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CHAIRPERSON: Thank you.

NOTE: Witness confirmed to be still under oath.

CHAIRPERSON: Good morning. Advocate Mphaga.

ADV MPHAGA: Thank you Chair, thanks for the
5 indulgence, we realize its 10h40 but thanks for the indulgence
Chair. Chair, we did receive a response from BAe in regard to
item 17 in the supply contracts and they've agreed that we can
refer to the clause in respect of liquidated damages, so we'll
proceed with the witness and we'll deal with the Hawk Supply
10 Terms and the Gripen Supply Terms.

CHAIRPERSON: Maybe say what you wanted to say, and
then I'll thereafter tell you what I wanted to say.

ADV MPHAGA: Thanks Chair, the file is marked
"Radar/Hawk/Gripen Supply Terms".

15 CHAIRPERSON: Yes that we have. Thank you.

ADV MPHAGA: Chair, there is a divider between in the
file, we are going to deal with the Hawk which is just after the
divider.

CHAIRPERSON: Advocate Mphaga I'm not quite certain,
20 maybe you might help us, is there anything which turns around
the supply chain of the Gripen and the Hawk because I can't
remember seeing anything which seems to suggest that there is
some dispute around that area.

ADV MPHAGA: Chair yes, there is some relevance in this
25 sense that the Supply Terms deals with the issue relating to

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the tranches in the ..., the tranches and as indicated yesterday in the Critics File of Mr Holden and Mr Feinstein they did refer to issues of the tranches and it also deals with subcontracts and it's also contentious, it may be contentious also in respect
5 of other Terms of Reference and also deal with the question of cancellation and which may also be relevant. We are not going to deal with the whole contract but only with the contentious clauses.

CHAIRPERSON: Thank you. Thanks a lot.

10 ADV MPHAGA: Thanks Chair. If you allow me then Chair on the Hawk Supply Terms, Mr Ferreira you have already given evidence that you were party to ...

JUDGE MUSI: Just hold on.

15 CHAIRPERSON: Advocate Mphaga, we do have the relevant documents.

ADV MPHAGA: Thank you very much. As part of the IPT after the appointment of the selected suppliers in terms of the Hawk and the Gripen you were involved in assisting the IONT in drafting the Supply Terms, am I correct?

20 MR FERREIRA: Good morning Chair, Commissioner. In terms of the negotiations in the 1999 the IBT negotiated the Supply Terms and the IONT negotiated an umbrella agreement. I was part of the two negotiations, both the Hawk and the Supply Terms together. As we'll go through there you will
25 notice that there is a big correlation between the two

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documents and we also made use of an external legal advisor to assist us on our side with the drafting up of the Supply Terms.

ADV MPHAGA: And if we go to page 16 of the Supply
5 Terms, page 16 Clause 3 refers to the Scope of Supply Terms and it speaks about that:

*“The seller shall sell and supply ARMSCOR, shall
buy in ARMSCOR and DOD (Indistinct) the tranche 1
and tranche 2 products, spares, GSE and Services.
10 All (indistinct) contained in this schedule, in this
umbrella agreement”.*

Clause 3.2 deals with the tranches in respect of the supply of the equipment. Can you just elaborate on that?

**NOTE: Please take note that the witness is not speaking
15 into the microphone, rendering his voice inaudible.
Transcription of his evidence proves difficult.**

MR FERREIRA: Chair, on Hawk there were two tranches and the Supply Terms Clause 3 then identifies what will be delivered at ever tranche. In the Gripen Supply Terms there
20 were three tranches and the same clause there also addressing (indistinct) tranche.

ADV MPHAGA: You can proceed to page 21. Clause 3.6 deals with the options. I know you have dealt with it during your evidence but can you elaborate on what it means?

25 MR FERREIRA: Chair, during the negotiations all the

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functionality was not included in the Supply Terms, these functionalities was added as options to the contract. On the Hawk there was only an option for helmet mounted capability, on the Gripen there were options for the radar package 1, laser designated pod, (indistinct) extension frequency requirements and other (indistinct) options. These options were as part of the contract and if we could get money these options could have been activated. On Gripen (indistinct) Hawk this (indistinct) option was never (indistinct) because we could not get the funds to do this option. On the Gripen some of these options were incorporated in the contract where they reduced the aircraft quantities from 28 to 26 and (indistinct) reduced was used to fund these options.

ADV MPHAGA: Then on page 64 during your evidence you indicated that just before the World Cup in 2010 there was a problem in the supply of the equipment timeously and you had to invoke liquidated damages. Clause 17 deals with that, can you take the Commission at least and explain what it means?

MR FERREIRA: Chair, Clause 17 goes about liquidated damages. This was one of the areas that was very problematic during contract negotiations and eventually the clause (indistinct) is based on the ARMSCOR stated terms and conditions. What it basically says is that there is a grace period of 30 days in the delivery of services not rendered and after 30 days when you start penalising the contractor it was

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worked out on the sum of 5% of the value of the deliverable at the maximum of 7%. When we had to negotiate it for the, not necessarily for the Hawk, for the ..., on the Hawk, we started, they did not meet all the functionalities (indistinct), then we had to negotiate the (indistinct) which was similar on the Gripen.

As part of those negotiations with them we took the once-off liquidated damages for the functionality not being delivered or not being cleared at that date. And after that whenever there is a late delivery like even today if there is some spare parts that is not delivered in time or within as contracted, BAe is penalised for late delivery utilising this clause, so it was not only applicable with (indistinct) but it's still applicable as we speak today.

ADV MPHAGA: Thanks Mr Ferreira. Let's proceed then to page 73. 73 Mr Chair, paragraph 20. Clause 20 makes provision for termination and the procedures to be followed for termination or cancellation of the agreement. Can you just give a brief explanation what it entails insofar as the Supply Terms are concerned?

MR FERREIRA: Chair, Clause 20 makes provision for a certain (indistinct) for termination. On page 283 clause 20.1 makes provision for termination due to force majeure provisions. Force majeure, if it's more than 180 days for either party to (indistinct) terminates the Supply Terms. Then Clause

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20.2 makes provision for termination by ARMSCOR for other reasons than force majeure, and then Clause 20.2.2 the (indistinct) terminate, the clause. Sorry, the (indistinct) if ARMSCOR is in breach of contract (indistinct) not provide any, for instance (indistinct) equipment he has a right of termination but that's the only reason he has for termination, then ...

ADV MPHAGA: Can you just refer to the pages as you ...

MR FERREIRA: Page 284.

ADV MPHAGA: Page 74?

10 MR FERREIRA: There's two numbers, page 74, I used their numbering system, and I've got the wrong one. It says there:

15 *'If ARMSCOR fails to comply with any obligation in terms of the Supply Terms the seller is entitled to give ARMSCOR written remedy for such breach 90 days after which they can then go into termination'.*

If we go to on page 75, clause 20.3:

"Termination by convenience. ARMSCOR do have the right to terminate by convenience".

20 But once we terminate by convenience there are certain conditions in terms of (indistinct) termination that we have to pay the contractor. Go to page 76, 20.3.4 we say:

25 *"In the event of a complete or partial termination and in clause 20.3 (indistinct) another clause (indistinct) an amount equal to 10% of the outstanding value of the Supply Terms".*

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CHAIRPERSON: I'm sorry, I think your witness (indistinct) just reading and he doesn't even tell us where he is reading. We are trying to follow where he is reading and we find it very difficult.

5 ADV MPHAGA: Thanks Chair. Can you please refer the commissioner to the relevant pages and paragraphs as you read.

MR FERREIRA: Commissioner, page 76 I'm referring to paragraph 20.3.

10 ADV MPHAGA: Is it 20.4 or (indistinct)?

MR FERREIRA: 20.3.4.

CHAIRPERSON: There seems to be a problem because our page 76 in the middle there's 20.4 "Termination Account".

ADV MPHAGA: 20.3.4 Chair, just before 20.4.

15 JUDGE MUSI: 20.3.4.

MR FERREIRA: (Indistinct) look at the Gripen Supply Terms.

ADV MPHAGA: The chair found the relevant paragraph, you can proceed to read.

20 MR FERREIRA: In essence what we say there:

"In addition to the other costs that might be implied in terms of termination favourable to the contract we also have to pay him an amount of 10% of the outstanding value (indistinct) terminated the contract to our convenience".

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(Indistinct) what we're saying there. Paragraph 20.4 is the termination account, if we terminate due to force majeure or because of non-performance of (indistinct) there is a whole process that says how we will determine the cost of termination.

ADV MPHAGA: Okay, thank you. Then can you proceed to page 100. That is Clause 34, Clause 34 deals with subcontracts, Clause 34.1 says that:

"The seller shall, if so requested by ARMSCOR timeously submit to ARMSCOR for its approval the names of proposed subcontractors at first tier level excluding raw material and aircraft general stores suppliers other than those named in Appendix 'AP7' in writing and in such event the seller shall not without the prior consent of ARMSCOR enter into any subcontract for the execution of the Supply Terms or any part thereof".

So, can you just explain that and the overall understanding of what this subcontract clause means?

MR FERREIRA: My understanding was there was a risk of subcontractors proposed which was included in the contract and if they want to bring in any other subcontractor for any reason they first need to clear that with us before that subcontractor could be contracted.

ADV MPHAGA: My understanding is that the suppliers

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themselves were responsible for appointing subcontractors, not ARMSCOR.

MR FERREIRA: Commissioner as we (indistinct) to make sure that (indistinct) the way forward.

5 ADV MPHAGA: Page 102 Clause 36, it deals with "Arbitration and Disputes", can you just give an explanation?

MR FERREIRA: If there was any disagreement between the seller, ARMSCOR or DoD then we would first need to resolve the issues amongst ourselves to try and get the (indistinct) in
10 good faith by directly speaking to the contractor (indistinct) negotiations. If the ARMSCOR programme manager, the seller's programme manager or the DoD's project officer could not resolve this issue or people reported to then this was referred to a procedure as to follow in a (indistinct) agreement.

15 ADV MPHAGA: Which procedure will mean taking the matter to arbitration, am I correct?

MR FERREIRA: Please repeat your question please.

ADV MPHAGA: It will be referred to formal arbitration as determined in the April agreement?

20 MR FERREIRA: That's correct Commissioner.

ADV MPHAGA: And lastly on page 109 the Supply Terms Agreement did not make provision for bribery and prohibition of employment, am I correct?

MR FERREIRA: Chair, that is correct, that would be
25 included in the (indistinct) agreement.

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ADV MPHAGA: So Clause 20 of the umbrella agreement will deal with the issues relating to bribery and corruption and so on.

MR FERREIRA: That's correct.

5 ADV MPHAGA: Thanks Chair that concludes the evidence of Mr Ferreira.

CHAIRPERSON: Is there anybody who wants to cross-examine Mr Ferreira? Thank you.

ADV SNYMAN: Good morning Chair, I act on behalf of Mr
10 Holden, Feinstein and Van Vuuren, surname is Snyman and initial G (indistinct). At this point Chair I just wish to point out that the transcripts from the last few days are not yet posted on this Commission's website, the last one that has been posted is from Monday, we have been trying to follow through
15 the transcripts and indeed for our clients to follow the evidence as well, they are not in a position to (indistinct) and to be present every day, they are not in a position therefore right now to be able to give an indication on cross-examination and in this regard we'd like to reserve the rights to cross-examine
20 this witness once we've had an opportunity to go through the transcripts as soon as they are posted.

CHAIRPERSON: Ma'am, I'm not quite certain what do you suggest I should do, saying that you reserve the right to cross-examine the witness because the record is not available on the
25 website I don't think that is good enough because we've got a

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particular programme that we follow. If at all for one reason or another there is a difficulty with that website what should we do with this witness, because I thought you knew that this witness is going to testify and if you have instructions to cross-examine one would have expected you to be here when the witness is here and testifies.

ADV SNYMAN: Chair, unfortunately I can't put it any higher than this, this is the position that we are in given the financial circumstances of our clients and the only position that we are in, in able to contribute towards this Commission. My respectful submission would be that the witness would be excused but should (indistinct) once we're in a position to go through the transcripts that it is necessary to cross-examine him but that he be recalled for that purpose and that it would be a very short and brief exercise and (indistinct) sequence. I merely raise this to point out the difficulties that we have in contributing towards the work of the Commission which our clients are obviously very keen and willing to do.

CHAIRPERSON: You do have copies of the record, of the transcript of the past few days except of the last two days?

ADV SNYMAN: Chair, the only transcript is from Monday, not from Tuesday through Thursday and I gather from what was raised earlier today that our client Mr Holden and Feinstein's submissions have been referred to over the past few days, that it is not possible to follow those through the Commission's

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website.

CHAIRPERSON: So if we do adjourn, because I don't want a situation where we release a witness, the witness goes away and after three, four weeks we want to recall that witness for
5 cross-examination that will not be fair to the witness. I wonder that if we do release the witness that must be after cross-examination, if any. Now are you in a position to start with the cross-examination because part of the testimony of this witness is on the, is already on the website?

10 ADV SNYMAN: Chair I understand the position that you are not seeking delays where the witness needs to be recalled after a substantial period of time. My respectful suggestion would merely be that as soon as the transcripts from the last three days have been posted we would very, very quickly be
15 able to give an indication to the Commission whether or not we would need to cross-examine, that decision could be made almost instantaneously given a few hours just to go through the transcripts, so that if this witness were to be provisionally excused it could be determined within half a day of those
20 transcripts being made available, whether or not we would seek to cross-examine him.

CHAIRPERSON: Advocate Mphaga.

ADV MPHAGA: Chair, we just need to put it on record that we actually had to give about two or three days for the copies
25 to be made and given to Mr Holden and Mr Van Vuuren and they

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have all the documents with them and we don't understand also why they excuse themselves from the proceedings and this maybe also be prejudicial to the witness for them, and they have not even indicated timeously that they haven't received
5 any transcripts which are relevant for them to decide whether they are going to make an application or not. Clearly if (indistinct) given an opportunity they should at least affect the interest of the witness at all.

CHAIRPERSON: So what you are saying to me that copies
10 of the statement of this witness and the annexures were made available to them about three or four days ago?

ADV MPHAGA: Yes Chair, and it was to assist them to at least have a view of whether they are going to cross-examine or not, and we never got any timeous indication in that respect
15 and it's unfair for them to come at this late stage to indicate that they may want to cross-examine.

CHAIRPERSON: Advocate Solomon, do you want to say something?

ADV SOLOMON: Yes, thank you, good morning Chair,
20 Commissioner Musi. We align ourselves with what our learned friend has placed on record in relation to the cross-examination. We would perhaps suggest as a compromise that Mr Ferreira stand down until Monday, that should give them sufficient time to make their decision as to whether they want
25 to cross-examine him or not. We endorse what you have stated

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Chair with the concurrence of Commissioner Musi that it's undesirable that witnesses are recalled at some unknown date in the future because what we hear from counsel for Mr Holden and Mr Feinstein is that they just want to reserve the right, an
5 indefinite reservation and we think that's unacceptable. She has placed on record that an hour or two or half a day is sufficient to make the determination, I'm not sure what the position is in regard to the transcripts but I'm sure those can be made available to her over the course of today or the
10 weekend and they can be in a position to continue on Monday if they do desire to cross-examine Mr Ferreira. Thank you Chair.

ADV SNYMAN: Chairperson, if I may just respond to ...

CHAIRPERSON: Just hold on; just hold on, I'll come to you, just hold on. Advocate Cane.

15 ADV CANE: Chairperson, I would endorse the approach of my learned friend Mr Solomon, I do have a concern that the critics should be given an opportunity to see the transcripts prior to making their decision to cross-examine, that's the reason why the Department of Defence would go along with a
20 very short adjournment for that purpose. Thank you Chair.

ADV SNYMAN: Thank you Chairperson. There's just one point I wish to clarify, no adjournment was sought by our clients for documentation, we were very specific in that regard, we merely placed on record that we had not received the
25 documentation, no adjournment was sought for us until Monday.

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If I recall correctly that was due to other reasons that the Commission was adjourning and for Evidence Leaders to continue with a new witness. I would agree that it would be sufficient for us over the weekend to make a determination on whether or not we would be seeking the right to cross-examine this witness, I would just also add to that, that in the event that we determine once we have sight of the transcripts that it's not necessary to cross-examine this witness but in order for the Commission not to be delayed the next witness would be ready to proceed in any event on Monday. That would be my only additional submission on that point. Thank you.

CHAIRPERSON: I think probably what we have to do now is to adjourn until Monday, which I'm doing very reluctantly and we'll give instructions that copies of the transcripts be made available on the website. If the staff of the Commission finds that it might (indistinct) or they find that probably today's proceedings might not be on the website by the weekend they will make attempts to hand-deliver copies of the remaining transcripts to the legal representative of Mr Paul Holden just to make sure that by Monday morning they are ready to proceed with this witness. I would be very reluctant to extend the staying of this witness in the witness box for another few days without him being cross-examined.

Once I recuse this witness I want to recuse him after all the procedures had been followed, so please just try

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and make sure that on Monday morning if you do want to cross-examine, that you are ready to start with your cross-examination.

ADV SNYMAN: Thank you Chairperson, I'm indebted.

5 CHAIRPERSON: Thank you. Advocate Mphaga, just make sure that those transcripts are put on the website, if not possible, I've seen the transcripts, they are already available, then they can probably even be given to the legal representative before they leave.

10 ADV MPHAGA: Chair, we will do so. Thanks Chair.

CHAIRPERSON: Thank you. We'll adjourn.

(COMMISSION ADJOURNS)