shortcoming, though that is one part, but there is another part that has to be sanctioned by court. So there are two lists. There is one list that as National Treasury would put together and will place there, that is one list. But there is another list called defaulters, those that default. But that of course has to be sanctioned by court, because we pick up this information. We send to court and court would then endorse and say that particular supplier and those people must be endorsed on the register for defaulters.

Now, there is a slight challenge in both processes. We are not experts – especially when
20 it comes to the register for tender defaulters. We are not experts in sentencing. So, courts have at times simply said no it must be indorsed, but they do not, of course indicate for how long. Now, we sit and we decide – which I think that what – and we decide out of O, to say - I mean the transgression may be – I mean the sanction may be commenced or it with the transgression and then we decide to give you five years – for five years you are banned from doing with Government, but whether that is fair. We do not know, but that is

a shortcoming in our process, for both restricted list as well as where court sanctions and endorses that people must be on that list. So, we would prefer at least a system. I am sure, where at least courts take both this responsibility of endorsing as well as sentencing, to say for how long. But the Anti-Corruption Act that is the guide in our case, because it says no more than 10 years.

ADV LEAH GCABASHE SC: Now, in the response you have given the Chairman, I understand that within the three spheres of Government there is the same response applied to SOC's and other state entities. Are they monitored in the same way? Do the same enforcement rules apply to them?

10 **MR NDLELENI MATHEBULA:** Yes, it is correct Chairperson.

ADV LEAH GCABASHE SC: Which particular office within National Treasury keeps a schedule of these transgressors? Is there – do you actually keep a record – an annual record of what you have investigated. How many people have then been prosecuted or what enforcement measures have been taken against particular people.

MR NDLELENI MATHEBULA: Thank you Chair. Those that are investigated by the office of the Accountant-General are kept by that office and those that are investigated by the office of the Chief Procurement Officer kept by that office. So, the stats in terms of what happened we keep differently, because the OAG receives quite a number of and they are involved quite a number investigations, similarly to ours.

20 **ADV LEAH GCABASHE SC:** And then just to re-cap. You have suggested that we speak to the DG in relation to getting these report, because he can then co-ordinate the various sources of reports whether it is statistics of any other investigative reports.

MR NDLELENI MATHEBULA: Yes. Yes, Chairperson that is correct.

ADV LEAH GCABASHE SC: Can I then move to the question of deviations. Deviations from a substantial part of your statement.

MR NDLELENI MATHEBULA: Yes.

ADV LEAH GCABASHE SC: And deviations; then variations and expansions of contracts – really are two sides of the same coin in a sense, because there again another weak link in the manner in which procurement is monitored by yourselves. Please address the question of deviations as fully as you can and deal with the exceptional circumstances, but in doing that deal with the deviations from those exceptional circumstances. If I might use the same term.

10 **MR NDLELENI MATHEBULA:** Thank you Chairperson. Deviations are actually allowed in as much as section 217 says but practically the instances where, you know, organs of state are allowed some kind of degree to deviate from the procurement processes, but then the instances. The first instance is it must be on an emergency basis for life threatening situations; cyber security crime which threatens National Security, fire and all those instances are classified as life threatening. So, you cannot be expected to go out on an open competitive period over 30 days to make sure that you address particular issue. That is an emergency .That is how we define emergency. Then you are allowed deviate but I have come ...[intervened]

ADV LEAH GCABASHE SC: Can I ask you to pause there. Is it defined in the
20 prescripts?

MR NDLELENI MATHEBULA: Yes.

ADV LEAH GCABASHE SC: Which particular prescripts?

MR NDLELENI MATHEBULA: This is defined in Treasury Regulation 16(a)(6.4) and also in MFMA as well as in a number of instructions that I will talk to.

ADV LEAH GCABASHE SC: But would those apply to those SOC's who we earlier agreed are not covered by 16 – Treasury Regulation 16(A).

MR NDLELENI MATHEBULA: Yes, Chairperson they would apply and I will explain why. If you allow me. So, the first part is emergencies. The second is sole source statuses. Where you are allowed to dispense with a competitive bidding process. It is as sole source. I mean this country - it is a known fact that over a period of time we procure electricity from Eskom. So, why would you expect an open competitive there is one
10 supplier for electricity in the country and therefore it is Eskom. So, in those instances the prescripts do make provision for dispensing with a competitive bidding process. Now, when we made this provision in the treasury relation immediately thereafter we – we then pick our pockets of the abuse of this particular regulation and they were issued an instruction to say: Look if you deviate from a normal procurement process, other than – in case of emergency or sole source and the transaction is above a Million, please report to the AG within 10 days and also the reasons for deviating from normal procurement process must recorded it by the accounting officers for audit purposes. That is one instruction. But this thing, you know, went on, you know people who started to make use of this, because I mean that is an instrument that is there. Then we again issued another
20 instruction that prescribed certain threshold within which people could apply this particular provisions and not losing the fact that it is on the basis of emergency and sole source – not agent because I know some institutions will always say: No this is agent, confusing emergency and agent and agents. And you know in recognition of the fact that you would find instances where a contract starts at 4 Million and by the time you know it, the contract value is sitting at 200 Million and you ask yourself. How is this possible? Then

we issue the instruction in 2011, May 2011, to deal specifically around these issues. Where we were prescribing exactly in what instances should contract expansions and deviations be allowed. In the case of the expansions and variations of contract. We then prescribed that - s for your normal goods and services, a contract could be varied by 15% of 15% of 15 Million. Whichever is the lesser and then for construction related procurement we set the threshold at 20% and 20 Million, also whichever is the lesser of these amounts. So that was an instruction that we issued in 2011. Of course the instruction issued in terms of section 76(4) (c) of the PFMA.

10 Then in 2016 there was another instruction that we issued, 2016/17 to combat procurement abuses and this particular instruction also highlighted exactly the same principles save for the fact that this particular instruction went a step further and say any other deviation outside of emergency and outside of a sole source must be approved by the relevant treasury. Where relevant treasury would refer to National Treasury and Provincial Treasuries and I think the intention was quite good, because he wanted to make sure that all deviations come to treasury and the relevant treasury approves – that was the intention to combat and the second intention was to make sure that the system becomes transparent, because already we knew that in as much as some of the public entities were not covered by our regulations, but this practices were happening in any event. So, but there were unintended consequences and I think this is quite
20 important. In defence that instead of deviations being an exception from the norm, deviations became the norm. So, orders of state instead complying with section 217 saw a room to use deviations to circumvent the system and this is where the challenge is. Remember deviations by their very nature - if you say to me I must deviate from a normal procurement process. You are actually giving me a blanc cheque, because then I decide who do I award the tender to. It is given to me. I decide. I can give it to anybody. I think

that is just the unintended consequence of a very good intention in terms of that instruction. So, I think let me stop here for now in terms of deviations, Chairperson.

ADV LEAH GCABASHE SC: Who has kept a record of those deviations? If there is one at all.

MR NDLELENI MATHEBULA: Thank you Chairperson. The office of the Chief Procurement Officer keeps the record thereof and all deviations approved or not approved – I mean supported or not supported are published on our website. So, it is publicly available information on our website you can see which entity applied for which deviation and what was granted at the end of the day and even the estimated value of a
10 deviation, because deviations are based on a project or a contract and that information is readily available provide from time to time to Parliament, of course and it is published information. It is available.

ADV LEAH GCABASHE SC: Back to the question of enforcement. What do you then do where you have found deviations that are outside of the prescripts of National Treasury – consequences ...[intervened]

[speaking simultaneously]

CHAIRPERSON: just hold on by Mr Mathebula. Just hold that. In case somebody has done something they know that it is working. Right now I can hear you very well.

ADV LEAH GCABASHE SC: Thank you Chairman.

20 **CHAIRPERSON:** Yes, you may answer.

ADV LEAH GCABASHE SC: It is enforcement consequences. We go back to that question.

MR NDLELENI MATHEBULA: Yes.

ADV LEAH GCABASHE SC: What happens to those transgressors?

MR NDLELENI MATHEBULA: Ja, it is a – it is one areas Chairperson, because when we report to Parliament and then Parliament place its oversight role. You may have seen that a number these entities and Government Departments over the last while have been appearing before Parliament for consequences – for consequence management, because that is what Parliament is therefore to play the oversight role. We go to Parliament of course to support Parliament in its work when these departments and entities are hauled before Parliament to answer to some of these things, as we speak. It is an ongoing process to make sure that are consequences.

10 **ADV LEAH GCABASHE SC:** Again I simply go back to the State Tender Board, because it is regime that we had and that one can use just to compare where we are. Variations of contracts. Deviations. How those were dealt with in that – under that regime and you can see my thought is. I am already thinking: is there anything that this Commission can recommend in terms of strengthening and improving the prevailing framework.

MR NDLELENI MATHEBULA: Thank you Chair, the State Tender Board, as indicated, you know, also did deal with contract variations, but to reasonable degree, because the Board would simply say: Okay, if there is an application for a variation of a contract. Firstly the Board would ask questions. Why was there variation in the first place,
20 because Government Departments are supposed to plan, you know, a lack of planning of course should not be used as a reason for varying contracts. So, it dealt with those issues but very carefully in the sense that the State Tender Board will simply say: Okay, we are giving you a variation but based on certain conditions, that institutions had to apply – had to comply with. I know there would for instance they would say we are giving

you this on a month to month basis but not exceeding x amount of period. So, within that period. So in other words your contract extension should be on a month to month basis but not exceeding x period. If for whatever reason departments failed to comply with that they could either come back to the Board, provide reasons or the contract expires – the contract expires and then the department would be sitting without and they were given – what we call delegated powers where they could procure through own delegated powers which of course delegated to them by the State Tender Board pending the finalisation of their own contracts and the Board would always follows some of these contract, because remember all procurement was under the auspices of the Tender Board, so there was

10 record of what has happened. What decisions were taken. Have those decisions been implemented *et cetera et cetera*. But that was the position in that particular – So, again the delegated powers within which government departments had to comply with conditions set by the State Tender Board had thresholds, had limits in terms of thresholds. The Board would say: Okay, we are delegating you, but not more than, as an example, 750 000, but those thresholds were set out quite clearly in the prescripts of the State Tender Board.

ADV LEAH GCABASHE SC: What I understand you to be saying is that there were much tighten controls really, probably the State Tender Board system was centralised and it was easier to then monitor and tighten controls over spending or would that not be

20 affair summation.

MR NDLELENI MATHEBULA: Look here. I think in hindsight – when one looks back. The current – the existing framework is now in the system for more than 10. I think we introduced in 2013 and we are now in 2018. So we are talking 15 years at least of the current procurement framework. I am sure one can always in hindsight said: Yes, perhaps we – there was a reason to stay with the State Tender Board, but I cannot say

convincingly that the Board also did not have these elements, because there were also allegations against certain Board members and their influence in terms of where procurement contracts should be going to. I think that is one of the reason to say no, you know based on these, because these are Board members of course and they live within communities and they are not immune to – they were not immune at that time to some kind of influence as is happening, currently, today. So, but at least there was some level of control at the time – apart from the fact that the service delivery was very very slow and I think that is quite important. Service delivery impacted negatively – quite negatively and very very slow in terms of the decisions of the Board.

10 **ADV LEAH GCABASHE SC**: Yes, you do make that point. Maybe this is an appropriate time for you then to deal with the reforms – the revisions that you are considering as National Treasury. You will find that section on page 33 of your statement and you break it down in your statement. So, if you could just help the Commission understand what measures you are taking to correct what you have identified as a project gone wrong. Those elements of the project that have gone wrong. I am not writing off the whole system. Just those elements that have gone of the rail.

MR NDLELENI MATHEBULA: Thank you Chair, through you. Now earlier on we spoke about the complexity of the system of the current framework and there were also spoke about the fragmented system. How fragmented the system is. Where you have the core
20 piece of legislation that are supposed to deal with procurement but you also have a number of other pieces of legislation that have an impact on procurement. So, in recognition of that problem and also in recognition of the abuse of the system which exists currently as the National Treasury are reforming the system. There is a Bill, the Public Procurement Bill that would be a national over acting regulatory framework to deal with all these other pieces of legislation. So, some of these pieces of legislation would be

repealed through this though – as some would be amended. There could be some amendments to make sure that you have one legislation in the country that deals with procurement. Whether you have people coming outside the country or in the country, but when you come to South Africa and you say: what is the procurement legislation in the country? We can then point out and say: That is the particular piece of legislation that deals with procurement process in the country. Now, the process is advanced stage and of course one of the issues that this Bill deal with – will review the delegations of authority – will also strengthen procurement planning, because I think that is where the problem is. There are also governance issues, because the failure of the system lies in governance, compliance and so on and we are also providing for the alternative dispute resolution

10 mechanism, Chairperson we do not want to always appear before courts to save costs. I am sure we can have another system where we think it is. I mean that is provided for in the Bill and then also the treasury regulations themselves are in the process of being reviewed and they will be published soon for comments, because if you look at that Chapter 16(A) that I have been always talking to. It recognises your normal goods and service but it does not address the procurement of infrastructure and which is quite a huge spend in terms of procurement in the country. It does not address those processes and it also does not address the procurement of capital project which you see, currently you have power stations that are under construction in the country. I mean that is capital.

20 So, that is what this particular piece of legislation seeks to do and of course to strengthen governance issues, as I indicated and to make sure that it gives more powers to this office of the Chief Procurement Officer to play an oversight role and take action where there are infractions and abuse of the system. Currently for instance – when accounting officers for some reason they, because they are answerable to the ministers. So, you can go that route and say no., for me to deal an account officer at least you channel it

through the minister because that is the minister's responsibility in the current system and I think it will remain as such, for now. We do not want to make sure there is ... insofar as the transactions themselves which are irregular in the process we have much more powers to deal with those, take decisions and where necessary restrict people from doing business with government. So that is in this particular legislation. Also the strengthening of contract managing, because this is where – when we are talking contract variations which is a very serious issue in this country. If you enter into a contract and the contract is 3 years and all of a sudden the contract finds itself being extended up to 12 years or 10 years. It cannot be. You cannot allow that to happen, because firstly it creates the so called ever green contracts in the system and it also serves as a barrier to entry by 10 small and medium enterprises and also black owned companies who find it very difficult to penetrate and it also place it selves to the anti-competitive practices, you know, collusive cover coating. You can name them and also the principle of value for money gets lost and what is also most important is the risk that one takes to extent a contract. For instance if an application to vary a contract is submitted and you do not even know how this contract was procured in the first place, you come in right at the end. You do not have all details of what happened and then you extend this contract. Contracts get extended time after time and this is also one area that I think we need to tighten and tighten very much to make sure that we improve contract management so that there is 20 proper planning and when contracts are about to expire government officials, those that are involved in procurement embark on procurement processes to make sure that we live up to the Constitution and to other pieces of legislation to make sure that there is transformation in the process and that is an area that is also very much in our radar. The Bill of course has to go through the normal legislative processes and it will be published soon as well, for public comments. I mean this is what we have always been saying and

once cabinet approves the publication there of. We expect South Africans to submit comments and it is quite urgent that we finalise this process. That is how urgent it is and I think even at levels outside ourselves there is an urgency. Government has placed it – I mean this is part of its priority projects to make sure that the Public Procurement Bill is out there and then people can have an opportunity to comment and also to address all these other socio economic objectives that we spoke earlier on.

ADV LEAH GCABASHE SC: I understand what you are saying, but my next question is how treasury is going to build this capacity you speak of, because you speak to capacity in contract management. You speak to capacity in procurement planning, just by way of
10 example. What practical specs or measures are you able to take – to build this capacity?

MR NDLELENI MATHEBULA: Thank you Chair. There is a process within treasury currently to build capacity. There again ins a division that is responsible for supply chain management capacity building and of course I think there are two streams there. The one stream is to professionalise this profession, because currently as I indicate earlier on you can just take anybody and throw him there and say: to and procure. That is where the problems are coming. So to professionalise to make sure that and why professionalization? Professionalization to make sure that like in any other profession – if Mathebula is found to have flouted the processes. Then the board that is responsible for that particular profession must take an action against Mathebula and say Mathebula must
20 be struck off the role. Just like in any other profession. So that is one part. But the other part which is an urgent part and practical for that matter is the training and development, because practitioners must be able to put together a tender document that is what is lacking. Hence we always appeared before courts and so on and simply because the way our tender documents are crafted you could clearly see that all these laws they are speaking about. There is a lot of misinterpretation and so on. Hence we land into the

problems. So, the immediate step that treasury are taking is to make sure that we train people practically to put together a document, a document that complies with the Constitution and all other applicable legislation. So that is one part, but the professionalization – we are talking to tertiary institutions is much more long-term and they will also have partnership with the National School of Government to make sure that we train people. We have also the forums that we always – where we share information among ourselves as procurement practitioners in order to clarify policies *et cetera et cetera*. It might not be adequate, but it exists.

ADV LEAH GCABASHE SC: As I conclude can I ask you to apply your mind to the next
 10 few set of questions. The first is you have told the Commission that the procurement spend of government is in the region of 800 Billion. Is there a monitoring process that this money spend achieves its intended objective.

MR NDLELENI MATHEBULA: A difficult question – quite difficult, but look the whole process also talks to the public finance the management of the budgets after the tabling of a budget by a Minister of Finance in Parliament that all of us. All divisions, within the National Treasury are enjoined to make sure that government departments and public entities spend that money correctly. But of course, there is a challenge. There is challenge because we cannot claim that all this money goes to where it is directed to. Hence the problem that we are facing in the country.

20 **ADV LEAH GCABASHE SC:** Then my next question really is one that seeks to identifying the real – Where the problem really is located. These transgressions. The misspending of money. Is it the law that needs to change? Is it Government Policy that needs to be revised or do wrongdoers simply have to face the consequences of what

they have done. Where do you locate and I know you have spoken to us about reforms where is the nub of this problem?

MR NDLELENI MATHEBULA: Chairperson, the thing is a combination of all this questions. If you look at our regulatory framework as indicated earlier in that for quite some time some of our prescripts never applied to specific public entities. Which we have now corrected of course through instructions that is one. But also the bigger element is the human element in this process. regulations are there. Hence we augment them from time to time but humans must also chose to make sure that there is compliance in the process and of course the issue around investigations and subjecting
 10 people to prosecutorial processes is well known save for that maybe the processes at times, you know take long in the current justice system now – this is personal now. This is personal and has got nothing to do with the prescription but perhaps we may need to look at whether we should not re-classify procurement transgressions differently so that they get or even considering or even considering a special tribunal specifically to deal with this cases, because otherwise if you do not so then the rot continues in in the system.

ADV LEAH GCABASHE SC: Yes this is also one of my last few questions. These criminal prosecutions investigations that have taken place. Maybe I should rephrase that. You have investigated certain matters and referred them for criminal prosecution. But one
 20 you have done that you have no control over what happens to those transgressors. Is there anything that you are thinking through, because really you need to have a deterrent to malfeasance an effective deterrent to malfeasance. Is there anything else other than these referrals to prosecution that you are knitting into your reforms, over and above the items out have already mapped out to the Commission?

MR NDLELENI MATHEBULA: Chairperson I am sure we can always take recommendation of what else could be done, but obviously we have always maintained a position that we need to send a shock in the system and of course the current instruments that we are using. Where we ban people from doing business with government, for quite some time, but of course the other parties - that criminal part where people should be subjected to. But we are able to... we are open to any proposals that we can include in our procurement processes for improvement.

10 **ADV LEAH GCABASHE SC:** Mr Mathebula are there any other material issues you would like to raise with the Commission within the context of course of public procurement.

MR NDLELENI MATHEBULA: Chair except for saying that we will continue to serve and where we identify wrong doing that we make sure that the wrongdoing is dealt with and of course also to make sure that there are people who were historically disadvantaged by unfair discrimination do benefit from the procurement of this country and I think we can say that we – without any fear that is has to be done but of course within law. That is what we are saying. They took advance them, must be transformation and people must repent at some point in time and I think this is where we leave it for now and thank the opportunity to appear before the Commission.

20 **ADV LEAH GCABASHE SC:** Not quite Mr Mathebula but thank you very much. Chairman there may be questions that you wish to put to Mr Mathebula.

CHAIRPERSON: We are going to take – if you are done the lunch break because we are on my watch about 7 minutes before one and Mr Mathebula must come back at two so that we can clarify certain things. You are done?

ADV LEAH GCABASHE SC: I am done Chairman. Thank you very much.

CHAIRPERSON: Okay. Thank you, those who may have done something that has improved the situation in regard to my problem of hearing counsel. I think if they could do the same in regard to the witness mic of speaker. It would be helpful. I can hear him, but if I can hear him as well as I hear counsel that would be great. We will adjourn then until 2 O'clock.

FEMALE SPEAKER: All rise.

HEARING ADJOURNS

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Session 3

CHAIRPERSON: Mr Mathebula, counsel asked you very pertinent questions that are really very important for this commission and generally, the information, the evidence that you have given, is very relevant to what we are doing, but I do have some questions to clarify certain things. You said if I understood you correctly, that you do take some action against officials when there has been no compliance with procurement rules, legislation and regulations or policies and instructions, is that right?

MR NDLELENI MATHEBULA: Correct Chairperson, we always make recommendations to relevant accounting officers to take actions against those people.

10 **CHAIRPERSON:** So you are not the ones who take action against them, you only make recommendations?

MR NDLELENI MATHEBULA: Yes.

CHAIRPERSON: Do you have statistics that could tell us how often your recommendations are complied with generally?

MR NDLELENI MATHEBULA: Chairperson we don't keep stats, but at least we do have cases that we can provide and say these are the recommendations that were made to relevant accounting officers to take action against, but perhaps that would be what we have as statistics, but as to whether the officials do comply in those things, I think there is definitely a gap there, but what I do know, because the work that we do, to a greater
20 extent, also involves the Auditor General, although the Auditor General's work is post facto, so we cannot track whether our recommendations are actually implemented.

CHAIRPERSON: So your office or National Treasury as far as you know, will not have statistics as to how often various government departments and maybe State entities,

comply with recommendations for action that your office may be making, or may have made over the years?

MR NDLELENI MATHEBULA: Thank you Chairperson, I think on a very small scale, we do have stats, but not to the extent that we would have loved to. I do know that in terms of recommendations where for instance, we get applications for condonements of instances where processes were not followed by officials, that we do require certain information on the basis of which a decision should be made, on whether or not to approve condonements for irregular expenditure.

We do have those stats, but on a broader scale, no I think I must just admit that we don't
 10 have those stats, but we do have especially for those national departments and to some degree, provincial departments, but surely at local government, we don't have those stats.

CHAIRPERSON: Do you know whether within government, there is any office that could give this commission that kind of picture nationally in terms of saying there are a lot of irregularities that are connected with procurement throughout government and that government is determined that there should be consequences for these things for non-compliance and therefore, it is monitoring whether action is taken when officials, employees of government and even accounting officers themselves, have not complied with procurement rules, policies and legislation, so that nobody thinks they can continue
 20 with non-compliance because there are no consequences?

MR NDLELENI MATHEBULA: Thanks Chair, yes, there is an office. The Public Service Commission in my understanding, can provide that kind of information because in many instances, some of these are reported to the Public Service Commission and I do know as a matter of fact, that the Public Service Commission is quite efficient and they do

make follow-ups on those allegations and they also do make follow-up in terms of whether accounting officers do take actions as recommended by the Public Service Commission, but they are that kind of office which the commission to approach to get such statistics.

As indicated, I am sure to a limited degree, the Treasury could also provide such information, but more in the Office of the Accounting General within Treasury, at least National Treasury, we could have such information because I do know that they do make follow-ups on some of these issues and of course other law enforcement agencies, but the Public Service Commission is the office that consolidates such information and I am
10 sure they could be approached in this regard.

CHAIRPERSON: As far as you understand the Public Service Commission, when it has received such reports from government departments, what is it supposed to do? Is it just for statistics, or is just to make further recommendations to Ministers, Premiers or what does it do with those reports once reports have been made to it?

MR NDLELENI MATHEBULA: Chair I am speaking under correction, but I do know that they act on those reports, they follow-up with the relevant officers and also political leaders, office bearers to make sure that action gets taken against those reports. It definitely does, that office does make a follow-up on what eventually happens. Why I am saying so, I have to state this, because allegations are made on a number of cases and
20 then even to ourselves as Treasury, investigations are done on individuals where allegations are made, but of course, the commission always wants to know what action has been taken, so they present this to accounting officers and they also demand the reports of what exactly transpired in terms of enforcing the recommendations of the Public Service Commission.

CHAIRPERSON: Okay and then, in terms of non-compliances that come to your attention that you are able to do something about, because I think you did give evidence that when you become aware of allegations of irregularities, you follow those up. Now, do you follow them up only if there is a formal complaint, or do you follow them up for example if you to read in the newspaper that there are complaints of irregularities in regard to a certain tender. Do you follow them up or do you have to have a formal complaint lodged by somebody?

MR NDLELENI MATHEBULA: We actually do both, because our position is that the public is actually the guardian of, or at least they should be seen to be contributing to
10 guarding against irregular practices in the procurement space, so whether we read in the newspapers that there are certain things happening in a particular public entity or government department, we are quick to demand documentation that of course pertains to that particular allegation, in as much as we receive formal requests. At times, we get information and at times, we battle to get information for our own investigations, but we act on both. We read, please give us documents, this is what we read in the media, we want to know exactly what happened and we do our own assessment that is one, but also when you have formal, I mean we get a lot of it. We get a lot of complaints ranging from irregular practices up to the non-payment of suppliers on time, which is a challenge currently in the country and we intervene where we can.

20 But of course, we do work with also the DPME Department of Monitoring and Evaluation in this regard, but we act on all these instances, to find out exactly because we can't take these things for granted and that is exactly what is happening currently.

CHAIRPERSON: With regards to the decision making in regard to tenders, you talked about I think the first instance committee, is it the Bid Committee, the Bid Adjudication Committee, is that what it is called?

MR NDLELENI MATHEBULA: Yes.

CHAIRPERSON: Yes and you said that part of the reason why that committee is critical, is because that is where it looks at the specifications for example, is that right?

MR NDLELENI MATHEBULA: Yes.

CHAIRPERSON: And you said that you could have situations where specifications are formulated in a certain way in order to favour a particular entity that would later on,
10 tender?

MR NDLELENI MATHEBULA: Yes.

CHAIRPERSON: Now, the actual adjudications of tenders, they are done privately in the sense of not in public, people sit in some boardroom and decide that, is that right?

MR NDLELENI MATHEBULA: Yes.

CHAIRPERSON: And generally the public will just hear that a particular tender was been awarded to a particular entity, but they won't have any participation of any kind, is that right?

MR NDLELENI MATHEBULA: That is correct Chair.

CHAIRPERSON: And that process of adjudication is not transparent is that right?

20 **MR NDLELENI MATHEBULA**: It is correct Chair in the sense that it is not open to the public.

CHAIRPERSON: Yes.

MR NDLELENI MATHEBULA: And it of course doesn't involve members of the public.

CHAIRPERSON: And the people, who make decisions on tenders, don't provide reasons until, there is a court case, is that right, or do they?

MR NDLELENI MATHEBULA: There is what we call in the process, debriefing and I do know that some institutions do conduct debriefings, because it gets provided for, if it is provided for in the tender document, but the information is also made available on application whether through PAJA or through PAYEA that information is actually made available, but in certain instances, I am aware because I also chaired a bid adjudication committee for more than 10 years on transversal contracts as a chairperson and also
10 head of that office. I do know that at times, the losing bidders, would without thinking twice, resort to the court process and apply court processes to request records and so on and we make the records available, that is what our duty is and of course relying on the fact that if the process was transparent or is transparent, then there is no reason to fear, to disclose the document, unless of course one is hiding something out of this process.

CHAIRPERSON: You see, I am thinking about that, because I think it is important that we look at what is within the procurement system that is weak which results in the levels of corruption and irregularities that are associated with procurement in the country, because my observation is that a lot of corruption, when we talk about corruption in this country, is connected with tenders, so it is a very important part of what we must look at
20 because that is part of the terms of reference of the commission. Part of the terms of reference, actually 1.5 and 1.9 says we must look at the extent or the nature and extent of corruption and therefore, we need to look at what are the systems that are in place and are there weaknesses in the systems, which encourage in a way, or make it possible for corruption to go on at the rate at which it is going on.

So the issue of transparency might be important because if the losing bidder has been given reasons why he or she lost or it lost, that might go a long way to convincing them that there is no corruption in the decision and that they lost because they deserve to lose, so it may well be that to the extent that the reasons are not provided as a matter of course, that maybe that should be considered. Do you have comments on that as somebody who has been very involved in procurement? Is it something that might assist? Is it something that might be practical?

MR NDLELENI MATHEBULA: Thanks Chair, but I must also say that when we talk about the bid adjudication, we are talking about the last leg of the process and I just want
10 to reiterate that yes, transparency can help to make sure that a number of people do take part, but at the same time, my own personal experience is that out of 100 bidders, one wins and the 99 that are losing, will always cry foul, legitimately or illegitimately, but the issue is, if the adjudication process itself is opened and people can see transparently what is being done, whether losing bidders would actually say no now I am happy and so on, but it is a good thing that we can always promote.

Historically Chairperson, if you take the construction sector, our prescripts make it mandatory to read the prices at the opening and closing of bids, so we read prices in the presence of the interested parties, but that is it and in the mind of the bidders, they always say look my price was the lowest and therefore I deserve to be awarded a tender,
20 but when you look at the entire process, I might be lower in price, but I have got a shovel and a spade and therefore, I can't build even a single house, or a shovel and a wheelbarrow, hence my price is low and somebody else who is a little bit higher in terms of price, might be having the technical expertise to make sure that the building is completed. That is one part, but the second part, is that price is not always the sole determinant of a winning bidder, that is why we are speaking about a combination of the

points, so you take price, you take these other elements and then you put them together and then it determines who the highest scoring bidder is, provided that bidder complies with all specifications, but I think without discounting this proposal, it is something we can take and test.

I know that in Gauteng, a few years ago, there was an open tender process that was introduced, but I have not seen exactly the impact thereof, perhaps that is something that one has to do, an assessment of what was the impact of that particular process and then we can see whether we can roll it out throughout the whole procurement system in order to deal with the issue of transparency.

- 10 Having said so, that the adjudication is the last leg, you also have this leg which is right at the beginning where this is the potential of crafting the specifications to arrive at a particular outcome which is also a bit of a problem because surely I don't think there, you can involve the public unless you are inviting the experts to come and sit in on that process as indicated in my earlier presentation.

CHAIRPERSON: Well what do you think can be done to deal with that situation where corruption takes the form of somebody within a government department who knows an entity that is likely to tender in due course or that will tender, who then decides that the specification must be formulated in such a way that when the adjudication happens, only one bidder will succeed in the sense that that one will fit into the specification perfectly.

- 20 What should be done to deal with that situation?

MR NDLELENI MATHEBULA: Chairperson, the current processes, all tenders are published, so every 1st of April, there are procurement plans that are sent to the National Treasury and I suppose also to relevant treasuries, where planned tenders for a particular year are packaged, so that potential bidders can position themselves to know what is

coming and of course, that is the current system that we have, so it is available on our website.

Secondly, the results of all bids, are also published and reasons why some of bidders have been successful and some not, but to answer your question directly what should be done, apart from enforcement where as far as I am concerned, accounting officers must be made to account, because they must make sure that the specifications are not biased and they must also approve the specifications before they go out into the market and that they must ask questions and serious questions where there is no clarity in terms of specifications that are supposed to go out. It is more making it a responsibility of
10 accounting officers. Maybe one can even think about putting this into their performance agreements to say, when a tender goes out in your department, personally, accounting officers must make sure that they read these things and where there are issues, they raise them before a tender gets put into the public domain, because if you miss that step and obviously you have missed the biggest part of the process, because we prescribe that when evaluation is done, evaluation must be done in terms of the criteria published and nothing else.

Also, at adjudication stage, the adjudication committee must look at all these processes, this was the tender published and this was the criteria specified and this is what the bid evaluation committee has considered during the evaluation and therefore, this is the
20 outcome and these committees as well, must also ask questions.

Now depending on delegations, because some of the bid adjudication committees have delegated powers to make final decisions, but in many other government institutions, that final decision rests with accounting officers, so again, I think we are open to taking proposals of how we can strengthen that particular system to make sure that that whole

chain, otherwise I don't even want to consider going back to the old order, where you have a board that has to look at this thing, but the other thing that we can do, which we always do by the way, is to benchmark against systems of other countries.

I know I have been to Ghana and then looking at systems of various other African countries, including countries from the Caribbean and in some cases, from Europe, just to look at what is best practice and what do they do to make sure we deal with these issues of allegations of corruption in our processes and the fraud that exists.

CHAIRPERSON: What are the chances of somebody else detecting that there has been an unfair formulation of the specification once the person who has done it, has done that, how easy is it for somebody else to say that there is something wrong with this specification. Is there something that is easy to pick up, or not really, or it depends on how bad the person is who was trying to formulate it in a certain way, if he is quite skilful, nobody will pick it up?

MR NDLELENI MATHEBULA: Thanks Chair, you raise a very important fact. Look, it depends on experience. Some of the officials can simply tell you right from the beginning, that this tender is cooked, but it depends on how long have you been involved in the system to pick those things up and because it was cooked, it was cooked in that way and that way and therefore, this thing can't pass the test and you refer it back. Sorry to say, but I think I have detected, but like I'm saying, on a number of instances where I conceded that no, this particular tender is cooked and I simply returned it back and simply not approved, but it is experience. It is a game of experience to understand and also, the application of all the policies that apply into the system, but not all of us are of course experienced.

CHAIRPERSON: Would there be somebody in any particular department or State entity, whose duty would entail precisely that, that before a tender is finally adjudicated, to check whether everything has been done the right way, but also to examine the specifications and see whether they cannot pick up as you say, cooked or check against the needs for this job and see whether the tender accurately reflects really what is needed. I mean I am just thinking that if I can make an example by way of appointing somebody to a position as opposed to pointing a supplier, appointing somebody to a position if I have a particular position in the department and I know that I have got a friend who can do the job, but that job, the person who must do that job, doesn't need more than a bachelor's degree in that field, but because I know my friend has got a Masters, then I say that one
10 of the requirements is that you must have a Masters, or if my friend has got a PHD, I say you must have a PHD, but when actually when somebody looks at what this person is supposed to do once appointed, they might be able to say you don't need a PHD, a bachelor's degree is just good enough.

So in other words now, taking that example to what we are talking about, would there be somebody who can look at all of all those things?

MR NDLELENI MATHEBULA: Correct, many of these, especially at SOC's, they have got, or they are supposed to have compliance units and then it becomes the responsibility of the compliance unit to make sure that the process is beyond reproach and above
20 board, but we are proposing, in the review, we are proposing something that we still need to discuss and agree on, is to extend-

CHAIRPERSON: I'm sorry, Ms Gcabashe you have been standing for a long time, please feel free to – I didn't realise you were standing, please feel free to sit and when I am done, you can rise again. I am sorry, I didn't see that.

ADV LEAH GCABASHE CC: Thank you Chair.

MR NDLELENI MATHEBULA: Thanks Chair, what I was saying, above just the compliance units, we are thinking whether it won't be possible to extend the mandate of internal audit function within departments because all of them have got internal audits to see if given the capacity constraints that we have in the system, whether we can't use internal auditors to audit procurement processes before they actually get finalised. It is something that we are thinking about and I think we will propose that also in the reforms that we are engaging in, although we know that their function is mainly to help us in terms of regularity audits, not necessarily in terms of forensic and so on. But we are
10 considering extending that particular mandate to say, give them the responsibility, they must vet all our processes to make sure that they are beyond reproach before a final decision and then give us a report at least from an independent point of view, because not procurement, these are an independent and then I guess they subscribe to their own ethics and in my view, this would be one of the instruments that we can use to make sure that before a tender is finalised, it gets to subjected to internal audit for review and then they can of course identify areas where there are concerns and we can address these issues even before the award of tenders. That is just something that we are thinking about for now Chairperson.

CHAIRPERSON: Well I think that is quite important because I was about to ask whether
20 there is any internal process to say, if a decision has been made before it is sent out to the bidders, successful and unsuccessful, whether there is a process where people other than the ones who have made a decision, can look at it and see whether everything seems to be fine. So from what you are telling me, it would appear that as things stand, there is no such process, but you are considering introducing a process that would run along those lines?

MR NDLELENI MATHEBULA: Yes.

CHAIRPERSON: Okay now have you got, or your office, or Treasury, any statistics as to what percentage of tenders maybe provincially or nationally, really get contested compared to the total tenders that get awarded? In other words, what I read in the media which gives me the impression that it is a lot of tenders that have got problems, to what extent is that a fair reflection of position? Is that 10% of tenders nationally for example, or is that 20%, in other words, we might be too concerned in circumstances where maybe it is just 1%, not that we should not be concerned at all, but obviously, if it is 1%, your degree of concern is not going to be the same as if it's 45% and more. Do you have
10 statistics along those lines in your office or Treasury?

MR NDLELENI MATHEBULA: Thanks Chair, because procurement takes place at all institutions and they are open tenders, after a certain threshold, for instance, open competitive tenders, the threshold is R500 000 currently, so what you see contested in the main, is what is above that threshold, because below that threshold for national and provincial sphere of government, go through normal quotations where you get 3 quotes and so on and that is one process that we can't see.

If you talking at local government, the current threshold is R200 000, so in other words, everything above R200 000, must be open and competitive. Anything below that, is of course procured through quotations and there are thousands and thousands of
20 transactions as we speak, as I sit here, that are happening in government. We do have a reporting system currently. It might not be perfect through the central supply database, there is a reporting system where transactions and contracts are reported, but that might not always be accurate. The only other stats that we use to determine how much goes through government, is through another system where payment is done, because you

need to pay at the end of the day and at least, that particular system will give you a much more accurate. It may not be accurate, but accurate of what exactly is happening, but as to giving a split in terms of percentages, it is a bit of challenge for now.

Chairperson can I also just go back to your question earlier around this internal audit, in our reforms, in the procurement bill, we are making provision for a procurement Ombud, so that you give a cool off period once a decision has been taken to make sure that people can come forward and say no they either object or what, but within a certain period, just to also highlight the importance of the decisions to make sure that they are fair before we even take these decisions to board.

- 10 **CHAIRPERSON**: I would imagine that people, who want to do business with various government departments and State entities, would know for example, who the people are who are likely to decide a tender, am I right? In other words, maybe let me put it this way, a bid adjudication committee and that is the committee that makes the decision, is that right?

MR NDLELENI MATHEBULA: Yes.

CHAIRPERSON: Now in regard to departments, a government department, would there be one bid adjudication committee for the entire department in different provinces, or would there be one for a particular province and a particular province in the same department, what is the position?

- 20 **MR NDLELENI MATHEBULA**: Currently, every department has its own bid adjudication committee and whether you are in the province or you at a national, but that is why in our prescripts, we say those committees must be cross-functional, so that is one part that we are prescribing, but what is important to note, is that your BEC, the evaluation committee, is always a non-standing committee, because it depends on the type of commodity that

they are procuring and then you put together that committee to come in, so it is not a standing committee, but your BAC in many instances, are standing kind of committees where they know that at a certain point in time, they need to sit as a committee and the secretariat must present recommendations of BAC on whatever procurement and they need to make decisions on that, so it is more similar to what we used to have in the State Tender Board, because the Board was a standing committee with at least 6 members from the public, representing different sectors and then 6 government officials, so you had that combination, but this current system, given accountability, we can't draw from people from outside unless maybe we review the legislation if we are to deal with this

10 issue to make sure that you bring in external people to be part of the bid adjudication committee to deal with the transparency and any potential abuse of the system.

CHAIRPERSON: So what you are telling me, seems to suggest to me that the answer to my question, is that yes, indeed, if I know that there is going to be a tender coming up in a particular department, that I am interested in, I would or could know who will decide it, because the bid adjudication committee is usually or all the time, a standing committee, so I would know that, if I want to know I can find out?

MR NDLELENI MATHEBULA: Yes that's correct.

CHAIRPERSON: And members of a bid adjudication committee, I assume are employees, officials employed by the same department, is that right?

20 **MR NDLELENI MATHEBULA**: Yes it is correct, but nothing prevents accounting officers from drawing from other departments, some people who must just come in, they either observe the process or provide technical support, but those of course are precluded from taking part in final decision making if they are observers, but if they are appointed as members, it is a different case altogether, because then they do participate in the final

decision making, or even making a recommendation to the accounting officer, depending on delegated powers.

CHAIRPERSON: And who decides on the composition of bid adjudication committee in a department? Is it the accounting officer, DG, or is it somebody else? It is the accounting officer?

MR NDLELENI MATHEBULA: Yes in a department, the accounting officer decides who should be appointed to that committee.

CHAIRPERSON: Yes in a business entity, a State entity, do you know how it would work?

10 **MR NDLELENI MATHEBULA**: In a State entity, those that have got boards, the boards would decide. The boards would decide who should take part in that committee, but in those public entities which are linked to departments, for instance your 3A, because with 3A, your national public entity is linked-

CHAIRPERSON: When you say 3A, you mean 3A to the PFMA?

MR NDLELENI MATHEBULA: Yes, the schedule 3A to the PFMA, because those entities are linked to specific departments and therefore, the accounting officer there, is the CEO, not necessarily the board, because there is no board. I mean you have got a number of them, we can talk about quite a few of them and of course 3C's that are listed as 3C's, these are your public entities linked to provincial departments, so then you also
20 have the CEO's who are accounting officers who decide what should happen. The mother department simply of course as a shareholder, plays an oversight role, but at the end of the day, the CEO who is an accounting officer, makes a decision. In a department, the DG makes the decision, in public entities, there are big SOC's and

Schedule 2's and other public entities, similar public entities, the boards does make a decision who sits, constitutional institutions, the CEO's who are there, make that decision.

CHAIRPERSON: And is there legislation or policy that sets out what criteria must be applied in selecting individuals who would sit in bid adjudication committees?

MR NDLELENI MATHEBULA: I think apart from prescribing that in all these committees, at least there must be a supply chain practitioner and also in certain instances, the CFO of those departments, must be part of this. There is no particular criteria of selecting officials that must constitute a committee, but at least we do prescribe, because the role of the supply chain management practitioner, is to make sure that the processes are applied and followed during the evaluation up to the adjudication process, that's the requirement and the CFO's, our prescript says all the SCM units must be under the auspices of the chief financial officers of respective departments.

CHAIRPERSON: So there would be nothing to suggest that an accounting officer in looking for people to appoint to a bid adjudication committee, must look for people of integrity and people who have for example, legal qualifications to understand some of the things and people who might just be known for impartiality and that kind of thing, there would be nothing that says that they must look at that?

MR NDLELENI MATHEBULA: It is correct Chairperson, there is nothing that would prescribe, save to say that those that participate in our prescripts, we have stated, that those who participate, must be unscrupulous, where there is a conflict of interest, they must disclose, declare and recuse themselves from the processes, because we describe in broad kind of ethical standards, that are applicable, but as to identify which individual best fits that criteria we don't have, but at least we do have a broader kind of prescripts of what the committee should do.

CHAIRPERSON: And would there be any study that may have been done, to your knowledge, by any government department, maybe even your office, to say, or that would identify where most of the tenders where there are allegations of corruption and so on, or that even get taken to court, where exactly problems seem to be, for example, is the problem at the specification stage? Is the problem at the adjudication stage? In other words, is one of the weaknesses that bid adjudication committees do not seem to have people who can do a proper job, is there any study or anything that has been done to say where exactly do things go wrong in our procurement system if we want to fix the system, where should we focus?

- 10 **MR NDLELENI MATHEBULA**: We always rely on the reports of the AG, because the reports of the AG in as much as they do not go to that level of detail, as to saying exactly where are the issues, but at least it is a usable report, to see where exactly the problems are at a very micro level without going into deeper details looking at it case by case to say if you are taking a basket of cases and say let's look at these cases and see exactly what could have gone wrong, we ourselves, have not done that study, but it is something that we definitely could do, because some cases are reported and some cases are not reported, so maybe one can always approach it in a phased manner to say let's look at all cases of a certain amount that are reported and analyse exactly where the issues are, because courts would in any event, go into detail and say the problem is here whether
- 20 the problem is procedure, whether the problem is the manner in which the specifications were crafted, whether the problem is the biasness of the members of the committees, the courts are able to give us those stats, but it is something that we can always look at, but we haven't done those studies yet, save for relying on what the AG says all the time.

CHAIRPERSON: Well I can say that before this commission finishes its job, whether it's through your office or through the investigation team of the commission, I will be very

interested in something that tells us where the problem areas are in terms of procurement. Therefore, if we are looking at making recommendations, which are the areas that really need to be looked at, so it may well be that you might wish to go and reflect on this and see whether it is not something that irrespective of this commission, whether it's not something that Treasury or your office, the whole government should look at and say we have so many problems with our tenders and procurement, where are the problem areas, so that they can then focus and say, this is where we must solve the problems.

If for example, if 80% of the problems are with regard to the actual adjudication, it may be
10 that more focus should be on that, but if 80% of the problems appear to be prior to that, then that can be looked at. Obviously, the whole thing must also be looked at, but the difference might be where you focus and where your emphasis is going to be, because your solution must seek to resolve the areas that present the most problems. Now, let me also ask you this, I don't know a lot about procurement, so if I ask some of the questions that reflects my ignorance, you'll forgive me.

MR NDLELENI MATHEBULA: Thanks.

CHAIRPERSON: You know, my observation is that when one talks... or let me start by saying, bid adjudication committees, they make decisions where there are competing interests, different bidders say here is what I will do, here is what I will do, blah-blah-blah,
20 and they make a decision and one party wins and another one loses. Now, courts do the same thing. You know, it is not exactly the same, but they also decide, where there are competing interest, they decide. Organisations such as the CCMA also decide where they are competing their disputes, you know. But my observation is that, in this country, we don't have any significant problem of the public complaining that for example, courts or organisation such as the CCMA, they decide cases based on corruption, the judges,

magistrates are bribed, the arbitrators in the CCMA... in fact a lot of bargaining councils throughout the country have got arbitrators who arbitrate disputes. I don't think we have problems of complaints, really, of people saying well I lost because the arbitrator or the magistrate or the judge was bribed, you know, that there was corruption, you know. So, when I look at that, I look at how much different it seems to be with the adjudication of tenders. So, I ask the question whether it might have, amongst other things, to do with the openness in which courts and organisations such as the CCMA, make their decisions. They come and sit, it is open, it is public, anybody can come in and listen and the decision is announced, it is known who decided it, it gives reasons. Now, the

10 adjudication committees don't do that. They do all of these things behind closed doors. And the public won't know who made those decisions, unless there is litigation and so on. So, I wonder whether it is too simplistic to say maybe if bid adjudication committees were to operate more openly, if for example the public is going to know that on that day, the bid adjudication committee of Department A, will be sitting to consider and decide a particular tender, it's known where they sit, the doors are open, the members of the public can come and sit and listen. And the people who make decisions know that the public knows that they are the ones that make those decisions. The media can come in. Maybe that could contribute, but as I say, I don't know much about procurement. You know quite a lot. Have you got some comments that you can make on that? I know that there may be

20 situations where a particular bidder might say, well, there is some sensitive information relating to my business that is involved there. But I don't know whether all bids would have that and secondly, even if there is such a situation, whether it should prevail over the public interest that may be there in having that kind of openness and transparency, where those who make decisions know that I will be known publicly to be the one who

gave that tender to so and so. If there is something wrong, everyone will know. If there are suspicions of corruption, they'll associate me with those suspicions.

MR NDLELENI MATHEBULA: Thank you, Chairperson. I think it is an invaluable proposition. Because procurement, by its very nature, is supposed to be an overt kind of process, that's one. But once one submit their responses or their tenders for adjudication, those tenders then become public documents. That is why, whenever people want access to the winning bidders, because they are losing, we have no objection, provided we, I mean, we disclose that information. So, that could be done. I think if one talks about the big projects, because I think that is where you need to start,
10 your big projects, it is doable. It is something that we can consider to kind of infuse in our own processes and see if we can't do that and see if the levels of the complaints that we have, even the court challenges, you know, cannot reduce. It is something that we can consider. And obviously it has to be done, in my view, in a phase approach. But also, having done some kind of study in terms of how many transactions go through quotations and how many transactions go through open competitive bidding processes. Because some of these tenders are parcelled, so in other words they are broken down into smaller chunks, maybe to circumvent opening it up, ja. But it is something that we definitely can take home and see how we can practically apply it and roll it out, because we need to pilot it somewhere and roll it out throughout the whole government. I know from a
20 transversal point of view, because those bids are adjudicated centrally within the Treasury, perhaps that should be the starting point and see that these are the tenders that Treasury are responsible for, can't we open it up. And then take that model, roll it out to government to see how practical it could be, given the number of tenders that are always in the system at any given time. But it is something that we can always consider.

CHAIRPERSON: And then two times you mentioned something about accountability when you were referring to bringing in outsiders. If I understood you correctly, you seemed to think that if you bring in outsiders to participate in decision making, as opposed to giving advice, there would be a problem of accountability. If that is so, can you explain that to me?

MR NDLELENI MATHEBULA: Thank you, Chair. That is correct. That is my thinking. In fact, if you look at the previous regime under the State Tender Board where we had, as indicated, six members who represented different sectors of the economy, who were members of the board and then you had six government officials who also represented

10 different interests of different government departments, who would come in as a board and adjudicate on tenders. Now, when the decisions of the board were challenged, the departments would always say, no, but we didn't take these decisions. We did not take these decisions, so we can't be held responsible for these decisions. Because that decision making power has been delegated to the board. So, that is why the State Tender Board over and over had always been drawn into court to kind of respond to their decisions, that's one. Now, when we introduced SCM, we were very clear in our own minds that if you bring in external people to form part of this bid adjudication committee, equally so, the accounting officer could simply say, no, but I mean these people, when there is wrong doing in that process, you can't take action against them, so you can't

20 discipline them, because these are external people. But when these are officials of a particular department and there is wrong doing in terms of what they do, then you have all the powers to hold them before a disciplinary action and take an action against them. So, this is where we kind of coming in. Why we are saying so, because the PFMA by its very nature, its preamble talks to let managers manage and also account. If there is wrong doing, there are so many other structures where they need to account to, from the

DG, the accounting officers, right up to Parliament, you take disciplinary actions against them. But the external people can always run away without them being subjected to a disciplinary action. At least in this case you are applying the Public Service Regulations to take disciplinary action in terms of... So, this is where the thinking was at the time. And I think until perhaps we get input from the public in terms of how do they view it in terms of the new envisaged bill. It is something that we can look at and see how then do we make even these external people accountable, what do we do to make them account to decisions that they take as part of the collective on the bid adjudication committee. This is in a nutshell what I was explaining, Chairperson.

10 **CHAIRPERSON**: Well, it ties in with the question that I was going to ask you. You did talk about one, maybe two challenges that were identified with regard to tender boards and hence they were abolished. I would like you to talk more about that. But before you do that, let me go back to what you've just said. You see, I have some difficulty with the proposition that says let's not bring in outsiders to the bid adjudication committee, because then there will be no accountability. Obviously, it might mean that you are not going to be able to take disciplinary action against outsiders, but that doesn't mean there won't be accountability. There could well be accountability of another kind. And obviously legislation that will allow the use of outsiders, will look at that.

MR NDLELENI MATHEBULA: Okay.

20 **CHAIRPERSON**: For example, if you are going to bring in a lawyer, an attorney or an advocate, or you are going to bring in an accountant, an auditor, people who fall into certain professions... If you bring them in, you can rest assure there is something wrong that they have done in their adjudication that, for example, goes to issues of integrity. You can rest assure that there is a place where they could be reported and there could be action against them. So, I don't think you would need to be concerned about

accountability in the case of people like that, just because they are outsiders. But, I don't know also even in terms of members of the bid adjudication committee that are employees or officials of the department. I don't know, I don't know if you know how much action is taken against them, generally speaking. How effective is any disciplinary action that is taken against them? Do you have any idea whether taking action is generally taken regularly and effectively? Do you know anything? All I know is, from time to time one reads in the newspapers that within government, within the public service, at any given time there are many employees and officials who have been on suspension on full pay for a long time.

- 10 **MR NDLELENI MATHEBULA**: Thank you, Chairperson, thank you very much. I think you are correct. That is why, although not in the similar context as you've just explained, the whole bid committee system is premised on cross-functionality. So, in other words, you bring in all skills in that committee, to be part of that process, it is premised on that process. You have technical people, you have specific professions, and all of these people must sit in a cross-functional team so that there is joint decision making. Our approach obviously was, has always been, draw from internally, even if it means draw internally as in government. But we have always, I think, maintained that position that in so far as external people are concerned, we were a little bit very cautious. But it is something to look at and explore and make sure that if we do go that route, presumably,
- 20 then that is something that we can look at in the new legislative review that we are busy with.

CHAIRPERSON: And then let's go back to the tender board. What was wrong with how the tender board was working?

MR NDLELENI MATHEBULA: The board... Firstly, maybe even before coming to what was wrong with the board... we had two conflicting piece of legislation at the time. One

being the PFMA and then the State Tender Board. Now, the PFMA surely was consistent with the constitution and the State Tender Board Act was inconsistent. Earlier on I highlighted the fact that in the State Tender Board, you would restrict a person indefinitely from doing business with government. So, these were some of the processes. That even if you would try and amend that particular act, you would find difficulty in looking at this whole act and making it consistent with the Constitution, that's one thing. So, the board itself, therefore, operated within a legislation that was inconsistent with the constitution, that's the first thing. The second thing was the slowness within which services were delivered. Because as far as Uppington Alexander Bay in the Northern
10 Cape, as far as Musina in Limpopo, Cape Town and so on, these decisions were taken centrally at the Treasury. And the pace was quite slow, because all the submissions had to be brought to the State Tender Board and the Board would sit and adjudicate, at times approve, at times not approve. So, when they don't approve then it means the service delivery was affected at the time. So, that was one of the considerations to say, perhaps the system is a little bit outdated and we needed a new framework that would make sure that accounting officers and authorities take decisions faster and for faster service delivery. That was the decision and hence the Board itself was disbanded in 2008. But of course we phased the Board out gradually right from 2003 when we introduced the new framework, the supply chain management, then we were phasing the Board. But of
20 course contracts that were concluded against the State Tender Board, we allowed to run their course, but as they expire, most of the tenders that we had centrally within Treasury, we decentralised. Took these tenders because they are either ad hoc in the sense that they are department specific or in the sense that they were once off. And those that were transversal in nature and strategic to contributing to the economy, we retained, and that is what we are currently facilitating within the National Treasury. But even that system of

the transversal bid adjudication, is based on... is constituted by officials from various departments that come in and sit and look at these things, not Treasury itself. Treasury's role is simply to facilitate. But these members are of course part of that process and delegated by their accounting officers and authorities in terms of Section 44 and 56, respectively, of the PFMA. Then they come and they take those decisions on behalf of their respective departments. And then the management thereof, of these contracts, then resorts with accounting officers. All we do, we look at the administrative part thereof, within Treasury. When is a contract expiring, what is the interval for price adjustments, what is the performance of the suppliers and we take action where there is lack of performance. And where there are allegations of fraud and corruption, we also make sure that we take decisions against such infractions. But this is how then the Board operated at that time.

CHAIRPERSON: Did it move throughout, did it deal with all tenders throughout the country, same people?

MR NDLELENI MATHEBULA: In the main, Chairperson, yes. But you may recall that when the new dispensation after 1994 came in to being, there were provincial tender boards. But those boards, of course, were operating within the State Tender Board kind of setup. So, that is why when the State Tender Board itself was disbanded, so were these provincial tender boards. But in the main, the State Tender Board was responsible for the entire procurement in the country. So, these tenders were centralised within the State Tender Board.

CHAIRPERSON: I am just thinking that when it comes to corruption and bribery in regard to tenders, logic suggest that people who want to bribe, who want to secure certain tenders, would actually want to bribe the actual decision makers, not somebody else. Maybe if they want to bribe somebody else, it might be because they want that person to

reach a decision maker or the decision maker or one of the decision makers. Now, if you don't know who is going to decide your bid, then obvious you can't bribe somebody you don't know. Now, again I must repeat that I don't know much about procurement, but with your experience, what do you think the chances are that corruption might be reduced significantly, or to some extent, if the identity of the person or persons who will adjudicate a tender, is kept secret until almost the last minute. To what extent do you think that could help reduce corruption. In terms of mechanism, how you achieve that, we can talk about that, but just in principle.

MR NDLELENI MATHEBULA: It is a difficult one, Chair. The position has always been
10 that... I mean that is what we would have loved to believe, that if you constitute a committee cross-functionally, it is very difficult to go and bribe all these people, it is quite difficult.

CHAIRPERSON: But of course, if you know them, you might know that a particular one is very influential in the committee.

MR NDLELENI MATHEBULA: Ja.

CHAIRPERSON: If you get him/her, you might be halfway there.

MR NDLELENI MATHEBULA: I would agree with you that if you keep the, even the composition of those committees, secret ...intervened.

CHAIRPERSON: Yes, that is what I am talking about.

20 **MR NDLELENI MATHEBULA**: Confidential.

CHAIRPERSON: Yes.

MR NDLELENI MATHEBULA: Ja, the composition confidential until the last day of the adjudication, it definitely would help to some degree to reduce the level of corruption.

CHAIRPERSON: As I say, how it would be done might be something else, how to achieve that. But, let me put this to you and see what you might wish to say. What if, in

a national government department, we had a panel of people, a certain number... let us say for argument sake 100 people that we put on a panel and we say these people have got mostly the kind of experiences and skills and information and knowledge that we normally need when we need to put together a bid adjudication committee, you know, out of these people most of them, you know, would have what we need and we say we are satisfied that they are people of integrity, okay. Now, if there is going to be a tender and you don't know out of these 100, you might know that there are about 100 people, or even if you might know some names, but you don't know which three of these 100 or 200 or whatever could actually sit in your particular tender and maybe that is only know the
10 day before the tender is adjudicated or on the morning of the tender and then they look at it and then they decide. Is that something that you think may need further reflection to explore? Is that something that appears to you to be quite impractical in terms of your knowledge? Is that something that may well help? And of course, you would have to be careful as to who puts together the committees. And there you might say it is the accounting officer. But since the accounting officer is known outside, even to the people who are bidding, you might say no, it should not be him/her. You might say well, I will take, for argument sake, a retired judge and say, we will tell you two days before when an adjudication committee must meet and decide a certain tender. Your job will just be to choose out of this panel any three and those must then go. Now, of course if you say two
20 or three days, there might be a problem about availability, so you might have to make it longer. But you might want to make sure that it is only that person who will know and those who are selected who will know beforehand who is going to sit and decide that tender, nobody else knows.

MR NDLELENI MATHEBULA: Chair, I think perhaps that is something to be explored.

CHAIRPERSON: Mm.

MR NDLELENI MATHEBULA: But sitting where I sit, I think one can always explore the possibility of having a retired judge presiding over some of these big transactions, that might help.

CHAIRPERSON: Mm.

MR NDLELENI MATHEBULA: But to the extent that we can identify certain individuals whose responsibility would, you know, be to be members of the committee. I think that is something that needs further exploration. We can explore that and see what are the logistics thereof, what could work and what can't work. But given where we are, in the challenges that we are facing, I think we need to explore options ...intervened.

10 **CHAIRPERSON**: Options, ja.

MR NDLELENI MATHEBULA: Ja, that are presented, ja.

CHAIRPERSON: Thank you very much. I think we have a duty, certainly I think that this Commission has a duty to look at all possible ways in which the system of procurement can be protected from corruption. I guess there won't be a system that is corruption proof completely, but we should do whatever we can to reduce the chances of corruption in any particular tender and to reduce the levels of corruption that the country has in relation to procurement. I don't have any further questions and I must ask whether Ms. Gcabashe has anything arising from the questions that I have put to you.

ADV LEAH GCABASHE SC: Thank you, Chairman. I think just three questions, really.
20 The first relates to the reports that you make, be it to the Public Service Commission or whoever else, you indicated that you make recommendations in writing where there have been infractions... I beg your pardon, you said you make recommendations. So, the question is, are these in writing and do you keep a record of each one that you send through to whichever accounting authority?

MR NDLELENI MATHEBULA: It is correct, Chair. Some of these are in writing.

ADV LEAH GCABASHE SC: And you keep a record. So, we would be able to get a schedule of those reports.

MR NDLELENI MATHEBULA: Yes, of the recommendations, Chair, thanks, that is correct.

ADV LEAH GCABASHE SC: Then the second issue, again a very brief one, what is the lifespan of a bid adjudication committee of each department?

MR NDLELENI MATHEBULA: Chair, it is not prescribed, you know, how long they should be there. There is no term. That is the advantage of the system, because it provides flexibility to the accounting officer to decide when to rotate and to change
10 members of the committee, especially bid adjudication committee. It allows him that space, rather than the fixed term that the State Tender Board used to have. Because it means if there is something during that process, then you are stuck with that. But there is no term prescribed currently.

CHAIRPERSON: Also, what it means – sorry, Ms. Gcabashe – what it means is that, if a corrupt accounting officer wants to keep a wrong bid adjudication committee, he/she can keep them for a very long time.

MR NDLELENI MATHEBULA: Ja, it is true.

ADV LEAH GCABASHE SC: Thank you, Chairman. And then my last question, really, relates again to the three committees that you've referred to. The one was the bid
20 specification committee, you've referred to the bid evaluation committee and you've referred to the bid adjudication committee. Now, the Chairman asked you about the vulnerabilities inhabitant in these committees and whether a more open system, such as the court system, where the public are involved or where there is less secrecy... I beg your pardon, where there is secrecy so that you only know at the last minute who comprises that committee, whether that would be of assistance. That was really the tenor

of the question. Would that proposition work for each one of these committees? It is one thing if there is only the final decision maker, the bid adjudication committee, that might work well. But you did indicate earlier in your testimony that the bid specification committee can also formulate the specs in such a way as to favour a particular person. So, would the same secrecy provisions have to be knitted into that level of adjudication? And then what about the bid evaluation committee? So, we are really talking about three levels of decision making. Is this a practical way of trying to limit the opportunity for bribery, corruption, maleficence? Thank you.

MR NDLELENI MATHEBULA: Thank you, Chair. Practically it won't work for bid
10 specification committee, even for the bid evaluation committee, for the following reason. These two committees are not standing committees, they change all the time. Because today I am buying a table or furniture, school furniture or... then you put a committee just for the procurement of school furniture. The next day you are buying textbooks, just an example, so it is a different committee, so that committee is not static. So, both the evaluation committee and the specification committee are not static. But of course, your bid adjudication committee is always a standard committee, I think this proposition would work well there. All I am saying is, in as much as that proposition could work well there, at the back of our minds, there should be this thing that whenever the accounting officer approves the bid specification that eventually goes into the market, he/she has applied
20 himself/herself to make sure that the specifications are correct and not bias and so on. But, when it comes to this transparent system that the Chair has alluded to, I am sure it could work well with the adjudication.

ADV LEAH GCABASHE SC: I think my last concern really with this is, whether you would have the capacity. It always boils down to capacity. Capacity to put the right people in place and then the capacity to monitor that they are doing things in accordance

with these rules of engagement or the prescripts. And that would really be the central challenge, I would like to think, at the end of the day.

MR NDLELENI MATHEBULA: Ja.

ADV LEAH GCABASHE SC: But you might think of it as a short term challenge and if you really think it through properly, in the long term you would resolve some of these systemic problems.

MR NDLELENI MATHEBULA: Thank you. Through you, Chair. I think this is one of our biggest challenges, capacity. That is why if you look at our system at the National Treasury, when we take interns, I mean we take these graduates from university and we
10 put them through a system and they then get promoted through the processes. This is one way of building capacity. But it is very difficult to get ready-made material from the system. That is a challenge that we are having. Because we are a very small community and yet our responsibility cuts across various institutions. So, there is a capacity problem both in terms of warm bodies, skilled warm bodies, as well as both in financial resources, to make sure that we capacitate. But that is something that we are looking at now, as I indicated earlier on.

ADV LEAH GCABASHE SC: Thank you very much, Mr. Mathebula. Thank you, Chairman.

CHAIRPERSON: Thank you very much. Just on that about the panel in regard to the bid
20 adjudication committee. It may well be that if that kind of idea were to be looked into, it may well be that the panel from which people who would form a committee, would need to be made up, that is the panel, made up of maybe partly internal people and partly external people, which ones should be the majority, I don't know, but it might be that it is something that would have to be, the panel might have to consist of internal and external people to look at that. I know that, I think you said at the moment legislation doesn't

permit outside people to take part in decision making. But obviously, if those who have the power, who were to be convinced having explored that, that it is something worth looking at, obviously, the question of changing legislation would be an option. Thank you. Do you want to say anything in response before I excuse you?

MR NDLELENI MATHEBULA: Thanks, Chair. I think that is something that we need to look at in the review of the Treasury regulations framework to see whether we can't review that particular process. Because in my own experience, I have learned that law can't stop you from... if you change law at any time, if you want to fit what you need, provided that it is consistent of course with the Constitution. So, it is something that one
10 can always look at. Because I am just thinking that we have this prescript in the regulations. So, as we review, it is something that we can explore and see how practicable it could be, but it is worth looking at.

CHAIRPERSON: Thank you very much, Mr. Mathebula. You must be quite tired. You have been on that seat for the whole day. Thank you very much. You have given us food for thought in terms of how procurement works. If we need you again, I have no doubt that you will remain available to us. Thank you very much. You are excused.

MR NDLELENI MATHEBULA: Thank you.

CHAIRPERSON: Mr. Pretorius.

ADV PAUL PRETORIUS SC: Thank you, Chair. We had arranged or planned to ask Adv
20 Mokwena to open in relation to the next witnesses that are going to be called from Friday. But we would not want to break up his presentation. And as we are at 15:50, perhaps we should adjourn and I should briefly tell you, Mr. Chairman, why the adjournment is necessary, so that the public too can be informed.

CHAIRPERSON: Well, it depends on a number of things. As for me, if we need to stay beyond 16:00, up to like 16:30 for purposes of us finishing what you wanted to do today, I

am quite happy to do that. But there may not be a need for that if the witness that we had on, next time we have a witness ...intervened.

ADV PAUL PRETORIUS SC: Friday.

CHAIRPERSON: On Friday. If that witness, for example, is unlikely to finish anyway on Friday and might go on to Monday, therefore that opening could be done on Friday. But I am quite easy, also, if we should come back tomorrow and do some work, I am easy. Let me hear what you have in mind.

ADV PAUL PRETORIUS SC: Let me, if you will, just consult.

CHAIRPERSON: Ja. And alternative, I can just mention before you respond, an
10 alternative might be that on Friday we start a little earlier than 10:00, maybe 9:30, to make space for that opening before the witness starts at 10:00.

ADV PAUL PRETORIUS SC: That is a solution. Mr. Mokwena and others have to consult with the witness at 16:00. So that if we could adjourn till 9:30. In relation to the days in between, we, like the Commission as a whole, we as a legal team have also faced issues with witnesses who have been planned to be called over the next few days, are no longer available and we have had to postpone their testimony until next week and that is the reason.

CHAIRPERSON: Okay, no that is fine then. Very well. Let's then adjourn. So, the proceedings are adjourned until 9:30 on Friday.

20 **ADV PAUL PRETORIUS SC**: Thank you, Mr. Chairman.

CHAIRPERSON: We adjourn.

FEMALE VOICE: All rise.

END OF SESSION 3