23 April 2020

Mr S Sole
AmaBhungane
Per email: solesam@gmail.com

Dear Mr Sole

Lebone Consortium

We have considered your questions and the answers of Novus and Lebone. The ad hominem remarks of Novus and Lebone that seek to impugn the integrity of Caxton and its executives are unfortunate and misplaced. The allegations that are made against Caxton are untrue.

Our answers to questions posed by AmaBhungane in relation to the Novus Lebone Commission are set out below. We apologise for the lengthy explanations.

1) Has Caxtons (or its associated companies) at any time since November 2015 donated money to the ANC?

The Caxton group is an independent non-aligned media group and publisher of newspapers, magazines and digital websites and publications. In line with our efforts to remain non-aligned, Caxton does not support any political party and in answer to your question, has not made donations to the ANC or any other political party for that matter, since November 2015.

2) Lebone claims that Caxtons cheaper price was based on a calculation error and that "if the [Caxtons] JV price was based on the correct number of pages, their bid would in fact turn out to be much more expensive".

This claim is false and without substance. We bid a fixed price based on the tender specifications. If we had mis-priced, which we did not, then the risk would have been ours. On the other hand, despite being the incumbent printer, the Lebone Consortium appears to have over-stated the pages and part of their excessive bid price is based on this fact. This may explain how it is that Novus, despite invoicing the DBE in terms of the Consortium agreement for its printing services, is still able to afford a separate commission fee of 13% / 15% off the top of its invoiced amounts, payable to Lebone, and still make a fair commercial margin. These commission levels imply an extremely high gross margin well above the benchmarked average in the printing industry.

We also now see from the Consortium Agreement- clause 4.7- that “any mark-up in regard to the printing of the Printing Work as regards to the printing shall accrue to Novus...”. The Commission agreement achieves the effect of re-distributing to Lebone, the excessive margin that accrues to Novus under the Consortium Agreement.

The allegation that the Caxton JV under-stated the number of pages in our tender, was raised by the Lebone Consortium in the course of the litigation and dealt with by the Caxton JV on oath. Caxton is prepared to make its pricing in its tender available for public scrutiny, on a transparent basis. It is satisfied it provided a fair price for the work (including a fair margin) and the suggestion that we under-quoted is speculative and without foundation. We explain in more detail-
From the record of decision filed by the DBE, it was evident that one of the concerns raised by one of the BEC members was that the Caxton JV’s pricing did not cover the full scope of work in that the pricing provided was based on a lesser number of pages than were required for the project. The BEC member also indicated that Caxton's pricing therefore appears to be lower, but will in fact be higher given the figures used in their pricing calculation. This is not correct.

Caxton responded to this in an affidavit which, at the time, was confidential to Caxton, as it contained information pertaining to Caxton's bid. This was nevertheless provided to the Lebone Consortium lawyers. In that affidavit:

- Caxton explained in detail that it had repeatedly sought confirmation from the DBE regarding the number of pages (per workbook) on which bidders were required to base their bids. (The information contained in the Standard Conditions of Contract which formed part of the bid documents, included an annexure setting out "average" pagination of the various workbooks.) The information received from the DBE was conflicting - it stated that the pagination was on a disk provided to bidders as well as on the DBE website. Caxton checked both sources and found that the disk did not contain the pagination. Caxton also checked the DBE website and, in particular, the actual workbooks published on the site. However, it was noted that the contents of the online workbooks (there are many titles in different languages per subject and grade), which were a mirror of what had to be printed, were constantly being edited and revised and it was therefore not clear what the actual exact pagination for each grade, language and subject workbook was.

- Caxton tried several times to obtain clarity from the DBE without success and, at the point that it could wait no longer, it finalised its bid using the exact pagination of the workbooks on the DBE's website as at 5 December 2015. Caxton ultimately based its bid on having to print workbooks containing approximately 7.3 billion pages. The number of workbooks for each subject ie the numbers of learners, was fixed in the bid request.

- At the time of responding to this allegation in its affidavit filed in the litigation (which was later in the year), Caxton repeated the exercise of reviewing the workbooks, as electronically published on the DBE website and calculating how many pages would need to be printed in order to fulfill the bid requirements. This exercise was based on the fact that each of the physical workbooks then being printed by Novus, matched the version of each online workbook. Our process was meticulous and rigorous. Using the pagination available on the DBE website in July 2016, it calculated that the number of pages required was just less than 7.3 billion pages. In other words, there was no material change to the numbers used by Caxton to prepare its bid, when compared to what was actually required to be printed - in fact, the number of pages was slightly less. It appeared that Caxton had in fact over-estimated the number of pages by approximately 32 million.

- When responding to the allegation by the Lebone Consortium (that was derived from the single erroneous and casual observation by a single evaluator) that it had prepared its bid based on too few pages, Caxton conducted a comparison of the number of pages used by the Lebone consortium (as set out in an affidavit deposed to by Mr Ehret for the Lebone consortium), with those used by Caxton in preparing its bid and found that the Lebone consortium appears to have based its bid on 7.8 billion pages ie. approximately 500 million more than Caxton."

- Based on the above, it is clear that Caxton’s calculation of 7.3 billion pages was accurate, and the bid of Lebone Consortium, based on 7.8 billion pages was inflated.
3) Lebone states: "To suggest that the bid was awarded to the Consortium only due to Michael’s influence on the DBE is reckless as it is completely unfounded. The plain truth is that the JV’s bid simply did not match up to the Consortium’s; and failed where it matters most, for functionality. A reading of the court record of the various evaluations will highlight this fact. For example, the JV’s bid documents showed that they did not have the requisite warehousing and also did not have adequate or any warehouse equipment to deliver this contract. Furthermore, the JV’s bid proposed to rely on a number of unregistered or unlicensed motor vehicles to distribute the workbooks."

We note the Lebone response that “to suggest that the bid was awarded to the Consortium only due to Michael’s influence on the DBE is reckless as it is completely unfounded”. Does that suggest that Lebone accepts that it was awarded to the Lebone Consortium partly due to Michael’s influence on the DBE?

The Caxton JV bid was fully compliant with the tender specification and technically competent. It is unfortunate that having scored 80% in the second, court ordered re-adjudication, we were subsequently marked down by one percent and disqualified. The senior counsel appointed by the order of the court to oversee the adjudication process, Adv. Pat Ellis SC furnished a written opinion to DBE, as part of his review of the process and advised that the method used by the BEC in re-marking Caxton’s bid was irrational, that the two bidders were clearly not treated equally and that the bids should be referred back to the BEC for reconsideration based on the initial scores and that both bids should proceed to an evaluation of pricing and BEE compliance. The DBE ignored this advice and confirmed the disqualification. The SCA agreed that the Caxton JV had been unfairly treated. So the argument that we did not comply technically is untrue- we achieved the 80% threshold for technical competence, before we were unlawfully marked down pursuant to an irrational remark process.

In the marking down process the independent Chairman, Mr G Whittle adopted an interventionist role. It was Whittle who pointed out that the registration certificates of some of the vehicles of the broad based owner driver distribution network available to Bongani Rainmaker, our distribution partner, for last mile -distribution, had expired and that some of the owner-drivers had old vehicles. This non-material and petty issue pertaining to a fraction of the vehicles, was a ground to motivate for the deduction of points. So the observation by Lebone simply highlights the unfairness. This can be verified by reference to the record of the adjudication. It should be noted that Lebone’s suggestion that the vehicles which Caxton intended to use were “unregistered and unlicensed” is incorrect. The point made by Lebone at the time was that the vehicles were old and some licences had expired by the time the bid was considered.

Part of the Caxton JV’s empowerment initiative was for some of the deliveries to be carried out by owner drivers who in some cases operated older vehicles. However, the vehicles were in working order. This was no reason to penalise Caxton. In fact, while the respondents made much of Caxton’s intended use of owner drivers and raised this point during the hearing at the SCA, Caxton pointed out that the Lebone Consortium also made provision for the use of owner drivers in carrying out deliveries.

Even more egregious is the allegation of Lebone relating to warehouse equipment. The technical requirement was a central warehouse of 30 000m2 and satellite warehouses in the provinces, which requirement was fully satisfied by the Caxton JV. So it was never an issue that we did not have the necessary warehouse space available. Nor was there an issue raised about the equipment available in the central warehouse where all the picking and packing was to be done. Instead, the record shows that the Chairman, Mr Whittle motivated that the Caxton JV must be marked down because it allegedly did not have picking and packing equipment in the satellite warehouses. Our score was then wrongly marked down at Whittle’s instance for this reason- despite the fact that all picking and packing was to be done in
the central warehouse, and there was no need or use for the allegedly missing equipment in the regional warehouses.

Based on Whittle’s misconception of the workflow and picking and packing process and palletized shipments to regional warehouses, the Caxton JV was marked down in the re-mark. Lebone again highlights the egregious results of an unfair re-marking process, which process was held by the SCA to be unlawful. The SCA held that “It cannot be said that, viewed objectively, the exclusion of CTP JV from further consideration on the ground that it had failed the functionality test, was fair in all the circumstances of the case.”

The SCA, accordingly, declared the award of the tender to the Lebone Consortium to be constitutionally invalid. These points were dealt with on oath by Caxton in the review proceedings. I also wish to add that both the DBE and the Lebone Consortium approached the Constitutional Court seeking leave to appeal against the decision of the SCA. In February 2019, the Constitutional Court declined both applications on the basis that they bore no reasonable prospects of success.

Lastly, it bears noting that at no time were the Caxton JV facilities inspected or visited during the evaluations, unlike the facilities of the Lebone Consortium, which were visited on multiple occasions.

4) Lebone states: “It is a fact that the Consortium succeeded in no less than three separate and independent evaluations. Each time the Consortium outscored the JV on functionality. For each of these evaluations, independent attorneys and chartered accountants were appointed to provide additional oversight over the process. None of these independent professionals reported any undue influence in the scoring process. To suggest that the Consortium was awarded the bid due to undue influence is not supported by any fact.”

This is entirely untrue- The first bid evaluation round was cancelled by Treasury itself who found the process was unfair. In that process, a scoring matrix of 1 to 3 was used, having been introduced at the eleventh hour- Caxton scored a compliant 66% odd on the 1 to 3 scoring matrix- but did not have the advantage of the incumbent, who scored higher, on this inherently unfair scale. It bears emphasis that all of the parties agreed by mutual consent that the tender process should be re-run. The agreement was then made an order by the High Court.

In the second round, in addition to the unfairness referred to above by the independent chairman motivating for the deduction of points from the Caxton JV bid for unwarranted reasons, the court ordered senior counsel, Adv Pat Ellis SC, formally advised the DBE that in his opinion, the process was unfair and that the Caxton JV must be admitted to the evaluation on price and BEE score. The DBE ignored the opinion. The DBE DG was himself criticized for misleading the court in regard to the debacle around the ignoring of Adv Ellis SC’s advice. Thus in the second round, both parties qualified under functionality, but the intervention of Chairman Whittle resulted in the Caxton JV being marked down by just 1 percent to 79% and then disqualified- a process which the SCA found was unfair. As stated above, the Constitutional Court rejected the Novus consortium’s application for leave to appeal the SCA’s judgment.

In the third round evaluation, the Caxton JV has noted the outcome. We have not been provided with any reasons or justification by the DBE as to why we were eliminated on functionality, other than a bland notification that this time, our bid was scored at approximately 75%. The DBE did not advise the Caxton JV of the outcome of the SCA ordered evaluation, which took nearly a year to complete. We learned of the outcome from a Novus SENS announcement of the re-award to the Lebone Consortium. It is possible that a further round of review litigation may well show further irregularities. It seems, however, that given that
the contract has only one more year to run, that to start another round of litigation with the DBE now, may be pointless. So we have not initiated new review proceedings- hardly the actions of a sore loser.

In any event the question of which party scored higher on functionality is not the point. The way that South Africa's procurement system works – for very good reason – is the functionality is merely a sifting mechanism to determine which bids are sufficiently functional to move onto Price and BEE evaluation. Once that has occurred, the result is determined by who scores better on Price and BEE – not functionality. This means that it is essential the functionality not be used as a basis to wrongly exclude bidders that are (objectively) functional – particularly when there are only two bidders in the race. Otherwise, one bidder gets removed (wrongly) on the basis of functionality and the other party gets a free ride – no matter how high the price. This is what happened in the AllPay case regarding social grants (which the ConCourt set aside for this reason) and again here (which the SCA set aside for this reason).

5) The allegation Caxtons is a sore loser motivated by "sour grapes" is given some force by the fact that the company waited until the outcome of the final re-evaluation of the tender in February to address these allegations directly with Novus.

Caxton has not waited to raise its issues with Novus. The correspondence shows that last year in August, Caxton articulated its concerns. At that stage, the re-adjudication of the tender had not even started and Caxton had not lost anything. Novus ignored the issues and instead, sought to obfuscate. It hardly behoves Novus or Lebone to now suggest we should have raised these issues earlier- this is yet another unjustified attempt to deflect the focus.

This is also not a dispute in which Caxton seeks to involve the DBE. It appears to us that the DBE was most likely unaware of the Commission agreement. We are challenging issues relating to Novus and Lebone. In the event that the DBE wishes to take action pursuant to the concerns which Caxton has highlighted in relation to the commission agreement, it is the DBE’s prerogative to do so.

We can hardly be accused of being a sore loser when the SCA has ruled in our favour, that the bid process was unfair, and awarded costs to Caxton.

We have pointed out what extraordinary profits have been made from the DBE contract, as evidenced by the commission payments. We note the disingenuous efforts of Lebone and Novus to justify the commission. These explanations do not hold water, nor do they accord with what the commission agreement says.

6) We note the allegation that Caxtons attempted to recruit Vroon after his departure from Novus and the allegation that Caxton chief executive Terry Moolman is “fixated on the workbooks contract which he is desperate to wrestle away from Novus by any means possible, fair or foul”.

It is correct that Mr Moolman engaged with Vroon following his resignation from Novus, given the fact that Vroon has significant experience in the printing industry and had an established reputation as a competent executive. At that stage, certain important issues had not come to light, nor had he joined Lebone.
What motivates Caxton is the desire for fair and transparent procurement processes that would result in the most competitive prices being realised in the context of limited state resources - not the compulsion to seek the DBE tender at all costs.

Yours sincerely

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