SUMMARY OF FINDINGS AND RECOMMENDATIONS IN THE MATTER OF B-BBEE COMMISSION // ESKOM HOLDINGS SOC LIMITED

CASE NUMBER: 1/7/2017

***Summary**: Allegations - B-BBEE Commission conducted the investigation pursuant to an anonymous complaint alleging that the procurement process for the boiler at Duvha Power Station (RFP CORP 3571) by Eskom Holdings SOC Limited did not comply with the requirements of the B-BBEE Act, and that the tender has been awarded to Dongfang Electric Corporation Limited, a Chinese company that does not comply with the B-BBEE requirements in South Africa – Findings – Eskom Holdings SOC Limited failed to comply with section 10 (1) (b) of the B-BBEE Act and its procurement policies in conducting the procurement process and awarding of the tender to Dongfang Electric Corporation Limited, which entity did not comply with the B-BBEE requirements – Recommendations – include cancellation of the contract awarded to Dongfang Electric Corporation Limited, investigation relating to specific officials that were involved in the process, an independent audit of all Eskom Holdings SOC Limited contracts with the threshold of R1 billion to test B-BBEE compliance.*

1. Introduction

1.1 The Broad-Based Black Economic Empowerment Commission ("B-BBEE Commission") is established in terms of section 13B of the Broad-Based Black Economic Empowerment Act No. 53 of 2003 as amended by Broad-Based Black Economic Empowerment Act No. 46 of 2013 ("the B-BBEE Act") within the administration of the Department of Trade and Industry ("**the dti**").

1.2 The B-BBEE Commission is empowered to conduct investigations on any matter arising from the application of the B-BBEE Act, including any B-BBEE initiative or a category of B-BBEE initiatives, in terms of section 13F (1) (d) and section 13J (1) of B-BBEE Act, read with regulation 15 of the Regulations Regulating the Administration and Implementation of

the B-BBEE Act and the Functions of the B-BBEE Commission, 2016 ("B-BBEE Regulations").

1.3 Without limiting the powers of the B-BBEE Commission, in terms of section 13J (3) of the B-BBEE Act, read with regulation 15 (4) (g) of the B-BBEE Regulations, the B-BBEE Commission may make a finding on whether any B-BBEE initiative involves a fronting practice.

1.4 In terms of regulation 15 (13) of the B-BBEE Regulations, before making its final findings, the B-BBEE Commission must notify the respondent in writing of the details of the adverse finding(s) and afford them an opportunity to respond to each or any finding within thirty (30) days, which on merit can be extended by a maximum period of ten (10) days.

1.5 In terms section 13J (7) (a) of the B-BBEE Act read with regulation 15 (12) (a)-(c) of the B-BBEE Regulations, the finding(s) or recommendation(s) made by the B-BBEE Commission must be in writing, communicated to the complainant and published in a manner it may deem fit or appropriate, subject to section 13J (7) (b) of the B-BBEE Act.

1.6 This publication is therefore issued in line with these provisions of the B-BBEE Act and in the interest of the public.

2. Brief description of the complaint

2.1 The Minister of Trade and Industry issued the B-BBEE Regulations on 06 June 2016 which prescribe the process for complaints in terms of the B-BBEE Act. Regulation 15 specifically outlines the process from submission to resolution of a complaint, and further provides for both instances where the B-BBEE Commission responds to a complaint and where it investigates a complaint on its own initiative.

2.2 The B-BBEE Commission received a complaint from a complainant who requested to remain anonymous on 25 May 2017 alleging that the procurement process for the boiler at Duvha Power Station (RFP CORP 3571) by Eskom Holdings SOC Limited did not comply with the requirements of the B-BBEE Act, and that the tender has been awarded to

Dongfang Electric Corporation Limited, a Chinese company that does not comply with the B-BBEE requirements in South Africa.

2.3 The matter relates to non-compliance with the B-BBEE Act, in particular section 10 (1) (b) of the B-BBEE Act, which provides that all organs of state and public entities must implement the requirements of B-BBEE in developing and implementing preferential procurement policy. Eskom Holdings SOC Limited had previously been made aware of the requirements of section 10 (1) of the B-BBEE Act directly by the B-BBEE Commission through formal correspondence to Eskom Holdings SOC Limited between 2015 and 2016.

2.4 In terms of regulation 13 (1) (b) (i) of the B-BBEE Regulations, a person who provides information to the B-BBEE Commission may request that the B-BBEE Commission treats his/her identity as restricted information, but such person may only be a complainant in the matter if he/she subsequently waives the request in writing. In this matter the complainant has not waived the request for his/her identity to be treated as confidential, and thus the identity remains restricted information.

2.5 The B-BBEE Commission assessed if there is merit in the allegations made to warrant an investigation in terms of regulation 15 (4) (a) of the B-BBEE Regulations and concluded that the allegations warrant an investigation, and Eskom Holdings SOC Limited was notified as required in terms of regulation 15 (4) (d) of the B-BBEE Regulations. Having investigated the allegations, the B-BBEE Commission has made findings in terms of section 13J (3) of the B-BBEE Act read with regulation 15 (4) (g) of the B-BBEE Regulations.

2.6 Prior to making its findings final, the B-BBEE Commission sent the preliminary findings to Eskom Holdings SOC Limited in terms of regulation 15 (13) of the B-BBEE Regulations and afforded them thirty (30) days to respond to the findings. Eskom Holdings SOC Limited cooperated with the B-BBEE Commission during the preliminary findings and responded to the said findings in time.

2.7 Further, the B-BBEE Commission notified other parties that were not respondents but are implicated in the findings relating to Eskom Holdings SOC Limited, and afforded them an opportunity to also respond to the parts of the findings that implicate them. Premier Verification (Pty) Ltd and Alstom S & E Africa (Pty) Ltd responded to the aspects that implicate them, held clarification meetings with the B-BBEE Commission and cooperated with the B-BBEE Commission during this process.

3. Findings of the B-BBEE Commission

3.1 The B-BBEE Commission conducted this investigation in accordance with the procedures that conform to the rules relating to fair administration of justice process applicable to investigations as expressed in regulation 15 (17) of the B-BBEE Regulations, and as indicated above, the responses were received from Eskom Holdings SOC Limited and the other parties that were implicated, except Dongfang Electric Corporation Limited, and all responses were considered carefully.

3.2 Having investigated the allegations in terms of the mandate under section 13F (1) (d) and section 13J (1) of the B-BBEE Act, after affording Eskom Holdings SOC Limited and other implicated parties an opportunity to respond to the findings, the B-BBEE Commission in terms of section 13J (3) of the B-BBEE Act, read with regulation 15 (4) (g) of the B-BBEE Regulations, made the following findings:

3.2.1 In respect of compliance to section 10 (1) (b) of the B-BBEE Act, which requires that every organ of state and public entity must apply the relevant code of good practice issued by the Minister in accordance with section 9 of the B-BBEE Act in developing and implementing a preferential procurement policy, section 13O (1) (a) and (c) of the B-BBEE Act, section 13O (2) of the B-BBEE Act, and the Codes of Good Practice, 2013;

3.2.1.1 Eskom Holdings SOC Limited expressly included the B-BBEE requirements in its procurement policy and procedure titled Eskom's Procurement and Supply Chain Management Policy and Procedure dated 19 May 2014, signed by Mr Matshela Koko as Acting Group Executive Technology and Commercial, in the RFP CORP 3571 and the document titled Explanation of the B-BBEE Requirements (Section 1.4),

which explanation document specifically required B-BBEE Level 4 for RFP CORP 3571, consistent with the requirements of section 10 (1) (b) of the B-BBEE Act;

3.2.1.2 Whereas Eskom Holdings SOC Limited included the requirements of the B-BBEE Codes of Good Practice in the development of the procurement policy and procedure and in the requirements for RFP CORP 3571, Eskom Holdings SOC Limited failed to implement these B-BBEE requirements during the procurement process for RFP CORP 3571, without appropriate authorisation to deviate from the requirements in question, in breach of its own requirements in the RFP CORP 3571, its procurement policy and procedure, and the B-BBEE Act;

3.2.1.3 Evidence also shows that Eskom Holdings SOC Limited breached the requirements of section 10 (1) (b) of the B-BBEE Act which requires that Eskom Holdings SOC Limited must apply the relevant code of good practice, in this case the Codes of Good Practice, 2013, that became effective on 01 May 2015, when it incorrectly specified in the Explanation of B-BBEE Requirements (Section 1.4) that reference for purposes of negotiation for RFP CORP 3571 be to the Codes of Good Practice, 2007, instead of the Codes of Good Practice, 2013, that were applicable at the time of RFP CORP 3571;

3.2.1.4 By requiring the Codes of Good Practice, 2007, to be applied for purposes of negotiating the RFP CORP 3571 as expressed in the Explanation of B-BBEE Requirements (Section 1.4), Eskom Holdings SOC Limited usurped the power of the Minister by making the old Codes of Good Practice, 2007, applicable for consideration of B-BBEE requirements in respect of RFP CORP 3571, when such Codes of Good Practice, 2007, had already been replaced by the 2013 version, in a manner that is *ultra vires* and undermines the objectives of the B-BBEE Act;

3.2.1.5 This *ultra vires* action on the part of Eskom Holdings SOC Limited in respect of the B-BBEE requirements for RFP CORP 3571 also had the potential and/or effect of causing confusion among the bidders who in a way seemed to be compelled to break the rules for verification and the B-BBEE Act by applying the Codes of Good Practice, 2007, that had been repealed already, for purposes of bidding for this tender. Eskom had no authority to do so under the B-BBEE Act, and therefore acted *ultra vires,* and in breach of the B-BBEE Act, including section 9 (7) of the B-BBEE Act which clearly states that the code of good practice remains in effect until it is amended, replaced or repealed;

3.2.1.6 The submission of the B-BBEE certificate was a mandatory requirement in the RFP CORP 3571 and whereas Eskom Holdings SOC Limited states that it was of the view that Dongfang Electric Corporation Limited was exempt from the B-BBEE requirement at the time, there is no record of any approval of such an exemption, including an exemption from submitting a mandatory document under RFP COPR 3571 or from complying with the B-BBEE requirements. The submission to the Eskom Holdings SOC Limited Board Tender Committee dated 8 March 2017 under the signatures of Mr Charles Kalima, Acting General Manager Commercial Division, Mr Abram Masango, Group Executive: Group Capital and Mr Edwin Mabelane, Chief Procurement Officer, did not make reference to such an exemption from the B-BBEE requirements that were specified in the RFP CORP 3571 or the basis thereof;

3.2.1.7 The extract of the minutes of the meeting of the Eskom Board Tender Committee of 08 March 2017 reflects that KPMG provided audit services in respect of the RFP CORP 3571 process and further that when a certain Ms Mabude posed a question about the performance history and B-BBEE in respect of Dongfang Electric Corporation Limited, Mr Charles Kalima merely referred to similar projects of Dongfang Electric Corporation Limited in China and that in his opinion this was one of the best B-BBEE opportunities. There is however no indication in the minutes or record to substantiate the basis for Mr Charles Kalima's opinion that this was one

of the best B-BBEE opportunities given that this is a procurement decision that ought to have been objectively substantiated, and not be made on the reliance of Mr Charles Kalima's opinion given that he is not known to be a B-BBEE expert or practitioner;

3.2.1.8 In processing and considering RFP CORP 3571, it is apparent that Eskom Holdings SOC Limited and its Board had little regard, if any, to the B-BBEE requirements in that Eskom Holdings SOC Limited proceeded to award the contract in direct violation of its own procurement policy and procedure, without any prior approval for exemption or deviation from the specifications in RFP CORP 3571, and to an entity that had no B-BBEE credentials, in addition to it having the highest price, in a manner that is contrary to the objectives of the B-BBEE Act;

3.2.1.9 Further, whereas Alstom S & E Africa (Pty) Ltd was disqualified for submitting a B-BBEE certificate that was subsequently confirmed by SANAS to be invalid, given that the B-BBEE certificate was a mandatory document for this tender, Dongfang Electric Corporation Limited, which had not even submitted a B-BBEE certificate was not disqualified but considered further into the process and awarded the contract for RFP CORP 3571, it being noted that Eskom Holdings SOC Limited later resolved not to disqualify Alstom S&E Africa Limited, but to rather not award it B-BBEE points, in light of a legal opinion obtained from Mchunu Attorneys;

3.2.1.10 Further, even if the B-BBEE sworn affidavit submitted by Dongfang Electric Corporation Limited to Eskom Holdings SOC Limited, which purported to reflect a B-BBEE Contributor Level 4, was to be considered during the negotiation process for RFP CORP 3571, the said B-BBEE sworn affidavit falls short of meeting the requirements for B-BBEE sworn affidavit, and could not have been acceptable for compliance with B-BBEE requirements in RFP CORP 3571;

3.2.1.11 Evidence shows that Murray & Roberts Power & Energy and Shanghai Electric Power Generation Services Company, as a consortium that also submitted a bid for RFP CORP 3571, was discounted for not submitting the proof of CIDB registration, which apparently also required foreign suppliers to open an office in South Africa, and the B-BBEE certificate, whereas Dongfang Electric Corporation Limited was nevertheless allowed by Eskom Holdings SOC Limited to proceed into the RFP CORP 3571 process until it was awarded the contract despite failing to meet the B-BBEE requirements at evaluation and contract award stages, an aspect that was a mandatory requirement for both such stages;

3.2.1.12 The Murray & Roberts Power & Energy and Shanghai Electric Power Generation Services Company consortium was further discounted and discredited on the basis that Murray & Roberts and subsidiaries were previously found guilty of collusion in the construction of the 2010 Soccer World Cup Stadia which posed a risk, an aspect that was not part of the considerations according to the specifications of this RFP CORP 3571, and does not seem to have been consistently applied throughout the procurement process for the award of this tender;

3.2.1.13 Evidence shows that of the three bidders that were considered on 8 March 2017 for a decision on RFP CORP 3571, Dongfang Electric Corporation Limited presented the highest price, had no B-BBEE credentials at all as a wholly Chinese owned company and no proof of CIDB registration for the required Level 9. Thus, without a proper approval to deviate or to be exempted in terms of the B-BBEE Act from the B-BBEE requirements for the award of the contract to Dongfang Electric Corporation Limited, there seems to have been no justifiable reason for Eskom Holdings SOC Limited to disregard the B-BBEE requirements and award the contract to Dongfang Electric Corporation Limited;

3.2.1.14 Reference to the inconsistent application of the rules and procedures by Eskom Holdings SOC Limited in respect of RFP CORP 3571 does not

amount to an expression of a view, finding, or decision that the RFP CORP 3571 should have been awarded to any of the other bidders, but it is to illustrate that the B-BBEE requirements were not implemented during RFP CORP 3571 procurement process, and where they appear to have been considered, it was done inconsistently and in a manner that sought to discount or discredit the bids submitted by other bidders, and not for the purposes of advancing the objectives of the B-BBEE Act;

3.2.1.15 Part IV of the Explanation of B-BBEE Requirements (Section 1.4) for RFP CORP 3571 stated that a B-BBEE penalty of 1.0% of the Accepted Contract Amount (as defined in the Contract Conditions) will be applied if the contractor fails to maintain the Required B-BBEE Recognition Level throughout and for the Stated Time, and that a grace period of 90 (ninety) days would apply in the event that the Contractor loses the B-BBEE rating to enable the contractor to regain the Required B-BBEE status. Evidence shows that these penalties have not been applied to the RFP CORP 3571 and also not included in the contract subsequently concluded between Eskom Holdings SOC Limited and Dongfang Electric Corporation Limited for RFP CORP 3571 on 28 March 2017;

3.2.1.16 The contract between Eskom Holdings SOC Limited and Dongfang Electric Corporation Limited states in clause Z. 3.5 that due to Dongfang Electric Corporation Limited being an international entity, it is exempt from submitting a B-BBEE certificate outlining its B-BBEE status, and that Eskom Holdings SOC Limited will provide Dongfang Electric Corporation Limited with an official letter from **the dti**, within 1 (one) month from the contract date, indicating that as an international entity Dongfang Electric Corporation Limited does not require a B-BBEE certificate for the purposes of providing the work under this contract, which indicates that a deal may have been negotiated favourably for Dongfang Electric Corporation Limited to exclude the B-BBEE obligations that were a mandatory requirement in RFP CORP 3571;

3.2.1.17 Whereas clause Z. 3.5 of the said contract states that Eskom Holdings SOC Limited was to obtain a letter from **the dti** within 1 (one) month and provide such letter to Dongfang Electric Corporation Limited stating that Dongfang Electric Corporation Limited is exempt from submitting the B-BBEE certificate for this contract, an email of 28 March 2017 from Mr Yuneal Padayachee, Deputy Director at **the dti** BEE Unit, to Mr Charles Kalima of Eskom Holdings SOC Limited indicates that *"in terms of International Companies that operate overseas, B-BBEE Legislation is not applicable to such entities unless they are registered and operating in South Africa".* Therefore, as Dongfang Electric Corporation Limited is registered as an external company under the Companies Act with legal recognition in South Africa, it is not exempt from B-BBEE requirements and Eskom Holdings SOC Limited had no right or authority to exempt Dongfang Electric Corporation Limited;

3.2.1.18 In any event, there is no provision or basis for **the dti** to issue such a letter exempting Dongfang Electric Corporation Limited under the B-BBEE Act and the B-BBEE Regulations**,** even more so after the tender process had been concluded, and for Eskom Holdings SOC Limited to sign the contract with Dongfang Electric Corporation Limited with such assurance in clause Z. 3.5 is suspect as it is clearly beyond its mandate;

3.2.1.19 Assuming **the dti** had a mandate to issue such a letter to exempt Dongfang Electric Corporation Limited, the commitment on the part of Eskom Holdings SOC Limited to obtain such a letter begs the question as to who the bidder was between Eskom Holdings SOC Limited and Dongfang Electric Corporation Limited for RFP CORP 3571, as proper process would require that Dongfang Electric Corporation Limited, as an entity that had an obligation to submit a B-BBEE certificate meeting B-BBEE Contributor Level 4, to be the one that obtains and submits such a letter to Eskom Holdings SOC Limited as proof that it is exempt, and in this case Eskom Holdings SOC Limited seems to have gone an extra mile to relieve Dongfang Electric Corporation Limited from

B-BBEE requirements in a manner that is contrary to its procurement policy and the objectives of the B-BBEE Act;

3.2.1.20 Having regard to the processes under the B-BBEE Regulations and the Codes of Good Practice, 2013, such a letter from **the dti** would have been irregular even if it were to be issued by **the dti** prior to the issuing or awarding of the contract as there is no exemption process for measured entities in the B-BBEE Act, the Codes of Good Practice, 2013, or the B-BBEE Regulations. At most, foreign entities that are registered or that do business in South Africa under the B-BBEE Act are only eligible for the Equity Equivalent Investment Programme upon application to the Minister in respect of ownership, but are still required to comply with all other elements of B-BBEE under the Codes of Good Practice, 2013 and be measured accordingly;

3.2.1.21 Eskom Holdings SOC Limited seems to have admittedly relied on false information submitted to it by Dongfang Electric Corporation Limited that the entity is exempt from submitting a B-BBEE certificate or complying with B-BBEE requirements, as this information was provided to Eskom Holdings SOC Limited for purposes of determining the B-BBEE status of Dongfang Electric Corporation Limited, which information Eskom Holdings SOC Limited negligently relied on without verifying with the B-BBEE Commission, in a manner that could amount to misrepresentation in terms of section 13O (1) (a) and (c) of the B-BBEE Act;

3.2.1.22 There is a copy of an unsigned B-BBEE sworn affidavit that Eskom Holdings SOC Limited provided to the B-BBEE Commission as submitted by Dongfang Electric Corporation Limited, basically reflecting that Dongfang Electric Corporation Limited has the annual turnover of less than R10 million and B-BBEE Contributor Level 4. According to Eskom Holdings SOC Limited, Dongfang Electric Corporation Limited informed them that it is exempt from the requirement to submit a B-BBEE certificate for RFP CORP 3571 but this B-BBEE sworn affidavit was

submitted to Eskom Holdings SOC Limited by Dongfang Electric Corporation Limited and the reason for this is not clear;

3.2.1.23 Further, Item 3 of Statement 000 indicates that the Codes of Good Practice, 2013, apply to all measured entities that undertake any economic activity with organs of state and public entities, and Eskom Holdings SOC Limited is a public entity which Dongfang Electric Corporation Limited is undertaking economic activity with. Therefore, on Eskom Holdings SOC Limited's own version, they exempted Dongfang Electric Corporation Limited from the application of the B-BBEE Codes of Good Practice, 2013, and B-BBEE requirements for RFP CORP 3571, and even if Eskom Holdings SOC Limited had considered the B-BBEE sworn affidavit dated 08 September 2016 from Dongfang Electric Corporation Limited, such B-BBEE sworn affidavit would have been unacceptable as it falls short of meeting the requirements for completion of such B-BBEE sworn affidavits under the Codes of Good Practice, 2013;

3.2.1.24 Further, even if Dongfang Electric Corporation Limited were to be regarded as a start up in terms of Item 6 of Statement 000, item 6.4 requires that such start up entity must submit the QSE scorecard when tendering for a contract above R10 million but less than R50 million and the large enterprise scorecard for above R50 million contracts, and in the case of RFP CORP 3571 the value of the contract they were bidding for is way above R10 million, and therefore the EME B-BBEE sworn affidavit would not have been acceptable for purposes of B-BBEE compliance;

3.2.1.25 It does appear that by submitting the B-BBEE sworn affidavit for EMEs to Eskom Holdings SOC Limited, Dongfang Electric Corporation Limited may have attempted to misrepresent its B-BBEE status by passing itself as a B-BBEE Contributor Level 4, which was a required B-BBEE Contributor Level in terms of the RFP CORP 3571. Further, the information on the CSD indicates that Dongfang Electric Corporation Limited reflects itself as a B-BBEE Contributor Level 4 for purposes of

B-BBEE compliance, which may amount to misrepresentation of B-BBEE status to organs of state that make use of the CSD;

3.2.1.26 Given that the B-BBEE sworn affidavit submitted by Dongfang Electric Corporation Limited is flawed as it was not properly commissioned, that it may not have been deposed to in the presence of a Commissioner of Oaths, and that it has not been signed by the person said to be the deponent, the document would be invalid for the purpose of compliance with B-BBEE requirements, and possibly would have resulted in being treated the same as the invalid B-BBEE certificate of Alstom S & E Africa (Pty) Ltd if the principles of fairness had been applied in respect of RFP CORP 3571;

3.2.1.27 Having established that Alstom S & E Africa (Pty) Ltd was initially disqualified for submitting an invalid B-BBEE certificate that was confirmed as invalid by SANAS and Premier Verification (Pty) Ltd to Eskom Holdings SOC Limited, although it was later decided to not award B-BBEE points based on the legal opinion from Mchunu Attorneys, Eskom Holdings SOC Limited remain in breach of the B-BBEE Act for including a requirement that the repealed Codes of Good Practice of 2007 be considered for the purposes of negotiating RFP CORP 3571 as indicated in Paragraph 2 of the Explanation of B-BBEE Requirements (Section 1.4) when it was not authorised to do so;

3.2.1.28 Further, nothing provided during the investigation absolves Premier Verification (Pty) Ltd and Alstom S & E Africa (Pty) Ltd from taking accountability for the invalid B-BBEE certificate submitted to Eskom Holdings SOC Limited for the purposes of RFP CORP 3571, also considering that the other bidder submitted a B-BBEE certificate issued appropriately using the Codes of Good Practice, 2013, and not the 2007 version, an approach that every law abiding corporate citizen would have adopted;

3.2.1.29 The obligation under section 10 (1) (b) of the B-BBEE Act is mandatory, and section 10 (2) (a)-(b) of the B-BBEE Act expressly provides that the Minister may after consultation with an organ of state or public entity, grant an exemption or allow for a deviation from section 10 (1) of the B-BBEE Act if there are objectively verifiable facts or circumstances justifying such an exemption or deviation, clearly demonstrating that the power to grant any deviation or exemption in respect of section 10 (1) of the B-BBEE Act rests solely with the Minister, and as such Eskom Holdings SOC Limited had no power to grant itself such deviation or exemption;

3.2.1.30 The process to obtain an exemption or deviation from section 10 (1) of the B-BBEE Act is clearly stipulated in Part 7 Regulation 20 of the B-BBEE Regulations issued by the Minister in accordance with section 14 of the B-BBEE Act, and based on evidence Eskom Holdings SOC Limited failed to obtain approval from the Minister to deviate or be exempted from the application of section 10 (1) (b) of the B-BBEE Act in contravention of the B-BBEE Act by disregarding the B-BBEE requirements in the award of RFP CORP 3571;

3.2.1.31 Eskom Holdings SOC Limited had no authority to deviate and not to apply or implement the B-BBEE requirements as per section 10 (1) of the B-BBEE Act in respect of RFP CORP 3571, or any procurement process that Eskom Holdings SOC Limited has or is engaging in for that matter, which also makes its actions in this regard irregular;

3.2.1.32 Further, evidence indicates that Eskom Holdings SOC Limited has not applied the B-BBEE requirements consistently and in a fair and objective manner in respect of the RFP CORP 3571, and whereas there may be permutations within its procurement policy, which in any way do not supersede the B-BBEE Act, Eskom Holdings SOC Limited's conduct could also amount to a violation of the PPPFA that it claims to have fully complied with, and the PFMA, in addition to such conduct being contrary to the objectives of the B-BBEE Act;

3.2.1.33 Whereas Alstom S & E Africa (Pty) Ltd was found to have submitted an invalid B-BBEE certificate issued by Premier Verification (Pty) Ltd, for which it was initially disqualified and later revised to B-BBEE points not being awarded, Eskom Holdings SOC Limited had as at the start of this investigation never reported this serious violation of the B-BBEE Act to the B-BBEE Commission as required in terms of the B-BBEE Act;

3.2.1.34 It is a requirement in terms of the B-BBEE Act that a procurement officer or any official of an organ of state or public entity who becomes aware of the commission of a fronting practice, misrepresentation of B-BBEE status, or submission of false information relevant for assessing the B-BBEE status, to report such to the appropriate law enforcement agency, and failure to do so is an offence in terms of section 13O (2) of the B-BBEE Act.

3.2.1.35 Based on the extent to which officials at Eskom Holdings SOC Limited may have been aware of this reportable aspect, but failed to report such in violation of section 13O (2) of the B-BBEE Act, it appears that the specific persons within Eskom Holdings SOC Limited, the Eskom Holdings SOC Limited Tender Board and the Board of Eskom Holdings SOC Limited had become aware of the reportable incident, which amounts to an offence in terms of section 13 O (1) (a) and (c) of the B-BBEE Act, but failed to report it as required;

3.2.1.36 Based on the documents submitted, the said specified persons have had direct and/or indirect interaction and/or involvement with the RFP CORP 3571 process at different stages and in different capacities, and there was an obligation on them, individually and/or collectively, to report the fact that Alstom S & E Africa (Pty) Ltd presented an invalid B-BBEE certificate, conduct that clearly points to an attempt to misrepresent the BBBEE status and provision of false information to the public entity in violation of section 13O (1) (a) and (c) of the B-BBEE Act, if they had had

become aware of it. The B-BBEE Commission did not receive a report on this violation, not even through the tipoff email address;

3.2.1.37 It also seems that the breach of section 10 (1) (b) of the B-BBEE Act by Eskom Holdings SOC Limited in facilitating the award of the RFP CORP 3571 contrary to the set requirements for B-BBEE, and further negotiating the exclusion of critical penalty clauses for non-compliance with B-BBEE requirements that ought to have been included in the contract between Eskom Holdings SOC Limited and Dongfang Electric Corporation Limited, should also have been reported by officials who became aware of it, particularly those involved in the negotiation and signing of the said contract, but no such reporting was received by the B-BBEE Commission on these apparent violations of the B-BBEE Act;

3.2.1.38 The Codes of Good Practice, 2013, outline the requirements for the five B-BBEE elements (a) ownership, (b) management control, (c) skills development, (d) enterprise and supplier development and (e) socio-economic development. Eskom Holdings SOC Limited is required to comply with the Codes of Good Practice, 2013, as a measured entity in terms of Item 3.1.1 of Statement 000, and Eskom Holdings SOC Limited has complied with this requirement in terms of the Codes of Good Practice, 2013, as evident in its B-BBEE certificates issued by NERA;

3.2.1.39 It is noted however based on the said B-BBEE certificates for 2016/2017 and 2017/2018 that Eskom Holdings SOC Limited's B-BBEE Contributor Level had dropped from Level 2 to Level 8, particularly regarding the priority elements in the Codes of Good Practice, 2013, and thus failure by Eskom Holdings SOC Limited to adhere to and implement the requirements of section 10 (1) (b) of the B-BBEE Act as in RFP CORP 3571 poses a further risk of them continuing to drop B-BBEE levels by awarding tenders to non-compliant entities in a manner that does not advance the objectives of B-BBEE Act;

3.2.1.40 The information submitted and reasons provided by Eskom Holdings SOC Limited for failing to comply with section 10 (1) (b) of the B-BBEE Act and further facilitating that the RFP CORP 3571 be awarded to Dongfang Electric Corporation Limited in clear and deliberate disregard of the B-BBEE requirements, indicate that there is reason to believe that there are more contracts to which Eskom Holdings SOC Limited had applied the same approach in violation of the B-BBEE Act, which may require an investigation or interrogation; and

3.2.1.41 Based on the fact that the value of the contract for RFP CORP 3571 is in excess of R4 billion and the insurance exposure of R1.7 billion, the irregular conduct of Eskom Holdings SOC Limited, its Board and the relevant officials that were involved in the tender has a significant financial impact on Eskom Holdings SOC Limited which could amount to fruitless and wasteful expenditure, and there is a possibility that Eskom Holdings SOC Limited may have more contracts, some of which are even of much higher value with a much higher financial exposure, where Eskom Holdings SOC Limited disregarded B-BBEE requirements that are mandatory to the detriment and prejudice of Eskom Holdings SOC Limited and its shareholders, who are indirectly the tax payers of South Africa.

3.2.2 In respect of the specific clauses of the contract concluded between Eskom Holdings SOC Limited and Dongfang Electric Corporation Limited in respect of RFP CORP 3571:

3.2.2.1 The Interim Group Chief Executive, Mr Johnny Dladla, of Eskom Holdings SOC Limited confirmed in writing that the contract was awarded to Dongfang Electric Corporation Limited, registered as an external company in South Africa, which then specifically refers to Dongfang Electric Corporation Limited with Registration Number **2015/221404/10**;

3.2.2.2 The contract concluded by Eskom Holdings SOC Limited in respect of RFP CORP 3571 is however with Dongfang Electric Corporation Limited

with Registration Number **91510100205115485Y**, the parent company in China, which is not the Dongfang Electric Corporation Limited registered on the CSD, whereas the company with legal recognition in terms of section 23 of the Companies Act is Dongfang Electric Corporation Limited with Registration Number **2015/221404/10** as an external company;

3.2.2.3 Clause Z. 3.5 of the contract states that clauses Z. 3.1 – Z. 3.4 relating to B-BBEE are not applicable to Dongfang Electric Corporation Limited due to the fact that Dongfang Electric Corporation Limited is an international entity and exempt from submitting a B-BBEE certificate outlining its B-BBEE status, and that Eskom Holdings SOC Limited will within 1 (one) month provide Dongfang Electric Corporation Limited with a letter from **the dti** indicating that Dongfang Electric Corporation Limited as an international entity is not required to submit a B-BBEE certificate, and further no requirements are included in this contract for the required B-BBEE Level 4 to be maintained as was the requirement in RFP CORP 3571;

3.2.2.4 Evidence provided by Mr Liso Steto of **the dti** BEE Unit that Eskom Holdings SOC Limited had requested such a letter from **the dti** through Mr Charles Kalima**,** but such that letter had not been issued by **the dti**, is an indication that through clause Z. 3.5 of the contract, Eskom Holdings SOC Limited clearly intended to completely contract out or exclude B-BBEE requirements, without any authority to do so under the B-BBEE Act, irregularly and with bias in favour of Dongfang Electric Corporation Limited;

3.2.2.5 Section 1.3 of the RFP CORP 3571 regarding tender returnables, Item 12 and 13 specifically stated that the B-BBEE certificate is mandatory at evaluation and contract award stages of the tender process, however Eskom Holdings SOC Limited elected to exempt Dongfang Electric Corporation Limited without any authority under the B-BBEE Act, and contrary to its own specifications and procurement policy and procedure;

3.2.2.6 Clause Z. 10.1 regarding the performance bond states that the performance bond and advance payment bond will be provided by Dongfang Electric Corporation Limited after fulfilment of three pre-conditions, namely, (1) that the contract has been signed by Eskom Holdings SOC Limited and Dongfang Electric Corporation Limited, (2) that Eskom Holdings SOC Limited has issued Dongfang Electric Corporation Limited with the official letter from **the dti** referred to in clause Z 3.5, and (3) that Dongfang Electric Corporation Limited obtains the CIDB registration, clearly indicating that it did not have such documents at the contract date contrary to the requirements of RFP CORP 3571;

3.2.2.7 The pre-conditions set in clause Z 10.1 of the contract clearly show that not only was Dongfang Electric Corporation Limited not meeting the requirements for B-BBEE for RFP CORP 3571, but Eskom Holdings SOC Limited went further to set as a pre-condition an aspect of the B-BBEE certificate for which Dongfang Electric Corporation Limited could have been discounted or disqualified;

3.2.2.8 Although the RFP CORP 3571 had indicated that the unavailability of the B-BBEE certificate at tender closing date will not result in disqualification, it was mandatory at both evaluation and contract award stages, and Eskom Holdings SOC Limited failed to adhere to this mandatory requirement at contract award;

3.2.2.9 Further, it is evident that Dongfang Electric Corporation Limited had also not complied with the requirement for proof of CIDB registration with a Level 9 designation, which was a mandatory requirement at contract award stage according to RFP CORP 3571;

3.2.2.10 Therefore, in clause Z. 26 of the contract Eskom Holdings SOC Limited allowed Dongfang Electric Corporation Limited six (6) months after the signing of the contract to ensure that it is registered as a level 9 with

CIDB, an aspect that Dongfang Electric Corporation Limited could have been disqualified for given that it was a mandatory requirement for the contract award; and

3.2.2.11 The above clauses of the contract in respect of RFP CORP 3571 demonstrate that Eskom Holdings SOC Limited did not only disregard its own procurement policy and procedure, but may have violated the PPPFA, PFMA, and the B-BBEE Act by failing to follow due process in respect of this contract, and seemingly bent the rules to facilitate the award of the contract in favour of Dongfang Electric Corporation Limited;

3.2.3 In respect of the identified B-BBEE certificate issued by Premier Verification (Pty) Ltd to Alstom S & E Africa (Pty) Ltd on 14 November 2016 using the 2007 Codes of Good Practice, which was submitted to Eskom Holdings SOC Limited for RFP CORP 3571:

3.2.3.1 The B-BBEE certificate in question was issued in contravention of the requirements and standards for verification in the Verification Manual, the Codes of Good Practice, 2013, and further contrary to the objectives of the B-BBEE Act pursuant to which the Codes of Good Practice, 2013, were issued;

3.2.3.2 This is so because the Codes of Good Practice, 2007, had been repealed and replaced, and thus no reason existed, whatsoever, for Premier Verification (Pty) Ltd or any verification agency to issue a B-BBEE certificate in 2016 on the basis of the Codes of Good Practice, 2007;

3.2.3.3 In response to a letter dated 06 March 2017 from Mr Charles Kalima of Eskom Holdings SOC Limited, SANAS also confirmed to Eskom Holdings SOC Limited that the said B-BBEE certificate was invalid;

3.2.3.4 On 06 March 2017 Mr Matthew Kearns of Premier Verification (Pty) Ltd had also confirmed to SANAS that the said B-BBEE certificate had no standing for submission in a tender, and that it was not a valid B-BBEE

certificate but a report for Alstom S & E Africa (Pty) Ltd to illustrate that they would have complied with the B-BBEE Level requirement as per the Codes of Good Practice, 2007;

3.2.3.5 Whereas Mr Matthew Kearns states that he relied on section 19 of the Verification Manual which states in 19.1 that a verification agency may be required by a measured entity to verify specific elements of the B-BBEE Codes in terms of contracts between the measured entity and a third party, and in such circumstances the verification agency shall follow the requirements in the Verification Manual bearing in mind additional requirements included in the contract between the measured entity and the third party, and as an example the reporting requirements may differ from the guide in the Verification Manual, in this case the B-BBEE certificate issued does not constitute a report envisaged in section 19.1 of the Verification Manual;

3.2.3.6 In support of the above assertion, Mr Matthew Kearns submitted an email correspondence of 15 October 2015 from a certain Tswelelo Ngwenza, a Chartered Accountant, reflected as the Deputy Onshore Project Controller at Alstom S & E Africa (Pty) Ltd, requesting an audit to be done to demonstrate for the purpose of a contractual arrangement that they had maintained a level 4 B-BBEE rating based on the Codes of Good Practice, 2007, this was however not the basis for Premier Verification (Pty) Ltd to issue the B-BBEE Certificate Number PV 1610007 as Premier Verification (Pty) Ltd was aware that this B-BBEE certificate was required for a new tender, and not for an existing contractual arrangement;

3.2.3.7 In the event that Premier Verification (Pty) Ltd had intended for the said B-BBEE certificate to be regarded as a report as it claims in its response, it had failed to clearly and prominently mark the said issued B-BBEE certificate to Alstom S & E Africa (Pty) Ltd as a report, or a ‘pro forma’ B-BBEE certificate, or ‘not valid’ for procurement processes, as the case may be, and the Verification Manual specifically defines a B-BBEE

certificate separate from a verification report, which Premier Verification (Pty) Ltd as a verification agency is aware of;

3.2.3.8 Whereas Premier Verification (Pty) Ltd may have indicated to Alstom S & E Africa (Pty) Ltd that the said B-BBEE certificate is not for tendering purposes, an ordinary person presented with the said B-BBEE certificate would not have known that Premier Verification (Pty) Ltd had issued the B-BBEE certificate to Alstom S & E Africa (Pty) Ltd for other reasons other than procurement for compliance with the B-BBEE Act, it being noted in this case that not only did Alstom S & E Africa (Pty) Ltd present the B-BBEE certificate for a tendering process, it also used the same B-BBEE certificate to present its B-BBEE status and compliance on the CSD based on the invalid B-BBEE certificate issued by Premier Verification (Pty) Ltd;

3.2.3.9 Further, nothing in the B-BBEE certificate in question indicates that it is not a valid B-BBEE certificate, but an indicative report or report, as it bears a B-BBEE certificate number and a validity period that runs into the future, and further there are no additional requirements arising from the contractual requirements of Alstom S & E Africa (Pty) Ltd with a third party reflected on the said B-BBEE certificate justifying reliance on section 19.1 of the Verification Manual;

3.2.3.10 Further, even if it were to be accepted that this document was a report as claimed by Premier Verification (Pty) Ltd, the document is titled B-BBEE Verification Certificate prominently without any qualification or mark to distinguish it from any other B-BBEE certificate validly issued by a verification agency, which clearly would result in the person presented with such a document being misled into believing that the said B-BBEE certificate is valid for purposes of procurement, it being noted that even the officials of Eskom Holdings SOC Limited had to seek an legal opinion on the validity of the said B-BBEE certificate to demonstrate this point;

3.2.3.11 Premier Verification (Pty) Ltd argued that Regulation 3 headed “Purpose of Verification” in the Government Gazette of 18 July 2008 states that *“…an acceptably low level of risk is achieved if a reasonable person with sufficient knowledge of the Codes will be able to arrive at a similar conclusion based on the same information*”, and that therefore a reasonable person with sufficient knowledge of the Codes of Good Practice would know that the certificate in question is not valid. Premier Verification (Pty) Ltd fails to appreciate the application of this provision, as the standard applied in this case is for another person with sufficient knowledge of the Codes of Good Practice and the same information for verification purposes, not a person to whom a B-BBEE certificate is submitted as proof of the B-BBEE status of an entity, which person may not have any knowledge of the Codes of Good Practice, or even more in this case, knowledge of when and how the SANAS logo is to be used according to SANAS requirements;

3.2.3.12 Premier Verification (Pty) Ltd issued the said B-BBEE certificate to Alstom S & E Africa (Pty) Ltd improperly and contrary to the requirements in the Verification Manual read with section 2 of the B-BBEE Act, which outlines the objectives, and section 9 (7) of the B-BBEE Act, which states that a code of good practice remains in effect until amended, replaced or repealed, and in this case the 2007 codes of good practice had been replaced;

3.2.3.13 Whereas it is noted that Premier Verification (Pty) Ltd was requested to merely do a verification for the internal purposes of Alstom S & E Africa (Pty) Ltd to illustrate that it would have maintained the B-BBEE Level under the 2007 vis-à-vis the 2013 Codes of Good Practice to meet its contractual requirements, another form of a document properly titled verification report or similar title should have been issued to avoid the said document being passed off as a valid B-BBEE certificate of the entity;

3.2.3.14 A B-BBEE certificate is a serious document issued to certify that the B-BBEE status that the measured entity claims is correct as independently verified by the verification agency, for a 12 (twelve) months validity period effective from the date of issue, for purposes of advancing the objectives of the B-BBEE Act, thus any reason outside the parameters of this purpose would be irregular and improper, and it is clear that a different document or report must be issued for the purpose of section 19.1 of the Verification Manual;

3.2.3.15 Premier Verification (Pty) Ltd indicated that the said B-BBEE certificate was issued without the SANAS logo as indication that it was not valid for purposes of procurement, but other than the absence of the logo, there is nothing in the said B-BBEE certificate indicating that it is not a valid B-BBEE certificate for purposes of procurement, and any reasonable person would be misled to believe that it is real and valid when presented for any procurement processes, and the B-BBEE certificate in question is invalid;

3.2.3.16 The conduct of Premier Verification (Pty) Ltd in this case frustrates the implementation of the B-BBEE Act as an entity presented with such a B-BBEE certificate could be awarded tenders based on incorrect B-BBEE status reflected on such a B-BBEE certificate to its advantage and to the prejudice of other tenderers, although it is accepted that this did not occur in this case as the invalidity of the B-BBEE certificate was established through confirmation by Premier Verification (Pty) Ltd and SANAS respectively upon enquiry by Eskom Holdings SOC Limited;

3.2.3.17 Premier Verification (Pty) Ltd failed to apply the required professional scepticism in the process of issuing the said B-BBEE certificate, acted improperly in a manner that amounts to unprofessional conduct and undermines the objectives of the B-BBEE Act, and may have in a way aided the misrepresentation or attempt to misrepresent the B-BBEE status of Alstom S & E Africa (Pty) Ltd to Eskom SOC Ltd for the purposes of RFP CORP 3571 and/or other organs of state as the same B-BBEE

certificate was used by Alstom S & E Africa Limited for its B-BBEE status on the CSD; and

3.2.3.18 Premier Verification (Pty) Ltd failed to report the conduct of Alstom S & E Africa (Pty) Ltd of attempting to misrepresent its B-BBEE status and/or submitting an invalid B-BBEE certificate to Eskom Holdings SOC Limited, when by its own admission, Premier Verification (Pty) Ltd became aware that Alstom S & E Africa (Pty) Ltd submitted to Eskom Holdings SOC Limited the said invalid B-BBEE certificate which Premier Verification (Pty) Ltd claims it did not issue for procurement purposes, in contravention of section 13O (2) of the B-BBEE Act;

3.2.4 In respect of other observations relevant to this investigation and in line with the mandate of the B-BBEE Commission:

3.2.4.1 Section 13G (1) of the B-BBEE Act read with regulation 12 of the B-BBEE Regulations requires all organs of state and public entities to submit their reports relating to B-BBEE compliance annually, and Eskom Holdings SOC Limited has failed to comply with this requirement as it has not submitted its compliance report to the B-BBEE Commission, without seeking an extension, and is therefore in breach of this requirement under the B-BBEE Act;

3.2.4.2 Further, section 217 of the Constitution requires all organs of state to procure goods and services in accordance with the principles of fairness, equitability, transparency, competitiveness and cost effectiveness, and further permits legislation for preferential procurement, in which the B-BBEE Act falls, and evidence at hand does not demonstrate compliance with these requirements in the Constitution, which may amount to a contravention of the Constitution;

3.2.4.3 On becoming aware of the investigation by the B-BBEE Commission, the Eskom Holdings SOC Limited Board at the time as the custodian of governance in terms of the Companies Act did not demonstrate any

seriousness in dealing with this matter, which is evident from the delays by Eskom Holdings SOC Limited in submitting required documentation, ignoring of summons served on Eskom Holdings SOC Limited and the blatant disregard of the expressed B-BBEE requirements in the RFP CORP 3571 in the award of this contract;

3.2.4.4 The lack of action on the part of the Eskom Holdings SOC Limited Board is despite the fact that the first letter to Eskom Holdings SOC Limited was copied to the Board through its Chairperson Dr Ben Ngubane, and the Notice to Investigate issued was acknowledged by a certain Ms Zandi Mbilase, Office of the Chairman & Board Support. The role of the board in ensuring proper corporate governance and to hold staff members accountable for apparent irregularities is questionable in this regard and may be in violation of the Companies Act;

3.2.4.5 Eskom Holdings SOC Limited failed to cooperate fully with the B-BBEE Commission during this investigation and this has impacted the period within which this investigation could have been completed. Further, the reluctance to provide documentation such as copies of the contract, the submission for approval and B-BBEE certificate, and ignoring the summons, was clearly an obstruction as these documents were readily available within Eskom Holdings SOC Limited, and the motive for the delay in submitting, while unknown to the B-BBEE Commission, has significantly delayed the finalisation of this investigation;

3.2.4.6 In addition to the above conduct of Eskom Holdings SOC Limited of hindering and obstructing the B-BBEE Commission in performing its mandate in violation of section 13N (3) (a) of the B-BBEE Act, it also points to a breach of its obligation as an organ of state to assist the B-BBEE Commission to exercise its authority and perform its functions effectively, in violation of section 13B (5) of the B-BBEE Act; and

3.2.4.7 Alstom S & E Africa (Pty) Ltd presented an invalid B-BBEE certificate to Eskom Holdings SOC Limited in a manner that is contrary to the requirements of the B-BBEE Act and may amount to an attempt to misrepresent the B-BBEE status of Alstom S & E Africa (Pty) Ltd in terms of section 13O (1) (a) and (c) of the B-BBEE Act.

3.3 The findings and other observations were communicated to Eskom Holdings SOC Limited and the parties implicated in this investigation, all of which were afforded an opportunity to respond. Eskom Holdings SOC Limited, Premier Verification (Pty) Ltd and Alstom S & E Africa (Pty) Ltd responded to the findings and held meetings with the B-BBEE Commission prior to the above final findings. Despite several communications to Dongfang Electric Corporation Limited, the B-BBEE Commission did not receive any response from them.

3.4 Eskom Holdings SOC Limited was also advised to extend the findings that implicate some of its officials as indicated in Paragraph 3.2.1.35 above for their responses, and the responses were received, wherein most officials denied that they were aware of the incident and/or that they had an obligation to report the incident. Some of the officials did not respond and refused to depose to affidavits, while a few demanded that Eskom Holdings SOC Limited provide them with the full report before they could respond. There were, however, serious inconsistencies and contradictions in the responses provided to the B-BBEE Commission, and therefore a further investigation is required.

4. Recommendations of the B-BBEE Commission

4.1 The B-BBEE Commission has conducted its investigation consistent with the provisions of section 13F (1) (d) and 13J (1) of the B-BBEE Act, read with regulation 15 of the B-BBEE Regulations, with due regard to the processes of fair administrative justice applicable to investigations as required in terms of regulation 15 (17) of the B-BBEE Regulations, and noting that the respondent was not fully cooperative with the B-BBEE Commission during the investigation.

4.2 Eskom Holdings SOC Limited was advised of the processes for the investigation and the consequences for non-compliance under the B-BBEE Act, as well as the provisions of

regulation 15 (11) of the B-BBEE Regulations which permit the B-BBEE Commission to facilitate alternative dispute resolution where it deems appropriate.

4.3 Eskom Holdings SOC Limited has not made an effort to seek reprieve or an opportunity to remedy this apparent breach, it being noted that there has been several Interim Group Chief Executives during this investigation, namely, Brian Molefe, Matshela Koko, Johnny Dladla and Sean Maritz, which could have affected the level of cooperation during the investigation. It must be noted that the current Chief Executive Officer, Phakamani Hadebe, has fully cooperated with the B-BBEE Commission in the finalisation of this matter.

4.4 Eskom Holdings SOC Limited failed to demonstrate good faith during the investigation, and withheld crucial information in a manner that impacted the investigation timelines negatively and compelled the B-BBEE Commission to issue summons, which summons were complied with, albeit not in time. The constant change in the leadership of Eskom Holdings SOC Limited, particularly at Chief Executive level, may have been the cause of the lack of cooperation as reflected above.

4.5 Based on the above findings, after considering the response of Eskom Holdings SOC Limited to the findings, as well as the responses of Premier Verification (Pty) Ltd and Alstom S & E Africa (Pty) Ltd, the B-BBEE Commission has made the following recommendations in accordance with its powers under the B-BBEE Act:

4.5.1 that Eskom Holdings SOC Limited should within **90 (ninety) days** cancel the contract awarded to Dongfang Electric Corporation Limited in line with section 13A of the B-BBEE Act as it was awarded in violation of section 10 (1) (b) of the B-BBEE Act and also on the basis of false information provided to the effect that Dongfang Electric Corporation Limited is exempted from B-BBEE requirements, when such is not the case;

4.5.2 that Eskom Holdings SOC Limited should within **90 (ninety) days** of these findings take steps to approach the appropriate court of law to declare the contract between Eskom Holdings SOC Limited and Dongfang Electric

Corporation Limited invalid and set aside, without prejudice to any other remedies, if the cancellation of the contract cannot be effected;

4.5.3 that Eskom Holdings SOC Limited should commission an independent audit by an audit firm with relevant experience on B-BBEE in respect of all contracts awarded by Eskom Holdings SOC Limited to any entity from 2014 to date, to the value of R1 billion and above each, to determine compliance with the B-BBEE Act, and the report must be submitted to the B-BBEE Commission within **90 (ninety) days** of these findings;

4.5.4 that Eskom Holdings SOC Limited Board should within **90 (ninety) days** of these findings commission an independent forensic investigation to determine the appropriateness of the relationships between the officials, executives and board members of Eskom Holdings SOC Limited and Dongfang Electric Corporation Limited, and whether any payments in the form of monies or in kind were made to any of officials or their related entities or family members at any time immediately prior to, during, and after the process for RFP CORP 3571, and whether meetings occurred before and during the process, which meetings had not been declared by the relevant officials, and submit the report to the B-BBEE Commission;

4.5.5 that Eskom Holdings SOC Limited should within **90 (ninety) days** conduct an investigation and take disciplinary steps, where applicable, in respect of its officials that were involved in the processing and awarding of RFP CORP 3571 contrary to the B-BBEE Act, including Mr Charles Kalima who has been instrumental in facilitating the award of the RFP CORP 3571, and in respect of officials that have failed to report the B-BBEE Act violations in respect of this process when they became aware of them as required in section 13O (2) of the B-BBEE Act,

4.5.6 that Eskom Holdings SOC Limited should take steps to report any conduct that may be criminal in respect of any of its officials, executives and board members that were involved in this RFP CORP 3571 to the South African Police Services,

whether or not these persons are still within the employ of Eskom Holdings SOC Limited, within **30 (thirty) days** after the investigations reports, if necessary based on the outcome of the investigations;

4.5.7 that Eskom Holdings SOC Limited should within **30 (thirty) days** submit its B-BBEE compliance report for purposes of complying with the requirements of section 13G (1) of the B-BBEE Act, which Eskom Holdings SOC Limited is already in breach of;

4.5.8 that Eskom Holdings SOC Limited should develop and implement a B-BBEE compliance program that will enable it to detect and prevent unauthorised deviations and/or violations of the B-BBEE Act and facilitate the correct implementation of the procurement policy and procedure that is aligned to the B-BBEE Act, and such a compliance program be submitted to the B-BBEE Commission within **90 (ninety) days** of these findings;

4.5.9 that the B-BBEE Commission should refer the apparent violation of the PFMA and the PPPFA to the National Treasury for a further investigation and appropriate remedial action, including an investigation into possible fruitless and wasteful expenditure that arises from the unauthorised and irregular conduct on the part of Eskom Holdings SOC Limited in disregarding section 10 (1) (b) of the B-BBEE Act;

4.5.10 that the B-BBEE Commission should refer aspects relating to apparent violation of the Companies Act to Companies and Intellectual Property Commission for consideration and appropriate remedial intervention;

4.5.11 that the B-BBEE Commission should refer the aspects relating to possible maladministration to the Public Protector for investigation and appropriate remedial intervention, where necessary; and

4.5.12 that the B-BBEE Commission should refer these findings with recommendations to the Minister of Public Enterprises who should be able to facilitate the

implementation of the recommendations in the event that Eskom Holdings SOC Limited and its Board may be conflicted or fails to implement these recommendations.

4.6 Eskom Holdings SOC Limited has accepted the recommendations above. However, in the event that the recommendations above, which in the view of the B-BBEE Commission are reasonable to remedy the violation, are not implemented by Eskom Holdings SOC Limited, the B-BBEE Commission may implement actions in accordance with the B-BBEE Act, in addition to some of the recommendations made above, as follows:

4.6.1 refer the officials, executives and directors of Eskom Holdings SOC Limited for prosecution to the NPA in accordance with section 13J (5) of the B-BBEE Act for their failure to report in violation of section 13O (2) of the B-BBEE Act, for obstruction and failure to comply with the summons in violation of section 13N (3) (a) and (f) of the B-BBEE Act;

4.6.2 pursue criminal action against the Eskom Holdings SOC Limited and Dongfang Electric Corporation Limited and their officials, executives and directors by referring the matter to the appropriate division of the SAPS and/or NPA in terms of section 13J (5) for offences under the B-BBEE Act, and for apparent fraud and corruption under the relevant laws, as the case may be; and

4.6.3 institute proceedings in the court of law to restrain Eskom Holdings SOC Limited in respect of this apparent breach, and/or seek appropriate remedial relief, including an order to declare the contract invalid and for the directors of Eskom Holdings SOC Limited and Dongfang Electric Corporation Limited involved in RFP CORP 3571 as delinquent directors, in accordance with section 13J (4) of the B-BBEE Act.

4.7 In respect of Premier Verification (Pty) Ltd, the B-BBEE Commission recommends that although Premier Verification (Pty) Ltd had not been cited as the respondent in this matter, its conduct is serious and Premier Verification (Pty) Ltd must do the following:

4.7.1 issue a public apology for issuing the B-BBEE certificate PV 1610007 dated 14 November 2016 to Alstom S & E Africa Limited contrary to the Verification Manual, the Codes of Good Practice, 2013 and the objectives of the B-BBEE Act within **30 (thirty) days**, and place the public apology on the face of its website for a period of **30 (thirty) days**;

4.7.2 commission an independent audit of the B-BBEE certificates it has issued in 2016 and 2017 within **90 (ninety) days** and submit the report of the independent auditor to the B-BBEE Commission for consideration, and

4.7.3 Refund all entities for which B-BBEE certificates were found by the independent audit to have been issued contrary to the Verification Manual, the Codes of Good Practice, 2013, and the objectives of the B-BBEE Act within **30 (thirty) days** of receiving the independent audit report.

4.8 Premier Verification (Pty) Ltd has agreed to implement the above recommendations as the implicated party. In the event that Premier Verification (Pty) Ltd fails to implement the recommendations above, which in the view of the B-BBEE Commission are reasonable, the B-BBEE Commission must initiate a separate investigation against Premier Verification (Pty) Ltd as the respondent, and pursue action in accordance with the B-BBEE Act.

4.9 In respect of Alstom S & E Africa (Pty) Ltd, the B-BBEE Commission recommends that although Alstom S & E Africa (Pty) Ltd was not cited as a respondent in respect of the investigation, Alstom S & E Africa (Pty) Ltd must do the following:

4.9.1 issue a public apology within **30 (thirty) days** for submitting an invalid B-BBEE certificate to Eskom Holdings SOC Limited, which had it not been detected, would have misrepresented the B-BBEE status of Alstom S & E Africa (Pty) Ltd; and

4.9.2 submit a sworn affidavit within **30 (thirty) days** confirming to the B-BBEE Commission that the B-BBEE certificate in question was not submitted for

procurement and/or B-BBEE compliance to any other organ of state, public entity or measured entity.

4.10 Alstom S & E Africa (Pty) Ltd has agreed to implement the recommendations above as the implicated party. Should Alstom S & E Africa (Pty) Ltd fail to implement these recommendations, which in the view of the B-BBEE Commission are reasonable, the B-BBEE Commission must initiate a separate investigation, and pursue action in accordance with the B-BBEE Act.

5. Implementation of recommendations

5.1 Reference to 'days' in the recommendations above means calendar days unless stated otherwise. The B-BBEE Commission is monitoring the implementation of recommendations.

6. Status of this publication

6.1 This publication is prepared only for the purpose of publishing the findings and recommendations of the B-BBEE Commission on this matter in the interest of the public, but does not constitute an investigation report.

7. Conclusion

7.1 The B-BBEE Commission has taken all due care in preparing this publication, and should there be any errors you wish to bring to our attention or should you require any clarity regarding the contents of this publication, please do not hesitate to contact us immediately.

7.2 This publication will also be available on the website of the B-BBEE Commission from the date of its release and it will be circulated to the public through channels that the B-BBEE Commission deems fit.

7.3 For any queries or further clarity on this publication, kindly feel free to contact us at the following contact details:

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End