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GOEWERMENTSKENNISGEWING

DEPARTEMENT VAN NYWERHEIDSWESE, HANDEL EN TOERISME

No. 1214 25 Junie 1982

WET OP DIE HANDHAWING EN BEVORDERING VAN MEDEDINGING, 1979

DIE BEDRYWIGHEDE VAN DIE ELEKTROTEGNIESE AANNEMERSVERENIGING (SUID-AFRIKA)

Ek, Dawid Jacobus de Villiers, Minister van Nywerheidswese, Handel en Toerisme, publiseer hiermee kragtens artikel 14 van die Wet op die Handhawing en Bevordering van Mededinging, 1979 (Wet 96 van 1979), in die Bylae hierby, die Raad op Mededinging se Verslag No. 6, gedateer 28 Julie 1981, ten opsigte van gemelde Raad se ondersoek na die bedrywighede van die Elektrotegniese Aannemersvereniging (Suid-Afrika).

D. J. DE VILLIERS, Minister van Nywerheidswese, Handel en Toerisme.

REPUBLIEK VAN SUID-AFRIKA

RAAD OP MEDEDINGING

VERSLAG No. 6

DIE BEDRYWIGHEDE VAN DIE ELEKTROTEGNIESE AANNEMERSVERENIGING (SUID-AFRIKA)

HOOFSTUK I

DIE AARD EN OMVANG VAN DIE ONDERSOEK

1. ***Die oorsprong van die ondersoek.***

1. Op 7 Julie 1980 het die waarnemende Provinsiale Sekretaris van Natal aan die Raad geskryf en gekla dat die Elektrotegniese Aannemersvereniging (Suid-Afrika), hierna "die ECA" genoem, aan sy lede opdrag gegee het om nie tenders vir die nie-benoemde subkontrakte vir twee provinsiale skoolprojekte aan houers aan te bied nie. Na die mening van die Natalse Provinsiale Administrasie vorm dit 'n beperkende praktyk.

GOVERNMENT NOTICE

DEPARTMENT OF INDUSTRIES, COMMERCE AND TOURISM

No. 1214 25 June 1982

MAINTENANCE AND PROMOTION OF COMPETITION ACT, 1979

THE ACTIVITIES OF THE ELECTRICAL CONTRACTORS' ASSOCIATION (SOUTH AFRICA)

I, Dawid Jacobus de Villiers, Minister of Industries, Commerce and Tourism, do hereby publish in terms of section 14 of the Maintenance and Promotion of Competition Act, 1979 (Act 96 of 1979), in the Schedule hereto, the Competition Board's Report No. 6, dated 28 July 1981, in respect of the said Board's investigation into the activities of the Electrical Contractors' Association (South Africa).

D. J. DE VILLIERS, Minister of Industries, Commerce and Tourism.

REPUBLIC OF SOUTH AFRICA

COMPETITION BOARD

REPORT No. 6

THE ACTIVITIES OF THE ELECTRICAL CONTRACTORS' ASSOCIATION (SOUTH AFRICA)

CHAPTER I

THE NATURE AND SCOPE OF THE INVESTIGATION

1. ***The origins of the investigation.***

1. On 7 July 1980 the Acting Provincial Secretary of Natal wrote to the Board complaining that the Electrical Contractors' Association (South Africa), hereafter referred to as the ECA, had instructed its members not to tender to builders for the non-nominated sub-contracts on two provincial school projects. In the opinion of the Natal Provincial Administration this constituted a restrictive practice.

2. Die ECA is onmiddellik van die klagte in kennis gestel en versoek om 'n vergadering in die kantore van die Raad se voorsitter by te woon. Op dié vergadering is die Vereniging daarop gewys dat hierdie opdrag aan sy lede sonder twyfel 'n beperkende praktyk vorm en dat die Raad dit sal moet ondersoek, tensy die probleem in der minne opgelos word.

3. Intussen het dit aan die lig gekom dat sowel die Departement van Gemeenskapsontwikkeling as die Transvaalse Provinsiale Administrasie sterk gekant is teen die reël wat die ECA vir sy lede ingestel het.

4. Op die vergadering in paragraaf 2 genoem, het die president van die ECA onderneem om die saak met die waarnemende Provinsiale Sekretaris van Natal te bespreek. In reaksie op vertoë van die Departement van Gemeenskapsontwikkeling het hy voorts sy lede meegedeel dat die betrokke verbod 'n maand lank opgeskort sal word ten einde hulle toe te laat om vir elektriese werk aan sekere dringende bouwerke te tender.

5. Die samespreking tussen die ECA se president en die waarnemende Sekretaris van Natal het geen resultate opgelewer nie en die Natalse Provinsiale Administrasie het sy versoek om 'n ondersoek herhaal. Die Raad het daarop besluit om kragtens artikel 10 (1) (a) van die Wet op die Handhawing en Bevordering van Mededinging, 1979 (Wet 96 van 1979), 'n ondersoek na die bedrywighede van die Elektrotegniese Aannemersvereniging in te stel. Kennis van die ondersoek is in die *Staatskoerant* van 28 November 1980[1] gepubliseer.

6. In reaksie op die kennisgewing is nog twee klagtes by die Raad ingedien—een deur die Steel and Engineering Industries Federation of South Africa (SEIFSA) en die ander deur die Staatsaankope-afdeling van die Departement van Finansies. In albei gevalle het die ECA sy lede verbied om binne drie maande weer vir dieselfde subkontrak te tender.

2. ***Modus operandi.***

7. Na aanleiding van sy versoek om kommentaar het die Raad skriftelike voorleggings ontvang van die ECA, die Federasie van Bounywerhede (Suid-Afrika)—hierna BIFSA genoem—, SEIFSA, die Specialist Engineering Contractors' Committee (SECC), the Fire Protection Industries Association of South Africa, die South African Industrial Refrigeration and Air Conditioning Contractors' Association, die Lift Engineering Association of South Africa en twee boukontrakteurfirmas.

8. Gedurende April vanjaar het amptenare van die Raad onderhoude gevoer met verteenwoordigers van die ECA en BIFSA, met amptenare van die Departement van Mannekragbenutting, die Departement van Gemeenskapsontwikkeling en Owerheidshulpdienste en die Transvaalse Provinsiale Administrasie, asook met etlike toonaangewende vakkundiges, met inbegrip van twee konsultingenieurs en 'n bourekenaar. Lede van die Raad het ook onderhoude gevoer met verteenwoordigers van die ECA.

9. Die Raad wil ook sy erkentlikheid betuig vir die waardevolle hulp wat hy ontvang het van prof. W. F. J. Steenkamp, wat as bykomende lid in die Raad aangestel is en 'n groot bydrae gelewer het.

HOOFSTUK II

DIE AARD VAN GESKILLE

10. In hierdie hoofstuk behandel die Raad eerstens die hoofgeskil, naamlik die ECA se weiering om sy lede toe te laat om vir nie-benoemde subkontrakte te tender, en daarna die klagtes wat van SEIFSA en die Staatsaankope-afdeling van die Department van Finansies ontvang is.

[1] Kyk Kennisgewing 863 in *Staatskoerant* 7311 van 28 November 1980.

2. The ECA was immediately informed of the complaint and requested to attend a meeting in the office of the Board's chairman. At that meeting it was pointed out to the Association that the instruction issued to its members without a doubt constituted a restrictive practice and that the Board would have to investigate it, unless an amicable solution to the problem were found.

3. In the meantime it transpired that both the Department of Community Development and the Transvaal Provincial Administration were strongly opposed to the rule imposed on its members by the ECA.

4. At the meeting referred to in paragraph 2, the president of the ECA undertook to discuss the matter with the Acting Provincial Secretary of Natal. In response to representations by the Department of Community Development, furthermore, he informed his members that the prohibition at issue would be suspended for one month in order to allow them to tender for electrical work on certain urgent building works.

5. The meeting between the ECA's president and the Acting Secretary of Natal failed to produce results and the Natal Provincial Administration repeated its request for an investigation. It was consequently decided by the Board to undertake an investigation into the activities of the Electrical Contractors' Association in terms of section 10 (1) (a) of the Maintenance and Promotion of Competition Act, 1979 (Act 96 of 1979). Notice of the investigation was published in the *Government Gazette* on 28 November 1980[1].

6. In response to that notice, two further complaints were lodged with the Board. One was from the Steel and Engineering Industries Federation of South Africa (SEIFSA) and the other from the State Purchases division of the Department of Finance. In both cases the ECA had forbidden its members to retender for the same sub-contract within three months.

2. ***Modus operandi.***

7. In response to a request for comments, written submissions have been received by the Board from the ECA, the Building Industries Federation (South Africa)—hereafter called BIFSA—, SEIFSA, the Specialist Engineering Contractors' Committee (SECC), the Fire Protection Industries Association of South Africa, the South African Industrial Refrigeration and Air Conditioning Contractors' Association, the Lift Engineering Association of South Africa, and two building contractor firms.

8. In the course of April of this year, a number of interviews were conducted by officials of the Board with representatives of the ECA and BIFSA; with officials of the Department of Manpower Utilisation, of the Department of Community Development and Auxiliary Services, and of the Transvaal Provincial Administration; and with several leading professionals, including two consulting engineers and a quantity surveyor. Finally, members of the Board interviewed representatives of the ECA.

9. The Board wishes to acknowledge the valuable assistance it received from Prof. W. F. J. Steenkamp, who was appointed as an additional member to the Board and made major contributions.

CHAPTER II

THE NATURE OF THE DISPUTES

10. In this chapter, the Board will first deal with the main dispute, which concerns the ECA's refusal to permit its members to take part in tendering on non-nominated subcontracts, and then with the complaints received from SEIFSA and the State Purchases division of the Department of Finance.

[1] *Cf.* Notice 863 in *Government Gazette* 7311 of 28 November 1980.

1. ***Die betrokke kontrakstelsels.***

11. Die hoofgeskil gaan oor die voor en die teen van verskillende soorte boukontrakte uit die oogpunt van hoofkontrakteurs, subkontrakteurs en die publiek.

12. Die betrokke stelsels staan bekend as die benoemde subkontrak en die nie-benoemde subkontrak. Nog 'n stelsel, die sogenaamde direkte kontrak, in Engels ook bekend as die "separate trades system", sal net vlugtig behandel word omdat dit nie regstreeks met die geskil gemoeid is nie.

1.1 *Die direkte kontrak.*

13. Deesdae vereis groot bouprojekte, naas die dienste van die bouer, ook dié van 'n hele aantal gespesialiseerde firmas en van vakkundiges soos argitekte, bourekenaars en konsultingenieurs. Vier klasse gespesialiseerde firmas kan onderskei word. Hulle is die "ambagsfirmas" wat pleister-, loodgieters-, verf-, klipmessel-, skryn- en teëlwerk doen; die "konstruksiefirmas" wat hulle toelê op staal- en gewapendebetonwerk, bevloering, dakwerk en soortgelyke konstruksiewerksaamhede, firmas wat hulle toelê op die installering van elektriese toerusting, sanitêre geriewe, hysers en lugreëling; en laastens firmas wat hulle toelê op versiering en ander afwerking[1].

14. In die geval van die sogenaamde direkte kontrak, sluit die werkgewer, ook bekend as die eienaar of kliënt, 'n afsonderlike kontrak met die bouer en met elk van die firmas waarvan gebruik gemaak word. Hierbenewens stel hy 'n agent aan, gewoonlik 'n argitek, om met die hulp van ander vakkundiges die werksaamhede van die onderskeie kontrakteurs op die terrein te koördineer en toesig daaroor te hou. Soms stel hy 'n sogenaamde projekbestuurder aan om die koördinering te behartig.

1.2 *Die nie-benoemde subkontrak.*

15. By die benoemde sowel as die nie-benoemde stelsel is daar 'n hoofkontrakteur en subkontrakteurs. Die hoofkontrakteur is die bouer en die subkontrakteurs is die spesialisfirmas.

16. By die nie-benoemde subkontrak, in Engels ook bekend as die "all-in bid"-stelsel, gaan die werkgewer net met die bouer 'n kontrak aan en laat dit aan hom oor om spesialisfirmas deur middel van subkontrakte aan te stel, met die voorbehoud egter dat die werkgewer beswaar teen die aanstelling van 'n bepaalde firma as subkontrakteur kan maak.

17. By hierdie stelsel, net soos by ander, word die werkgewer gewoonlik deur 'n argitek verteenwoordig wat bygestaan word deur 'n bourekenaar asook een of meer konsultante wat toesig oor die werk hou. By die uitvoering van hulle pligte werk die argitek en sy assistente altyd deur die hoofkontrakteur; hulle het dus geen regstreekse kontak met enige subkontrakteur nie.

18. Wat die verhouding tussen hoofkontrakteur en subkontrakteur betref, word dit soos volg in die voorlegging van BIFSA beskryf: "in terms of the non-nominated subcontract, the sub-contractor is obliged, *inter alia,* to conform to the provisions of the principal contract and to carry out the sub-contract work strictly in accordance with the contractor's programme. The contractor is, therefore, in complete charge of the non-nominated sub-contractor and his activities on the site.".

[1] Kyk Raad van Handel en Nywerheid, *Ondersoek na die Bedrywighede van die Federasie van Bounywerhede (Suid-Afrika) in die Republiek van Suid-Afrika,* Verslag 1273 (M), par. 9.

1. ***The contract systems at issue.***

11. The main dispute relates to the merits and the demerits of different types of building contract from the point of view of main contractors and sub-contractors as well as of the public.

12. The systems at issue are known as the nominated subcontract and the non-nominated sub-contract. There is, in addition, the so-called direct contract, also known as the "separate trades system"; but this will be only briefly dealt with as it is not directly at issue.

1.1 *The direct contract.*

13. In modern times, the execution of large building projects has come to involve the employment, next to the builder, of a more or less large number of specialist firms as well as of professionals, such as architects, quantity serveyors and consulting engineers. Four classes of specialist firm have been distinguished. These are "craft firms", which do plastering, plumbing, painting, masonry, joinery and tiling; "constructional firms", which engage in steel and reinforced concrete work, flooring, roofing and similar constructional activities; firms specialising in the installation of electrical equipment, sanitary facilities, lifts and air conditioning; and firms specialising in decoration and other furnishings[1].

14. In the case of the so-called direct contract, the employer, also known as owner or client, enters into a separate contract with the builder and with each of the specialist firms employed. In addition, he employs an agent , usually an architect, to co-ordinate and supervise the activities of the different contractors on site with the assistance of other professionals. Sometimes he engages a so-called project manager to do the co-ordination.

1.2 *The non-nominated sub-contract.*

15. In the nominated and the non-nominated systems, there are a main contractor and sub-contractors. The main contractor is the builder and the sub-contractors are the specialist firms.

16. In the non-nominated sub-contract—also known as the "all-in bid system"—the employer enters into a contract only with the builder, leaving it to the latter to engage specialist firms through sub-contracts, except that he (the employer) may object to the employment of a firm as subcontractor.

17. In this, as in other systems, the employer is usually represented by an architect, assisted by a quantity surveyor as well as one or more consultants who supervise the work. In performing their duties, the architect and his assistants must always work through the main contractor; they thus have no direct contact with any sub-contractor.

18. As for the relationship between main contractor and sub-contractor, it is described thus in the submission by BIFSA: "In terms of the non-nominated sub-contract, the sub-contractor is obliged, *inter alia*, to conform to the provisions of the principal contract and to carry out the subcontract work strictly in accordance with the contractor's programme. The contractor is, therefore, in complete charge of the non-nominated sub-contractor and his activities on the site.".

[1] *Cf.* Board of Trade and Industries, *Investigation into the Activities of the Building Industries Federation (South Africa) in the Republic of South Africa,* Report No. 1273 (M), par. 9.

1.3 *Die benoemde subkontrak.*

19. In die geval van die benoemde subkontrak moet die bouer die subkontrakteurs aanstel wat deur die eienaar of sy agent vir 'n gegewe deel van die projek, soos lugreëling, gekies is, met die voorbehoud dat die bouer beswaar teen 'n benoeming[1] kan aanteken.

20. Wat betref die prys wat betaal moet word: "Die argitek vermeld die bedrae wat by die hoeveelheidslyste ingesluit moet word ten opsigte van werk wat . . . onderkontrakteurs sal onderneem, en die bouer word gewoonlik toegelaat om byvoegings te maak om sy eie indirekte koste en wins op daardie deel van die werk te dek, of anders kan hy staatmaak op die vereffeningskoste wat die onderkontrakteur toestaan"[2].

21. Ook hier is die hoofkontrakteur verantwoordelik vir die uitvoering van die hele projek. Dit is hy wat verantwoordelikheid aanvaar "vir die koördinering van hul (die subkontrakteurs se) werk en die toesien dat dit behoorlik en ooreenkomstig die hoofkontrak uitgevoer is"[3]. Om hierdie rede moet elke subkontrakteur wat deur die kliënt benoem is 'n afsonderlike kontrak met die bouer aangaan. *Sodoende stel hy hom onderworpe aan dieselfde voorwaardes as die nie-benoemde subkontrakteur en moet hy volgens die bouer se program werk.*

2. *Die kwessie van die heraanbieding van tenders.*

22. Die Raad beskryf vervolgens die klagtes van SEIFSA en die Staatsaankopeafdeling van die Departement van Finansies.

2.1 *Die SEIFSA-klagte.*

23. In 1978 het die Metal Industries Group Life and Provident Fund besluit om 'n blok woonstelle in Durban te bou. Tenders vir die elektriese installasie is deur middel van dié Fonds se argitek en konsultingenieurs aangevra. Die sluitingsdatum was 23 Augustus 1978. Die tenderpryse wat ontvang is, het gewissel van R227 657,17 tot R276 151,51. Die konsultante het beraam dat die werk vir R225 000,00 gedoen kon word.

24. Voordat die kontrak aan die laagste tenderaar toegeken kon word, het hy, nadat hy gemerk het wat die ander tenderaars vra, probeer om 'n hoër prys as R227 657,17 te beding. Die Fonds het gereageer deur nuwe tenders aan te vra, met 19 September 1978 as die sluitingsdatum. Die lede van die ECA is egter opdrag gegee om nie weer te tender nie.

2.2 *Die klagte van Staatsaankope.*

25. Wat die ander klagte betref, is tenders verlede jaar deur die Pietermaritzburgse streekkantoor van die Afdeling Staatsaankope vir elektriese werk by die Imbali Tegniese Instituut aangevra. Die sluitingsdatum was 24 Oktober 1980. Ses tenders is ontvang. Dit blyk toe egter dat Pretoria die tenders moes aangevra het. Die Pietermaritzburgse tenderuitnodiging word daarop gekanselleer en Pretoria vra nuwe tenders aan. Die nuwe sluitingsdatum was 22 Januarie 1981. Die Natalse tak van die ECA reageer deur sy lede in 'n brief van 12 Desember 1980 te versoek om nie te tender nie.

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(1) Kyk klousule 15.1 van die *Form of Contract approved and recommended by the Institute of South African Architects, the Association of South African Quantity Surveyors, the Building Industries Federation (South Africa) and the South African Property Owners' Association.* 1980-uitgawe.

(2) Kyk Raad van Handel en Nywerheid, *op. cit.*, par. 26.

(3) *Ibid.*, par. 27.

1.3 *The nominated sub-contract.*

19. In the case of the nominated sub-contract, the builder has to employ the sub-contractors selected by the owner or his agent for a given part of the project, such as air conditioning, except that he, too, may object to any nomination[1].

20. As for the price to be paid, "(t)he architect specifies the amounts to be included in the bills of quantities for the work to be undertaken by . . . sub-contractors and the builder is usually allowed to make an addition thereto, or may rely on the settlement discount allowed by the sub-contractor, to cover his own overheads and profit on that part of the work"[2].

21. Here, too, the main contractor is responsible for the execution of the whole project. He it is who accepts "responsibility for co-ordinating their (the sub-contractors') work and ensuring that it is executed properly and in accordance with the main contract"[3]. For this reason every sub-contractor nominated by the client has to enter into a separate contract with the builder. *He thus becomes subject to the same conditions as the non-nominated sub-contractor and has to work to the builder's programme.*

2. *The question of retendering.*

22. The Board must now describe the complaints of SEIFSA and the State Purchases division of the Department of Finance.

2.1 *The SEIFSA complaint.*

23. In 1978, the Metal Industries Group Life and Provident Fund decided to construct a block of flats in Durban. Tenders were invited through the Fund's architect and consulting engineers for the electrical installation. These closed on 23 August 1978. The tender prices received ranged from R227 657,17 to R276 151,51. The consultants had estimated that the work could be done for R225 000,00.

24. Before the contract could be awarded to the lowest tenderer, the latter, having noted the prices of the other tenderers, endeavoured to negotiate a higher price than R227 657,17. The Fund reacted by calling for new tenders, the closing date being 19 September 1978. The members of the ECA, however, were instructed not to tender again.

2.2 *The State Purchases complaint.*

25. As to the other complaint, tenders were invited last year by the Pietermaritzburg regional office of the division of State Purchases for electrical work at the Imbali Technical Institute. The closing date was 24 October 1980. Six prices were received. It then appeared, however, that the tenders should have been called by Pretoria. So the Pietermaritzburg invitation was cancelled and Pretoria called for new tenders. The new closing date was 22 January 1981. The Natal branch of the ECA reacted by requesting its members, in a letter dated 12 December 1980, to refrain from tendering.

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(1) *Cf.* clause 15.1 of the *Form of Contract approved and recommended by the Institute of South African Architects, the Association of South African Quantity Surveyors, the Building Industries Federation (South Africa) and the South African Property Owners' Association.* 1980 edition.

(2) *Cf.* Board of Trade and Industries, *op. cit.*, par. 26.

(3) *Ibid.*, par. 28.

HOOFSTUK III

DIE VRAAG OF DIE ECA SE BEDRYWIGHEDE BEPERKENDE PRAKTYKE VORM

26. By die oorweging van die vraag of die ECA se bedrywighede beperkende praktyke vorm, bespreek die Raad vervolgens eers die klagte van die Natalse Provinsiale Administrasie en daarná die klagtes van SEIFSA en die Staatsaankope-afdeling van die Departement van Finansies.

1. ***Die kwessie van die nie-benoemde kontrak.***

27. Dit is nodig om eers die oorsprong van die geskil te beskryf en dan vas te stel of die bedrywighede van die ECA 'n beperkende praktyk vorm. Die vraag of sy bedrywighede in die openbare belang te regverdig is, word in hoofstuk V bespreek.

1.1 *Die oorsprong van die hoofklagte.*

28. Uit 'n brief wat die Direkteur van die ECA op 1 Junie 1977 aan "all members and branch secretaries" gerig het, blyk dat die uitvoerende komitee van die Vereniging reeds op 14 Junie 1976 al besluit het "that members were not to tender on any work for the Natal Provincial Administration until such time as the matter critically affecting the Electrical Contractors Industry was resolved". Die betrokke opdrag is daarna teruggetrek in afwagting van onderhandelinge met die Administrasie. Toe die onderhandelinge misluk, het die hoofbestuur van die ECA in genoemde brief van 1 Junie 1977 die volgende opdrag aan sy lede uitgereik:

"Members are instructed, under no circumstances, to tender on any work for the Natal Provincial Administration, where tenders are called for on a 'Non-Nominated' basis.".

29. Uit briewe geteken deur die sekretaris van die ECA se Natalse tak blyk dat, ten spyte van dié opdrag, twee lede wel in 1979 vir sulke werk getender het, dat hulle skuldig bevind en elk met R550 beboet is, maar dat hierdie boetes later tot R100 elk verminder is. Voorts blyk dit dat die twee lede intussen hul tenders teruggetrek en onderneem het om nie weer te tender nie.

30. Soos in die eerste hoofstuk van hierdie verslag gemeld, is bogenoemde opdrag toe weer opgeskort, hierdie keer vir 'n maand in afwagting van verdere samesprekings tussen die president van die ECA en die waarnemende Provinsiale Sekretaris van Natal. Hierdie samesprekings het ook nie die gewenste resultate opgelewer nie en die huidige ondersoek het dus nodig geword.

31. In sy voorlegging aan die Raad het die ECA sy optrede rakende die nie-benoemde subkontrak verdedig, eerstens, deur te beweer dat die Natalse Provinsiale Administrasie "have been acting *ultra vires* their authority when giving out sub-contracts of more than R10 000 on a non-nominated basis"[1], tweedens, deur te ontken dat hy hom aan 'n beperkende praktyk skuldig gemaak het, en derdens, deur aan te voer dat "it has at all times been acting in the interests of the public".

32. Die bewering aangaande die wettigheid van die Natalse Provinsiale Administrasie se optrede is vir hierdie ondersoek nie ter sake nie. Ter sake is wel of die ECA geregtig is om sy lede te verbied om te tender "where tenders are called for on a 'Non-Nominated' basis", soos in die geval van Natal gebeur het en in ander gevalle kan en ongetwyfeld sal gebeur, wat ook al die reëls, indien enige, wat die optrede van die kliënt beheers. Hoewel hierdie geskil in Natal ontstaan het, het dit, soos blyk uit die voorlegging van die ECA self asook uit die voorleggings van andere uitgekring tot die algemene vraag of die ECA die reg het om die nie-benoemde subkontrak in die ban te doen.

[1] Daar word beweer dat die Natalse Provinsiale Administrasie buite die bevoegdheid hom verleen by subartikel 2 (1) van sy Reëls oor Tenders en Kwotasies opgetree het. Hierdie reël bepaal dat "all construction works and kindred services, including maintenance, which can be reasonably anticipated to exceed R10 000 in value, shall be offered on tender".

CHAPTER III

THE QUESTION WHETHER THE ECA'S ACTIVITIES AMOUNT TO RESTRICTIVE PRACTICES

26. In considering whether the ECA has engaged in restrictive pratices, the Board will first discuss the complaint of the Natal Provincial Administration and thereafter the complaints of SEIFSA and the State Purchases division of the Department of Finance.

1. ***The question of the non-nominated contract.***

27. It is necessary first to describe the origins of the dispute and then to inquire whether the activities of the ECA amount to a restrictive practice. The question whether its activities can be justified in the public interest will be discussed in chapter V.

1.1 *The origins of the main complaint.*

28. From a letter directed "to all members and branch secretaries" by the director of the ECA dated 1 June 1977 it appears that the executive committee of the Association had as long ago as 14 June 1976 resolved "that members were not to tender on any work for the Natal Provincial Administration until such time as the matter critically affecting the Electrical Contractors Industry was resolved". The relevant instruction was subsequently withdrawn, pending negotiations with the Administration. The negotiations having broken down, the national executive of the ECA, in the above-mentioned letter dated 1 June 1977, issued the following directive to its members:

"Members are instructed, under no circumstances, to tender on any work for the Natal Provincial Administration, where tenders are called for on a 'Non-Nominated' basis.".

29. From letters signed by the secretary of the Natal branch of the ECA it appears that, in spite of that instruction, two members did, in 1979, tender for such work, that they were convicted and each fined R550, but that these fines were later reduced to R100 each. It further transpires that the two members had meanwhile withdrawn their tenders and had undertaken not to tender again.

30. As noted in the first chapter to this report, the above instruction was again suspended, for one month this time, pending further discussions between the president of the ECA and the Acting Provincial Secretary of Natal. These discussions, too, failed to produce the desired results. So the present investigation became necessary.

31. In its submission to the Board, the ECA defends its action regarding the non-nominated sub-contract, first, by alleging that the Natal Provincial Administration "have been acting *ultra vires* their authority when giving out sub-contracts of more than R10 000 on a non-nominated basis"[1]; secondly, by denying that it has engaged in a restrictive practice; and, thirdly, by arguing that "it has at all times been acting in the interests of the public".

32. The allegation concerning the lawfulness of the Natal Provincial Adminsitration's conduct is irrelevant to this investigation. The matter at issue is whether the ECA is justified in prohibiting its members from tendering "where tenders are called for on a 'Non-Nominated' basis", as happened in the case of Natal and could and will no doubt happen in other cases, whatever the rules, if any, governing the conduct of the client. Thus, while this dispute originated in Natal, it has, as is clear from the submission of the ECA itself as well as from the submissions of others, broadened into the general question of the right of the ECA to out law the non-nominated sub-contract.

[1] The Natal Provincial Administration is alleged to have acted *ultra vires* subsection 2 (1) of its Rules relating to Tenders and Quotations. This rule states that "all construction works and kindred services, including maintenance, which can be reasonably anticipated to exceed R10 000 in value, shall be offered on tender".

1.2 *Het die ECA hom aan 'n beperkende praktyk skuldig gemaak?*

33. Die ECA ontken dat sy optrede die Natalse Provinsiale Administrasie verhinder het "from obtaining 'all-in' building tenders" en voer aan dat "there is accordingly absolutely no evidence of competition having been restricted or the availability of electrical services having been limited". Dit is veral waar "as there are many electrical contractors who are not members of ECA" en, boonop "(n) o member is bound irrevocably to the ECA and may resign at any time".

34. In die klagte wat hy by die Raad ingedien het, spreek die Natalse Provinsiale Administrasie hom nie ten gunste van of teen nie-benoeming uit nie maar boekstaaf hy bloot sy oortuiging dat die ECA se opdrag aan sy lede om nie te tender nie op 'n beperkende praktyk neerkom.

35. Na die mening van die Raad bestaan daar hoegenaamd geen twyfel dat die ECA hom aan 'n beperkende praktyk skuldig gemaak het nie[1]. Deur sy lede die reg te ontsê om vir nie-benoemde subkontrakte te tender en sodoende met bouers te onderhandel, beperk by die mededinging onder elektrotegniese aannemers. Slegs nie-lede, dus 'n kleiner getal elektrotegniese aannemers, is dus vry om mee te ding. Dit moet noodwendig die uitwerking hê om, eerstens, "die fasiliteite beskikbaar vir die produksie . . . van enige handelsartikel in te kort," tweedens "die produksie . . . van enige handelsartikel op die mees doeltreffende . . . manier te verhoed" en derdens, "die prys van enige handelsartikel te verhoog of te handhaaf". In hul getuienis het verteenwoordigers van die ECA amptenare van die Raad meegedeel dat hoewel slegs sowat 20 persent van alle elektrotegniese aannemers in die land lede van die Vereniging is, hulle omtrent 80 persent van die elektriese werk op die binnelandse mark verrig. Onder sy lede is die meerderheid of selfs die oorgrote meerderheid van die toonaangewende elektrotegniese aannemers wie se vakmanskap en ervaring uit die boonste rakke is. As sodanige firmas verhinder word om te tender, is "die fasiliteite beskikbaar vir die produksie . . . van enige handelsartikel" nie net beperk nie, maar word die "produksie . . . van enige handelsartikel op die mees doeltreffende . . . manier" ook belemmer. Boonop sal pryse styg as so 'n belangrike sektor van 'n bedryfstak van mededinging uitgesluit word.

[1] Ingevolge artikel 1 van die Wet op die Handhawing en Bevordering van Mededinging, Wet 96 van 1979, beteken—

" 'beperkende praktyk'—

(a) enige ooreenkoms, reëling of verstandhouding, hetsy regtens afdwingbaar of nie, tussen twee of meer persone; of

(b) enige besigheidspraktyk of handelsmetode, met inbegrip van enige metode om pryse vas te stel, hetsy deur die verskaffer van enige handelsartikel of andersins; of

(c) enige handeling of versuim deur enigiemand, hetsy hy onafhanklik of tesame met iemand anders optree; of

(d) enige toestand wat uit die bedrywighede van enige persoon of klas of groep persone ontstaan;

wat, deurdat dit mededinging regstreeks of onregstreeks beperk, die uitwerking het of bereken is om—

(i) die produksie of distribusie van enige handelsartikel te beperk; of

(ii) die fasiliteite beskikbaar vir die produksie of distribusie van enige handelsartikel in te kort; of

(iii) die prys van enige handelsartikel te verhoog of te handhaaf; of

(iv) die produksie of distribusie van enige handelsartikel op die mees doeltreffende en ekonomiese manier te verhoed; of

(v) die ontwikkeling of invoering van tegniese verbeterings of die uitbreiding van bestaande of die skepping van nuwe markte te verhoed of te vertraag; of

(vi) die toetrede van nuwe produsente of distribueerders tot enige tak van die handel of nywerheid te verhoed of te beperk; of

(vii) die aanpassing van enige beroep of tak van die handel of nywerheid by veranderde toestande te verhoed of te vertraag.".

1.2 *Has the ECA engaged in a restrictive practice?*

33. The ECA denies that its conduct has prevented the Natal Provincial Administration "from obtaining 'all-in' building tenders" and asserts that "there is accordingly absolutely no evidence of competition having been restricted or the availability of electrical services having been limited". This is particularly so, it argues, "as there are many electrical contractors who are not members of ECA" and, furthermore "(n)o member is bound irrevocably to the ECA and may resign at any time".

34. The Natal Provincial Administration, is its complaint to the Board, does not argue for or against non-nomination, but merely records its conviction that the ECA's instruction to members not to tender constitutes a restrictive practice.

35. In the Opinion of the Board, there can be no doubt whatsoever that the ECA has engaged in a restrictive practice[1]. By denying its members the right to tender for non-nominated sub-contracts and thus to deal with builders, it is restricting competition amongst electrical contractors. Only non-members, hence a smaller number of electrical contractors, are then free to compete. This must have the effect, first, of "limiting the facilities available for the production . . . of any commodity"; secondly, of "preventing the production . . . of any commodity by the most efficient . . . means"; and, thirdly, of "enhancing or maintaining the price of any commodity". In evidence, representatives of the ECA told officials of the Board that, while only about 20 per cent of all electrical contractors in the country were members of the Association, these performed some 80 per cent of the electrical work in the domestic market. Its membership comprises the majority, if not most, of the leading electrical contractors whose skills and experience are of the highest order. If such firms are prevented from tendering, not only are "the facilities available for the production . . . of any commodity" limited, but the "production of any commodity by the most efficient . . . means" is also obstructed. Furthermore, prises will be enhanced when so important a sector of any trade is excluded from competition.

[1] In terms of section 1 (x) of the Maintenance and Promotion of Competition Act, Act 96 of 1979—

" 'restrictive practice' means—

(a) any agreement, arrangement or understanding, whether legally enforceable or not, between two or more persons; or

(b) any business practice or method of trading, including any method of fixing prices, whether by the supplier of any commodity or otherwise; or

(c) any act or omission on the part of any person, whether acting independently or in concert with any other person; or

(d) any situation arising out of the activities of any person or class or group of persons;

which, by directly or indirectly restricting competition, has or is calculated to have the effect of—

(i) restricting the production or distribution of any commodity; or

(ii) limiting the facilities available for the production or distribution of any commodity; or

(iii) enhancing or maintaining the price of any commodity; or

(iv) preventing the production or distribution of any commodity by the most efficient and economical means; or

(v) preventing or retarding the development or the introduction of technical improvements or the expansion of existing markets or the opening up of new markets; or

(vi) preventing or restricting the entry of new producers or distributors into any branch of trade or industry; or

(vii) preventing or retarding the adjustment of any profession or branch of trade or industry to changing circumstances.".

2. ***Die kwessie van die heraanbieding van tenders.***

36. Die ECA het ooreenkomstig sy bepaling 7.6, wat soos volg lui, opgetree:

"A member shall not tender for or accept on any other basis a contract for which contracts have already been submitted by members before the lapse of three months calculated from the closing date of the invitation for tenders, provided that this prohibition shall not apply where less than three tenders have been submitted. Nor shall this by-law be applied to preclude the lowest tenderer, irrespective of the number of tenders submitted from entering into negotiations to secure a contract any time after the closing date for the submission of tenders.".

37. Hierdie statutêre bepaling is deur die ECA oorgeneem van 'n BIFSA-bepaling wat in 'n ooreenkoms voorkom wat in 1970 tussen die Federasie en die Raad van Handel en Nywerheid aangegaan is[1]. Die ou bepaling het voorsiening gemaak vir 'n tydperk van ses in plaas van drie maande. Ongeag die kwessie van die tydperk waarin die heraanbieding van tenders verbied is, het die Raad van Handel en Nywerheid bevind dat die bepaling mededinging beperk en boukoste kan laat styg deurdat dit geskille en vertragings meebring[2].

38. Hierdie Raad gaan akkoord met die bevinding van die Raad van Handel en Nywerheid.

HOOFSTUK IV

VERTOË VAN BELANGHEBBENDE PARTYE OOR DIE KWESSIE VAN DIE OPENBARE BELANG

39. Hierdie hoofstuk handel net oor die geskil omtrent benoemde en nie-benoemde subkontrakte. Die rede hiervoor is dat die vertoë van belanghebbende partye byna uitsluitend op die voor en die teen van benoemde en niebenoemde subkontrakte betrekking het.

40. Oor die kwessie van die heraanbieding van tenders maak SEIFSA in sy voorlegging kortliks beswaar teen die betrokke bepaling van die ECA as iets wat "the free and competitive market system" belemmer. Op sy beurt het die Staatsaankope-afdeling van die Departement van Finansies aan die Raad verduidelik dat die herhaling van sy tenderuitnodiging te wyte was aan 'n misverstand aan die kant van sy Pietermaritzburgse kantoor. Hy glo in ieder geval dat die ECA-bepaling nie op staatstenders van toepassing moet wees nie.

41. Die Raad het voorleggings ten gunste van die benoemde subkontrak nie net van die ECA ontvang nie maar ook van die SECC, die Fire Protection Industries Association of South Africa, die South African Industrial Refrigeration and Air Conditioning Contractors' Association en die Lift Engineering Association of South Africa. Die Raad gee vervolgens 'n opsomming van die sienswyse van die ECA asook van ander organisasies van gespesialiseerde ingenieurs en behandel daarná dié van die BIFSA.

1. ***Die sienswyse van die ECA.***

42. Uit 'n onderhoud wat amptenare van die Raad met verteenwoordigers van die ECA gevoer het, het geblyk dat laasgenoemde se eerste voorkeur die direkte kontrak en sy tweede voorkeur die benoemde subkontrak is.

43. Sowel uit dié onderhoud as uit sy voorlegging aan die Raad het dit geblyk dat die Vereniging dié twee stelsels verkies omdat hy van oordeel is dat hulle in die belang van sy lede sowel as van die publiek is.

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[1] Kyk Kennisgewing 1544 van 18 September 1980 gepubliseer in *Staatskoerant* 2905 van 25 Oktober 1970.

[2] Kyk Raad van Handel en Nywerheid, *op. cit.*, par. 62.

2. ***The question of retendering.***

36. The ECA acted in accordance with its by-law 7.6, which reads:

"A member shall not tender for or accept on any other basis a contract for which contracts have already been submitted by members before the lapse of three months calculated from the closing date of the invitation for tenders, provided that this prohibition shall not apply where less than three tenders have been submitted. Nor shall this by-law be applied to preclude the lowest tenderer, irrespective of the number of tenders submitted from entering into negotiations to secure a contract any time after the closing date for the submission of tenders.".

37. This by-law was taken over by the ECA from a BIFSA by-law appearing in an agreement entered into by the Federation with the Board of Trade and Industries in 1970[1]. The old by-law had provided for a period of six instead of three months. Quite apart from the question of the period within which retendering was prohibited, the Board of Trade and Industries had found that the by-law was restrictive of competition and could raise building costs by causing disputes and delays[2].

38. This Board agrees with that finding of the Board of Trade and Industries.

CHAPTER IV

REPRESENTATIONS BY INTERESTED PARTIES ON THE QUESTION OF THE PUBLIC INTEREST

39. The present chapter will be concerned only with the dispute regarding nominated and non-nominated sub-contracts. This is so because the representations by interested parties relate almost exclusively to the pros and cons of nominated and non-nominated sub-contracts.

40. In regard to the question of retendering, SEIFSA briefly objects, in its submission, to the relevant by-law of the ECA as something that impairs "the free and competitive market system". The State Purchases division of the Department of Finance, again, explained to the Board that the re-issue of its tender was due to a misunderstanding on the part of its Pietermaritzburg office. In any case, it feels that the ECA by-law should not be applicable to State tenders.

41. The Board received submissions in favour of the nominated sub-contract not only from the ECA but also from the SECC, the Fire Protection Industries Association of South Africa, the South African Refrigeration and Air Conditioning Contractors' Association, and the Lift Engineering Association of South Africa. It will first summarise the views of the ECA as well as the other specialist engineering associations and thereafter deal with those of BIFSA.

1. ***The views of the ECA.***

42. From an interview officials of the Board had with representatives of the ECA it appeared that the latter's first preference is the direct contract and its second preference the nominated sub-contract.

43. Both from that interview and from its submission to the Board it further appeared that the Association prefers those two systems because it regards them as being in the interests both of its members and of the public.

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[1] *Cf.* Notice No. 1544 of 18 September 1980 published in *Government Gazette* No. 2905 of 25 October 1970.

[2] *Cf.* Board of Trade and Industries, *op. cit.*, par. 62.

1.1 *Die belange van ECA-lede.*

44. Volgens die Vereniging is die benoemde subkontrak in die belang van sy lede omdat dit, eerstens, billike mededinging en, tweedens, betaling vir gedane werk verseker.

45. Die stelsel van nie-benoeming verseker, na die mening van die ECA, geen billike toewysing van tenders nie, want "when selection is in the hands of main contractors they do not always have the competence to adjudicate on the technical considerations that may arise. Worse still, they tend to dutch auction the bids and play one tenderer off against another. Much worse still, once they obtain a contract they tend to hawk the specialist work around . . . reserving any savings for themselves.".

46. In onderhoude met amptenare van die Raad het verteenwoordigers van die ECA en die SECC daarop gewys dat in die geval van die nie-benoemde subkontrak 'n spesialis sy betaling sou kwyt wees as die bouer bankrot sou speel, terwyl volgens die benoemde kontrak die kliënt moet betaal as die hoofkontrakteur versuim om dit te doen. Boonop verseker die benoemde subkontrak stiptelike betaling terwyl die nie-benoemde kontrak dit nie doen nie.

47. 'n Toonaangewende bourekenaar het egter in 'n onderhoud beklemtoon dat stiptelike betaling nie deur die benoemde subkontrak gewaarborg is nie maar slegs sekerder gemaak word. Klousule 15.3 van die kontrakvorm wat deur die Instituut van Suid-Afrikaanse Argitekte, die Vereniging van Suid-Afrikaanse Bourekenaars, die Federasie van Bounywerhede (Suid-Afrika) en die South African Property Owners' Association goedgekeur is, bepaal dat indien die hoofkontrakteur versuim om stiptelik betaling te doen, die werkgewer die subkontrakteur "kan" betaal maar nie dat hy dit "moet" doen nie.

1.2 *Die belange van die publiek.*

48. Na die mening van die ECA is die stelsel van benoeming in die belang van die publiek omdat dit, eerstens, werk van beter gehalte en, tweedens, laer koste as die stelsel van nie-benoeming verseker.

49. Die ECA beweer dat beter gehalte verseker word deur selektiewe aanbesteding waarby die werkgewer se professionele konsultant 'n subkontrakteur kies uit "a tender list . . . of concerns . . . known to have the skills required and a proven record". Daarenteen, "when selection is in the hands of the main contractors multiple tendering arises and a large number of tenders get invited from firms of varying capacity and competence".

50. Daar is verskeie redes waarom, volgens die ECA, benoeming laer boukoste meebring. Eerstens, verseker dit dat daar toereikende tenderdokumente is: "In practice, when selection is in the hands of main contractors the tender information may be confined to a few pages photostated from the bill of quantities. The tenderers are left to guess the rest with the result that misunderstandings frequently arise as to the nature of the work to be done, with inevitable disastrous effects for the client." Tweedens, veroorsaak die rondsmous van gespesialiseerde werk "cut-price work for which the client may well pay full price". Laastens, "with nomination the client can marry together the lowest bids for each section of the specialist work. Under the main contract system the lowest all-in bid is unlikely to be as low as a combination of the lowest elemental bids, since each contractor chooses his own specialists".

2. ***Die sienswyse van ander organisasies van gespesialiseerde ingenieurs.***

51. Die sienswyses van die ander organisasies van gespesialiseerde ingenieurs is besonder volledig in 'n voorlegging van die SECC aan die Raad uiteengesit. In die ander voorleggings word daar trouens dikwels dieselfde uitdrukkings gebruik as dié in die SECC-voorlegging. Die Raad sal derhalwe net laasgenoemde behandel.

1.1 *The interests of ECA members.*

44. The nominated sub-contract is considered by the Association to be in the interests of its members because it is stated to ensure, first, fair competition and, secondly, payment for work done.

45. The non-nomination system does not, in the opinion of the ECA, ensure fair adjudication of tenders. "When selection is in the hands of main contractors," it asserts, "they do not always have the competence to adjudicate on the technical considerations that may arise. Worse still, they tend to dutch auction the bids and play one tenderer off against another. Much worse still, once they obtain a contract they tend to hawk the specialist work around . . . reserving any savings for themselves."

46. In interviews with officials of the Board, representatives of the ECA and the SECC pointed out that under the non-nominated sub-contract a specialist would lose payment if the builder went insolvent, whereas under the nomination system payment would have to be made by the client if the main contractor failed to do so. Furthermore, the nominated sub-contract ensured timeous payment and the non-nominated one did not.

47. A leading quantity surveyor, however, emphasised when interviewed that timeous payment was not guaranteed under the nominated sub-contract but merely rendered more certain. Clause 15.3 of the contract form approved by the Institute of South African Architects, the Association of South African Quantity Surveyors, the Building Industries Federation (South Africa) and the South African Property Owners' Association provides that, in case the main contractor fails to make timeous payment, the employer "may" pay the sub-contractor, not that he "shall" do so.

1.2 *The interests of the public.*

48. In the opinion of the ECA, the nomination system serves the interests of the public by ensuring, first, better quality work and, secondly, lower costs than does the non-nomination system.

49. Better quality, the ECA asserts, is ensured by selective tendering, in which the employer's professional consultant chooses a sub-contractor from "a tender list . . . of concerns . . . known to have the skills required and a proven record". On the other hand, "when selection is in the hands of the main contractors multiple tendering arises and a large number of tenders get invited from firms of varying capacity and competence".

50. There are several reasons why, in the opinion of the ECA, nomination means lower building costs. The first is said to be that it ensures adequate tender documents. "In practice, when selection is in the hands of main contractors the tender information", it maintains, "may be confined to a few pages photostated from the bill of quantities. The tenderers are left to guess the rest with the result that misunderstandings frequently arise as to the nature of the work to be done, with inevitable disastrous effects for the client." Secondly, the hawking of specialist work leads to "cutprice work for which the client may well pay full price". Finally, "with nomination the client can marry together the lowest bids for each section of the specialist work. Under the main contract system the lowest all-in bid is unlikely to be as low as a combination of the lowest elemental bids, since each contractor chooses his own specialists."

2. ***The views of other specialist engineering organisations.***

51. The views of the other specialist engineering associations have been stated to the Board most fully in a submission by the SECC. As a matter of fact, the other submissions often employ the same expressions as the SECC submission. The Board will, therefore, deal only with the latter.

52. Ook die SECC is baie sterk ten gunste van die benoemde subkontrak.

2.1 *Die SECC en die boubedryf.*

53. Die SECC begin met te sê dat in die ingenieursektor "a project is normally split up into a number of direct contracts and in this respect comparatively few problems are experienced, simply because the honest straight line of communication between employer and contractor(s) exists, with the contracting engineer acting as agent for the employer".

54. In die boubedryf, daarenteen, kom lede van die SECC voor talle probleme te staan. Tans geniet die Komitee geen "representation on some of the committees which influence the destiny of the building industry, although the specialist contractors' share in the overall cost of a large building contract can range from 30% to 50%, and the major portion of this is undertaken on a nominated subcontract basis". In 'n onderhoud met amptenare van die Raad het die voorsitter van die SECC 'n sterk pleidooi vir sodanige verteenwoordiging gelewer.

2.2 *Die voordele van benoeming.*

55. Die vernaamste voordele van die benoemde subkontrak is, na die mening van die SECC, dat toekenning van tenders deur 'n spesialiskonsultant geskied; dat die werkgewer 'n tenderaar van sy keuse kan benoem; dat die werkgewer regstreeks met die spesialis oor afwykings kan onderhandel; dat konsult- en kontrakterende ingenieurs met mekaar kan praat; dat die tyd wat vir dokumentasie nodig is aansienlik verkort word; en dat die subkontrakteur 'n beperkte mate van beskerming ten opsigte van sy betaling het.

56. Die koste sal natuurlik daal as die tyd nodig vir dokumentasie verkort word. Daarenteen kan benoeming van die tenderaar deur die werkgewer blykbaar hoër koste meebring. Die SECC merk op dat "due to the dynamic aspect of the project the lowest tenderer may not be the most favourable one".

57. Die SECC sê verder dat die stelsel van benoeming gebruik moet word (a) "where the architect wishes to have special (not engineering) work performed on a project" en (b) "(w)here the employer appoints consulting engineers to design engineering work in a project". Die rede wat vir laasgenoemde aangegee word, is dat "(t)his method provides a direct link between consulting engineer and subcontractor. On a non-nominated sub-contract basis there is no link between consulting engineer and sub-contractor".

58. Dit is belangrik om daarop te let dat die SECC meen dat "the use of nomination should only apply to specialist services which are of a certain complexity and value".

2.3 *Die nadele van nie-benoeming.*

59. Die SECC verklaar dat die spesialiskontrakteur wat na die ingenieurskant georiënteer is gekant is teen niebenoeming "as the building contractor does not have knowledge of the specialist sub-contractor's services and the subcontractor eventually finds himself at the mercy of (unscrupulous) contractors".

60. Na die mening van die SECC "the most disturbing aspect of the entire industry is the hawking of prices by contractors, not only prior to but after the award of the (principal) contract. The honest straight line of communication . . . simply does not exist. For undefined reasons, when persons belonging to different professions are working together within an industry, unethical practices sometimes prevail . . ."

3. ***Die sienswyse van die boubedryf.***

61. In sy voorlegging aan die Raad behandel BIFSA die hoofargumente wat die ECA aanvoer ten gunste van die benoemde teenoor die nie-benoemde subkontrak.

52. The SECC, too, is very much in favour of the nominated sub-contract.

2.1 *The SECC and the building industry.*

53. The SECC begins by noting that, in the engineering sector, "a project is normally split up into a number of direct contracts" and that "in this respect comparatively few problems are experienced, simply because the honest straight line of communication between employer and contractor(s) exists, with the contracting engineer acting as agent for the employer".

54. In the building industry, on the other hand, members of the SECC are said to encounter "numerous problems". At present the Committee "does not enjoy representation on some of the committees which influence the destiny of the building industry, although the specialist contractors' share in the overall cost of a large building contract can range from 30% to 50%, and the major portion of this is undertaken on a nominated sub-contract basis". In an interview with officials of the Board, the chairman of the SECC pleaded strongly for such representation.

2.2 *The advantages of nomination.*

55. The main advantages of the nominated sub-contract, in the opinion of the SECC, are that adjudication is done by a specialist consultant; that the employer can nominate a tenderer of his choice; that the employer may negotiate directly with the specialist on variations; that consulting and contracting engineers can "talk to one another"; that the time required for documentation is "considerably shortened"; and that "the sub-contractor has some limited safeguards regarding payment".

56. Costs will, of course, be reduced if the time required for documentation is shortened. On the other hand, nomination of the tenderer by the employer may apparently raise costs. "Due to the dynamic aspect of the project", the SECC notes, "the lowest tenderer may not be the most favourable one."

57. The SECC further states that the nomination system should be used (a) where "the architect wishes to have special (not engineering) work performed on a project" and (b) "(w)here the employer appoints consulting engineers to design engineering work in a project". The reason for the latter is stated to be that "(t)his method provides a direct link between consulting engineer and sub-contractor. On a non-nominated sub-contract basis there is no link between consulting engineer and sub-contractor".

58. The SECC, it is important to note, states that the "use of nomination should only apply to specialist services which are of a certain complexity and value."

2.3 *The disadvantages of non-nomination.*

59. The engineering orientated specialist contractor, the SECC states, is against non-nomination "as the building contractor does not have knowledge of the specialist subcontractor's services and the sub-contractor eventually finds himself at the mercy of (unscrupulous) contractors".

60. "The most disturbing aspect of the entire industry," in the opinion of the SECC, "is the hawking of prices by contractors, not only prior to but after the award of the (principal) contract. The honest straight line of communication . . . simply does not exist. For undefined reasons, when persons belonging to different professions are working together within an industry, unethical practices sometimes prevail . . ."

3. ***The views of the building industry.***

61. In its submission to the Board, BIFSA deals with the main arguments advanced by the ECA in favour of the nominated as against the non-nominated sub-contract.

3.1 *Die subkontrakteurs se belange.*

62. BIFSA stem saam dat die benoemde subkontrakteur beskerming ten opsigte van betaling geniet. Hy wys egter daarop dat hoewel lede van die Electrical Contractors and Allied Industries Association (Oostelike Provinsie) die benoemde subkontrak verkies, hulle tog al op 'n niebenoemde basis gesubkontrakteer en die probleem van betaling opgelos het deur voldoende waarborge vir stiptelike betaling te eis. "Were this question of payment to be equally safe-guarded in the case of non-nominated sub-contractors", meen BIFSA, "then the only real advantage of nominated status would disappear.".

63. Die Federasie ontken dat die stelsel van nie-benoeming geen behoorlike toewysing van tenders verseker nie. Hy wys daarop dat die bourekenaar 'n hoeveelheidslys vir die hele projek opstel. Die hoeveelheidslys "relates every item of work to be done and is sent to the contractor, including the electrical contractor, before he submits his tender". Wat die rondsmous van tenders en die toe-eiening van besparings deur die hoofkontrakteur betref, voer BIFSA aan dat mededinging onder die bouers sal sorg dat sodanige praktyke uitgeskakel word. Die ECA, sê hy, probeer bloot aan die bouer voorskryf watter elektrotegniese aannemer se dienste hy moet gebruik.

3.2 *Die openbare belang.*

64. Sowel in sy voorlegging as in onderhoude het die Federasie sterk ontken dat nie-benoeming die oorsaak van swak vakmanskap en hoër boukoste is.

65. Hy wys daarop dat die werkgewer verteenwoordig word deur 'n argitek "who in turn calls in such other consultants as may be required by the varying complexities of a particular contract. The effective adjudication and control of the quality of work is carried out by the Architect or, in those instances where the principal contract is one where a consulting engineer is used, then such adjudication and control is exercised by the consulting engineer". Dit is dus verkeerd om te beweer dat die hoofkontrakteur die werk toewys en die gehalte daarvan bepaal. BIFSA voer ook aan dat dit verkeerd is om te beweer dat die wyse waarop toesig uitgeoefen word in die twee gevalle verskil. By albei word toewysing en gehaltebeheer deur die kliënt se agent deur bemiddeling van die hoofkontrakteur gehanteer. Met ander woorde, in geen van beide gevalle is daar regstreekse kontak tussen die werkgewer se agent en die subkontrakteur nie.

66. Wat die boukoste betref, ontken die Federasie dat die tenderdokumente ontoereikend is in die geval van niebenoeming. Soos reeds opgemerk is, hou hy vol dat die subkontrakteur sy tender opstel aan die hand van 'n hoeveelheidslys wat deur die bourekenaar opgestel is. Wat die bewering betref dat die werkgewer in die geval van die niebenoemde subkontrak moontlik te veel gevra sal word, verklaar die Federasie dat die mededinging wat normaalweg onder bouers heers, hulle verplig om die pryse wat subkontrakteurs voorlê baie versigtig na te gaan en te verseker dat die totale tenderprys nie opgedryf word deur subkontrakteurs wat te veel vra nie. Boonop vervul die bourekenaar 'n belangrike rol deurdat hy die pryse wat getender word versigtig nagaan.

HOOFSTUK V

BEOORDELING VAN DIE VERTOË

67. In Hoofstuk III het die Raad tot die slotsom gekom dat die ECA met sy bedrywighede twee beperkende praktyke ingevolge die Wet beoefen. Nou moet die Raad hom afvra of so iets in die openbare belang geregverdig kan word. Hierby sal hy eers die maklikste van die twee gevalle, naamlik die heraanbieding van tenders, behandel.

3.1 *The sub-contractors' interests.*

62. BIFSA agrees that the nominated sub-contractor does enjoy a safeguard in regard to payment. It points out, however, that members of the Electrical Contractors and Allied Industries Association (Eastern Province), while preferring the nominated sub-contract, have yet sub-contracted on a non-nomination basis and solved the problem of payment by requiring adequate guarantees for timeous payment. "Were this question of payment to be equally safe-guarded in the case of non-nominated sub-contractors", BIFSA opines, "then the only real advantage of nominated status would disappear.".

63. The Federation denies that the non-nomination system fails to ensure proper adjudication of tenders. The quantity surveyor, it points out, prepares a bill of quantities for the whole project. That bill "relates every item of work to be done and is sent to the contractor, including the electrical contractor, before he submits his tender". As for the hawking around of tenders and the pocketing of savings by the main contractor, BIFSA argues that competition among the builders may be relied upon to take care of any such practices. The ECA, it charges, is merely attempting to prescribe to the builder which electrical contractor he should employ.

3.2 *The public interest.*

64. The Federation has, both in its submission and in interviews, vigorously denied that non-nomination is the cause of poor workmanship and higher building costs.

65. It points out that the employer is represented by an architect, "who in turn calls in such other consultants as may be required by the varying complexities of a particular contract. The effective adjudication and control of the quality of work is carried out by the architect or, in those instances where the principal contract is one where a consulting engineer is used, then such adjudication and control is exercised by the consulting engineer". It is wrong to suggest, therefore, that the main contractor adjudicates and assesses the quality of the work. It is also not correct to suggest, BIFSA maintains, that the manner in which the control is exercised is different in the two cases. In both, adjudication and quality control are effected by the client's agent through the main contractor. In other words, in neither case is there direct contact between the employer's agent and the sub-contractor.

66. As for building costs, the Federation denies that the tender documents are inadequate in the case of non-nomination. It maintains, as already noted, that the sub-contractor tenders on a bill of quantities prepared by the quantity surveyor. As to the allegation that, under the non-nominated sub-contract, the employer will tend to be overcharged, the Federation states that the competition normally found among builders compels them to scrutinise the prices submitted by sub-contractors most carefully and to ensure that the total tender price is not inflated by "overcharging" sub-contractors. Moreover, the quantity surveyor performs an important role by carefully checking the prices tendered.

CHAPTER V

APPRAISAL OF THE REPRESENTATIONS

67. In chapter III, the Board came to the conclusion that the activities of the ECA were responsible for two restrictive practices in terms of the Act. It must now ask whether these can be justified in the public interest. In doing so, it will first deal with the simpler of the two cases, namely, that of retendering.

1. ***Die kwessie van die heraanbieding van tenders.***

68. Soos reeds gemeld maak SEIFSA beswaar teen statutêre bepaling 7.6[1] as iets wat "the free and competitive market" belemmer. Die Staatsaankope-afdeling het, soos ook reeds gemeld is, verduidelik dat die heruitreiking van sy tender deur 'n misverstand veroorsaak is. Hy is in elk geval "sterk" van mening dat die ECA-verordening nie op staatstenders van toepassing moet wees nie.

69. Daar sal opgemerk word dat die Natalse tak van die ECA sy reëls besonder nougeset toepas, want die tweede sluitingsdatum van die Staatstender was 'n geringe twee dae voor die verstryking van drie maande[2]. Of was daar nog 'n misverstand? Die ou BIFSA-reël (wat soos die nuwe een deur die ECA oorgeneem is) maak voorsiening vir ses in plaas van die huidige drie maande. Die korter tydperk is ten gevolge van optrede deur die Raad van Handel en Nywerheid ingevoer. Die Natalse streeksekretaris het moontlik van die verandering vergeet want in sy brief aan die ECA se lede in Natal skryf hy dat bepaling 7.6 hulle verbied om te tender voor die "expiry of a period of six months". In 'n brief aan die hoofdirekteur van Staatsaankope het hy later verduidelik dat dit, let wel, "the result of a typographical error" was.

70. In 'n brief aan SEIFSA het die Natalse taksekretaris van die ECA bepaling 7.6 verdedig deur te verklaar dat dit ten doel het "to promote good practice and to prevent the exploitation of the tender system. It has the effect of maintaining fair prices based on fair and equitable tendering procedures. It also acts as a deterrent to clients who may seek to undermine tendering procedures contrary to the interests of our Industry, and of the national economy. It is in the interest of the public that the system of competitive tendering should at all times be protected against exploitation, and to this end a duplication of bids for the same reason, e.g., if a client can support a contention that the original competitors' prices were not 'bona fide' ".

71. Dis dieselfde verweer as dié wat BIFSA opgewerp het toe die Raad van Handel en Nywerheid in die sestigerjare sy bedrywighede ondersoek het[3]. Die Raad het egter destyds bevind dat die verordening mededinging beperk en dat die praktyk nie in die openbare belang geregverdig kon word nie[4]: "Die Raad is van mening dat die toepassing van hierdie reël moeilikhede oplewer waar die goeie trou van albei partye, dit wil sê die bou-eienaars asook die tenderaars, in twyfel getrek word en dinge op 'n dooie punt uitloop. In so 'n geval moet die bou-eienaar die besluit van die betrokke bouersorganisasie aanvaar. Van hierdie liggaam wat in die geskil deel het, kan nouliks verwag word dat sy uitspraak onpartydig moet wees. Aangesien lede nie weer mag tender nie en die deur private onderhandeling ook vir hulle gesluit is, is daar vir die bou-eienaar geen ander weg oop as om die opgelegde vertraging van ses maande te aanvaar, wat aansienlike koste, ongerief en die moontlike intrekking van die hele projek kan meebring. Die nadelige uitwerking hiervan op die openbare belang kan maklik voorgestel en hoef nie beklemtoon te word nie"[5].

72. Terwyl twee beroepsverenigings die bepaling as onnodig beskou het, was "bou-eienaars wat nie in beginsel teen die reël gekant was nie, oor die algemeen van mening dat 'n tydperk van ses maande uitermate lank was en dat hoogstens drie maande vir die Federasie se doel voldoende behoort te wees"[6]. Dit verklaar ongetwyfeld waarom, in

[1] *Cf.* par. 36 van Hoofstuk III.
[2] *Cf.* par. 25 van Hoofstuk II.
[3] *Cf.* Raad van Handel en Nywerheid, *op. cit.*, par. 105.
[4] *Ibid.*, par. 110.
[5] *Ibid.*, par. 107.
[6] *Ibid.*, par. 108.

1. ***The question of retendering.***

68. SEIFSA, as already noted, objects to by-law 7.6[1] as something that impairs "the free and competitive market system". The State Purchases division, as also noted, has explained that the re-issue of its tender was caused by a misunderstanding. In any case, it feels "strongly", to repeat, that the ECA by-law should not be applicable to State tenders.

69. The Natal branch of the ECA, it will be noted, applies its rules with particular diligence, for the second closing date of the State tender was a mere two days short of three months[2]. Or was there another misunderstanding? The old BIFSA rule—which, like the new one, was taken over by the ECA—provided for six instead of the present three months. The shorter period was introduced in consequence of action taken by the Board of Trade and Industries. The Natal regional secretary could have forgotten about the change, for in his letter to the ECA's members in Natal he wrote that rule 7.6 forbade them to tender before the "expiry of a period of six months". In a letter to the Chief Director of State Purchases he later explained that this was, of all things, the "result of a typographical error".

70. The Natal branch secretary of the ECA defended by-law 7.6 in a letter to SEIFSA, stating that its object was "to promote good practice and to prevent the exploitation of the tender system. It has the effect of maintaining fair prices based on fair and equitable tendering procedures. It also acts as a deterrent to clients who may seek to undermine tendering procedures contrary to the interests of our Industry, and of the national economy. It is in the interest of the public that the system of competitive tendering should at all times be protected against exploitation, and to this end a duplication of bids for the same project . . . should not be permitted, unless for good and sufficient reason, e.g., if a client can support a contention that the original competitors' prices were not 'bona fide'."

71. This is the same defence as was put up by BIFSA when the Board of Trade and Industries investigated its activities in the 'sixties[3]. The Board however, found that the by-law was restrictive of competition and that the practice could not be justified in the public interest[4]. "In the Board's view", it argued, "the problem with the application of this rule arises where the bona fides of both parties, i.e. the building owners as well as the tenderers, are questioned and an *impasse* is reached. In such an event the building owner has to accept the decision of the relevant builders' organisation. As a party to the dispute, this body can hardly be expected to give an unbiassed verdict. Since members may not retender and the doors for private negotiation are also closed to him, the building owner will have no alternative than to accept the imposed delay of six months, which may entail considerable costs, inconvenience and possibly that the whole project may be cancelled. The deleterious effects that this may have on the public interest is imaginable and need not be stressed."[5]

72. Whereas two professional associations considered the by-law to be unnecessary, "building owners who did not oppose the rule in principle, were generally of the opinion that the period of six months was excessive and that a period of no longer than three months should be sufficient for the Federation's object"[6]. This, no doubt, explains the fact that, in the agreement subsequently entered into by the

[1] *Cf.* par. 36 of chapter III.
[2] *Cf.* par. 25 of chapter II.
[3] *Cf.* Board of Trade and Industries, *op. cit.*, par. 105.
[4] *Ibid.*, par. 110.
[5] *Ibid.*, par. 107.
[6] *Ibid.*, par. 108.

die ooreenkoms wat daarna tussen die Raad van Handel en Nywerheid en BIFSA aangegaan is, die bepaling behou is mits die ses maande tot drie verkort word[1].

73. Hieruit blyk duidelik dat die ECA in sy optrede teenoor SEIFSA en die Staatsaankope-afdeling van die Departement van Finansies ooreenkomstig dié ooreenkoms gehandel het. Die Raad kan derhalwe die ECA se optrede in hierdie verband nie veroordeel nie—al is hy van mening dat die besluit om lede te verbied om weer te tender in 'n geval waar die sluitingsdatum van die tweede tender op slegs twee dae na drie maande ná die sluitingsdatum van die eerste was, uitermate kras is.

74. Wat betref die vraag of bepaling 7.6 op staatstenders toegepas moet word, deel die Staatsaankope-afdeling die Raad mee dat BIFSA die reël nie op staatstenders toepas nie en "sy misnoeë(sic) met betrekking tot toepassing van die bepaling van die Electrical Contractor's Association op staatstenders" uitgespreek het. Die Raad sien egter nie in waarom die openbare sektor anders as die privaatsektor in hierdie aangeleentheid behandel moet word nie.

2. ***Die vraag van die nie-benoemde subkontrak.***

75. Die ECA het probeer om sy gedrag te regverdig deur aan te voer dat hy in die belang van sy lede sowel as die publiek optree deur sy lede te verbied om vir nie-benoemde subkontrakte te tender. Die belange van sy lede hou, soos reeds duidelik geword het, hoofsaaklik verband met die kwessie van betaling en dié van die publiek met die kwessie van die gehalte sowel as die koste van die bouwerk.

2.1 *Stiptelike betaling van die subkontrakteur.*

76. BIFSA asook toonaangewende vakkundiges meen dat die benoemde subkontrak slegs dié voordeel vir die spesialis inhou dat dit, hoewel dit nie stiptelike betaling waarborg nie, wel sy kanse verbeter om stiptelik betaal te word vir reeds gedane werk. Ook die SECC beskou dit as die enigste voordeel[2].

77. Amptenare van die Raad het in elk geval oortuigende getuiens van twee onpartydige partye aangehoor dat, wat betaling betref, die nie-benoemde subkontrakteur soms onbillik deur bouers behandel word.

78. Maar dit regverdig nog nie die gedrag van die ECA nie. In die eerste plek kan 'n organisasie, in plaas van om tot die uiterste oor te gaan en 'n algemene verbod op te lê, probeer om die probleem op te los deur waarborge vir stiptelike betaling te eis soos blykbaar in die Oostelike Provinsie gedoen is. Tweedens, selfs al misluk sulke pogings, kan geen bedryfsvereniging toegelaat word om die belange van sy lede, teen wat op stuk van sake 'n normale bedryfsrisiko is, te beveilig op 'n manier wat die belange van ander ekonomiese subjekte skade aandoen nie.

79. Die voorsitter van die SECC het in 'n onderhoud met amptenare van die Raad sy kommer uitgespreek oor die versuim om erkenning aan die beroepstatus van die ingenieur in die boubedryf te verleen. Maar beroepstatus kan tog nie bedrywighede regverdig wat daarop gemik is om 'n soort beskerming te verleen aan spesialiste soos die elektrotegniese aannemer wat spesialiste soos die loodgieter of inderdaad enige ander persoon wat gemoeid is met 'n bouprojek ontsê word nie.

2.2 *Die gehalte van die bouwerk.*

80. Die bouwerk by groot projekte omvat werksaamhede wat nie binne die vermoëns van die bouer as sodanig lê nie. Daarom word gespesialiseerde subkontrakteurs by sulke projekte betrek en vakkundiges aangestel om tenders toe te ken en die gedane werk te kontroleer. Dit gaan nie om die

[1] *Cf.* Kennisgewing 1544 van 18 September 1970 gepubliseer in *Staatskoerant* 2905 van 23 Oktober 1970.

[2] *Cf.* par. 55 van Hoofstuk IV.

Board of Trade and Industries with BIFSA, the rule was upheld, provided that the six months were changed to three[1].

73. From this it must be clear that the ECA, in its conduct towards SEIFSA and the State Purchases division of the Department of Finance, acted in accordance with that agreement. The Board cannot, therefore, fault the ECA in this matter—even though it considers the decision to prohibit members from retendering when the closing date of the second tender was only a few days short of three months from the closing date of the first, as harsh in the extreme.

74. As to the question whether by-law 7.6 should be applied to State tenders, the division of State Purchases informs the Board that BIFSA does not apply the rule to State tenders and has expressed "sy misnoë (sic) met betrekking tot toepassing van die bepaling van die Electrical Contractor's Association op staatstenders". The Board does not, however, see any reason why the public sector should be treated differently from the private sector in this matter.

2. ***The question of the non-nominated sub-contract.***

75. The ECA has tried to justify its behaviour by arguing that in prohibiting tendering on non-nominated sub-contracts it was acting in the interests both of its members and of the public. The interests of its members, it has already become clear, revolve mainly around the question of payment and that of the public around the questions of the quality as well as the cost of building work.

2.1 *Timeous payment of the sub-contractor.*

76. BIFSA as well as leading professionals have expressed the opinion that the only advantage that the nominated sub-contract confers upon the specialist is that, while it does not guarantee timeous payment, it does improve his chance of being so paid for work done. The SECC, too, places no higher value upon this advantage[2].

77. Anyhow, officials of the Board did hear convincing evidence from two disinterested parties to the effect that, in the matter of payment, the non-nominated sub-contractor does at times suffer "a raw deal" at the hands of builders.

78. But this does not yet justify the behaviour of the ECA. For one thing, instead of proceeding to the extreme of prohibition, an association might try to solve the problem, as was apparently done in the Eastern Province, by demanding guarantees for timeous payment. For another, even if such attempts were to fail, no trade association can be permitted to safeguard the interests of its members against what, after all, is a normal business risk in a manner that is harmful to the interests of other economic subjects.

79. The chairman of the SECC, in an interview with officials of the Board, expressed concern about the failure to lend recognition to the professional status of the engineer in the building industry. But professional status cannot, surely, justify activities that seek to afford a kind of protection to specialists like the electrical contractor that is denied specialists like the plumber or, for that matter, any other person engaged on a building project.

2.2 *The quality of building work.*

80. Building work on large projects comprises operations beyond the capabilities of the builder as such. That is why specialist sub-contractors take part in those projects and professionals are engaged to adjudicate on tenders and to control the quality of the work done. The fact that these

[1] *Cf.* Notice 1544 of 18 September 1970 published in *Government Gazette* 2905 of 23 October 1970.

[2] *Cf.* par. 55 of Chapter IV.

vraag of die gewone bouer vir hierdie werksaamhede en funksies bevoeg is nie. Dit gaan om die vraag of die benoeming van bevoegde spesialiste en doelmatige beheer oor die gehalte van hul werk by die nie-benoemde kontrak verseker word.

81. Daar is min rede om te glo dat die benoeming van bevoegde spesialiste by hierdie soort kontrak nie sal plaasvind waar die bou-onderneming self groot is en vakkundiges in sy diens het nie. Maar ook waar dit nie die geval is nie, kan die aanvaarding van 'n swak tender aan die kant van die bouer deur die eienaar of sy agent geveto word. Swak benoeming is dus moontlik maar nie noodwendig wanneer die bouer dit onderneem nie.

82. Aan die Raad is gesê dat—soos ook in die voorlegging van die SECC veronderstel word—die eintlike rede vir die doelmatiger kwaliteitsbeheer by benoeming is dat die konsultante regstreekse kontak met die gespesialiseerde subkontrakteurs het. Toe daarop gewys is dat die argitek en sy konsultante by die stelsel van benoeming net soos by dié van nie-benoeming veronderstel word om met die subkontrakteurs op die bouterrein deur bemiddeling van die hoofkontrakteur te kommunikeer, het een getuie verduidelik dat die kontak informeel van aard is. Maar selfs al word toegegee dat gehaltebeheer deur regstreekse kontak vergemaklik word, beteken dit nog nie dat beheer via die bouer ondoeltreffend hoef te wees nie. Dit verhoed die vakkundiges tog nie om op die handhawing van hul standaarde aan te dring nie.

83. Die gehalte van die gedane werk hang per slot van rekening af van behoorlike opdragte en toesig. Word van hierdie dinge seker gemaak, soos behoort te gebeur as die vakkundiges reg gekies word en hulle hul pligte bekwaam en nougeset uitvoer, is daar geen rede om te veronderstel dat die nie-benoemde subkontrak heeltemal so sleg is as wat die ECA wil voorgee nie. Buitendien, waar uitsonderlike eise aan die elektrotegniese aannemer gestel word, kan planne beraam word—soos met die bou van hospitale gebeur het[1]—om te verseker dat die regte spesialis by nie-benoeming gekies word.

2.3 *Die koste van die bouwerk.*

84. In 'n onderhoud het 'n toonaangewende konsult-ingenieur geskat dat die boukoste geneigd is om in die geval van nie-benoeming 10 tot 15 persent hoër te wees as by benoeming. Gestel dat hierdie skatting juis is, dan ontstaan die vraag in hoeverre die koste verskil verklaar kan word deur die feit dat die bouer by benoeming die risiko van wanbetaling deur subkontrakteurs vryspring omdat die eienaar dit dan moet dra. As dit die verskil nie ten volle verklaar nie, moet gebreke van die stelsel van nie-benoeming dan die skuld vir die res kry?

85. Oor hierdie kwessie, net soos oor dié van gehalte, het die Raad weer teenstrydige getuienis gehoor. 'n Toonaangewende bourekenaar het daarop gewys dat nie-benoeming die kostevoordeel bied dat slegs een hoeveelheidslys nodig is, terwyl by benoeming elke tenderaar 'n lys moet opstel. Daarteenoor is die Raad meegedeel dat die nie-benoemde subkontrak die probleem oplewer dat die spesifikasies vir gespesialiseerde dienste nie altyd ingevul of nie behoorlik ingevul word nie en dat dit moeilikhede en vertragings by die toewysing van tenders veroorsaak. Selfs al word die gehalte van die werk verseker deur aan te dring op sekere standaarde, word die boukoste in sulke gevalle nadelig beïnvloed.

86. Die ECA en ander gespesialiseerde organisasies voer verder aan dat die hoofkontrakteurs hul pryse opstoot deur meer vir die werk van spesialiste te vra as wat nodig is. Hulle doen dit, so word beweer, deur 'n bod van 'n spesialis

[1] *Cf.* par. 95 van hierdie hoofstuk.

operations and functions are beyond the competence of the normal builder is not in dispute. The matter in dispute is whether, under the non-nominated sub-contract, the nomination of competent specialists and effective control of the quality of their work are ensured.

81. There is little reason to believe that the appointment of competent specialists will not take place under this type of contract where the building firm itself is a large one with professionals in its employ. Even where that is not the case, the acceptance of a poor tender by the builder can be vetoed by the owner or his agent. So poor nomination is possible but not necessary if done by the builder.

82. The Board was told—as is also assumed in the submission by the SECC—that the real reason for better control of quality under nomination was that the consultants had direct contact with the specialist sub-contractors. When it was pointed out that under the system of nomination, as under that of non-nomination, the architect and his consultants are supposed to communicate with the sub-contractors on site through the main contractor, one witness explained that the contact was of an informal nature. But even if it be granted that quality control is facilitated by direct contact, this need not yet mean that control through the builder must inevitably be ineffective. Surely, this in no way prevents the professionals from insisting that their standards be met.

83. The quality of the work done ultimately depends upon proper briefing and proper supervision. If these are ensured, as they should be if the professionals are correctly chosen and perform their duties capably and diligently, there is no reason to assume that the non-nominated subcontract is quite as bad as it is made out to be by the ECA. Moreover, where exceptional demands are made upon the electrical contractor, ways can be devised, as has happened in the building of hospitals[1], to ensure the choice of the right specialist under non-nomination.

2.3 *The cost of building work.*

84. In an interview, a leading consulting engineer estimated that building costs tend to be 10 to 15 per cent higher in the case of non-nomination than in that of nomination. Assuming this estimate to be correct, the question arises in how far the difference in costs can be explained by the fact that under nomination the builder is relieved of the risk of default by subcontractors, since that risk is then borne by the owner. If this is not the full explanation, are shortcomings of non-nomination to blame for the rest?

85. On this question, as on that of quality, the Board again heard conflicting evidence. A leading quantity surveyor pointed out that non-nomination had the cost advantage that one bill of quantities sufficed, whereas under nomination each tenderer had to prepare one. On the other hand the Board was told that one problem with the non-nominated sub-contract was that the schedules pertaining to specialist services were not always completed, or not properly completed, and that this gave rise to difficulties and delays in adjudication. In such cases, even if the quality of the work were ensured by insisting that certain standards be met, building costs would be adversely affected.

86. The ECA and other specialist organisations further contend that the main contractors inflate their prices by charging more for specialist work than is justified. They do this, it is alleged, by obtaining a bid from a specialist and by

[1] *Cf.* par. 95 of this chapter.

te kry en dan op die grondslag van daardie bod te tender maar agterna die werk deur 'n ander spesialis teen 'n laer prys te laat doen en die versil in hul sakke te steek. Dit veronderstel dat mededinging onder die bouers swak is. In 'n hoogkonjunktuur soos die huidige kan so 'n veronderstelling geregverdig wees[1]. 'n Bekende bourekenaar het onlangs in 'n simposium verklaar dat "in the present economic climate we generally advise our client not to call for tenders but rather to negotiate with a selected contractor. At least you have the opportunity to beg him to be reasonable"[2]. In tye van slapte sal die bouers dit egter nouliks kan waag om hul kliënte te veel te vra op die wyse wat die ECA veronderstel. Wat die koste betref, is dit dus moontlik om die nie-benoemde subkontrak vir die gevolge van marktoestande te blameer. Daar is weinig rede om te glo dat in bloeitye soos die huidige die benoemde subkontrak aan die kliënt die beskerming verleen wat slegs 'n skerp mededinging kan verseker.

87. Nog 'n argument van die ECA is dat "(u)nder the main contract system the lowest all-in bid is unlikely to be as low as a combination of the lowest elemental bids, since each contractor chooses his own specialist". Hierdie stelling berus op verskeie veronderstellings wat nie waar hoef te wees nie. Eerstens, hoef die werkgewer self nie altyd die laagste tender te kies nie. Tweedens, selfs as die bouer nie die laagste tender kies nie, hoef dit nie die koste nadelig te beïnvloed nie. As hy 'n subkontrakteur kies wat hy ken en met wie hy goed saamwerk, kan die boukoste eerder gunstig as nadelig beïnvloed word. Laastens, wanneer 'n aantal bouers vir dieselfde werk tender, hoef nie almal die laagste tenderaars verby te gaan nie.

88. Die ECA is geneig om hom te weerspreek sowel as om te oorveralgemeen. In sy bespreking van die kostekwessie, verklaar hy dat die bouer sy eie spesialiste kies en gee daardeur te kenne dat min subkontrakteurs om 'n bod genader word. Wanneer hy egter die kwessie van gehalte bespreek, verklaar hy dat "a large number of tenders" deur die bouer aangevra word. Hy oorveralgemeen deur, soos reeds opgemerk, te beweer dat die bouers hul pryse opstoot deur 'n bod te verkry, op die grondslag van daardie bod te tender, die werk dan teen 'n laer prys te laat doen en die verskil vir hulself te hou. Daar bestaan min twyfel dat wanpraktyke wel voorkom. Die Raad neem aan dat bouers net soos mense in ander beroepe geneig is om te sondig, tensy hul dopgehou word of hul eie belange hulle tot beter gedrag aanspoor. Die ECA toon egter nêrens aan hoe algemeen die sondes van die hoofkontrakteurs is nie.

89. Wat die kwessie van boukoste betref, is die keuse van die regte persoon vir die werk, duidelike dokumentasie en streng gehalte- asook vorderingsbeheer miskien nog belangriker as die keuse van die soort kontrak. Op die reeds genoemde simposium is die volgende raad aan ontwikkelaars gegee: "Choose the right Professionals on their tract record. Always provide a clear and explicit Brief. Insist that the job is reliably and appropriately managed, programmed and monitored"[3].

2.4 *Ander aspekte van die saak.*

90. Die nie-benoemde subkontrak kan op stuk van sake nie heeltemal so swak wees as wat die ECA ons wil laat glo nie. As dit werklik so sleg is, ontstaan die vraag waarom dit nog gebruik word. Dit is inderdaad nie alleen nog in gebruik nie maar word, volgens getuienis, deesdae nogal bo die

[1] By huisbouery ten minste lyk dit asof geen twyfel bestaan dat 'n gebrek aan mededinging pryse soms oormatig opstoot nie. *Cf.* "Swak bouers knel mark", *Rapport, Sake-Rapport,* Sondag, 17 Mei 1981.

[2] *Cf.* C. P. le Leeuw, "Financial design criteria. 1. Financial aspects." *Transkripsie van referaat gelewer by 'n seminaar oor die hoë boukoste. Probleme en oplossings.* Johannesburg, 17 Maart 1981. Carlton Hotel, The South African Property Owners Association.

[3] *Cf.* R. B. Prisgrove, "Financial design criteria. 2. The role of the professionals." *Transkripsie van referaat,* ens., *op cit.*

tendering on that bid, but afterwards having the work done by another specialist at a lower price and pocketing the difference. This assumes that competition amongst builders is weak. It is an assumption that may well be justified under boom conditions such as the present[1]. "In the present economic climate", a wellknown quantity surveyor stated at a recent symposium, "we generally advise our client not to call for tenders but rather to negotiate with a selected contractor. At least you have the opportunity to beg him to be reasonable."[2] In less buoyant times, however, builders dare hardly overcharge their clients in the way assumed by the ECA. It is thus possible, in the matter of costs, to blame the non-nominated sub-contract for the consequences of market conditions. There is little reason to believe that in boom times such as the present the *nominated* sub-contract will afford the client the protection that only keen competition can ensure.

87. Another contention of the ECA is that "(u)nder the main contract system the lowest all-in bid is unlikely to be as low as a combination of the lowest elemental bids, since each contractor chooses his own specialists". This statement rests on several assumptions that need not be true. For one thing, the employer himself need not always choose the lowest tender. For another, even if the builder fails to choose the lowest tender, this need not adversely affect costs. If he chooses a sub-contractor whom he knows and with whom he works smoothly, building costs may be favourably rater than deleteriously affected. Finally, where a number of builders tender for the same job, they need not all of them bypass the lowest tenderers.

88. The ECA tends both to contradict itself and to overgeneralise. In discussing the question of costs, it states that the builder chooses his own specialists, thereby suggesting that not many sub-contractors are approached for bids. When dealing with the matter of quality, however, it states that "a large number of tenders get invited" by the builder. It over-generalises by asserting, as just noted, that builders inflate their prices by obtaining a bid, tendering on that bid and then having the work done at a lower price, keeping the difference for themselves. There can be little doubt that objectionable practices occur. Builders, the Board assumes, are as prone to sin as are other human beings in other walks of life, unless they are watched or their own interests dictate better behaviour. But the ECA nowhere shows how prevalent the sins of the main contractors are.

89. In the matter of building costs, perhaps more important that the choice of contract form, is the choice of the right men for the job, clear documentation and strict quality as well as progress control. At the symposium already referred to, the following advice was tendered to developers: "Choose the right Professionals on their track record. Always provide a clear and explicit Brief. Insist that the job is reliably and appropriately managed, programmed and monitored."[3]

2.4 *Other aspects of the matter.*

90. After all said and done, the non-nominated sub-contract cannot be quite as objectionable as the ECA would have us believe. If it were all that bad, the question arises why it is still in use. As a matter of fact, far from it being discarded, there has lately, according to evidence, been a

[1] In house-building, at least, there appears to be no doubt that lack of competition is sometimes forcing up prices unduly. *Cf.* "Swak bouers knel mark", *Rapport, Sake-Rapport,* Sondag, 17 Mei 1981.

[2] *Cf.* C. P. de Leeuw, "Financial design criteria. 1. Financial aspects." *Transcript of papers delivered at a seminar on the high cost of building. Problems and solutions.* Johannesburg 17 March 1981. Carlton Hotel, The South African Property Owners Association.

[3] *Cf.* R.B. Prisgrove, "Financial design criteria. 2. The role of the professionals." *Transcript of papers, etc., op. cit.*

benoemde subkontrak verkies. Trouens, in 'n brief gedateer 19 Maart 1980 aan alle lede en taksekretarisse, skryf die direkteur van die ECA self dat "it was noted with concern that this method of calling for electrical tenders is being used more commonly in the Industry". 'n Ander vraag is of, indien die benoemde subkontrak al hierdie gebreke het, hulle nie uitgeskakel kan word nie.

91. Wat betref die neiging om die nie-benoemde subkontrak te verkies, blyk dat owerheidsliggame al hoe meer van dié stelsel gebruik begin maak. In een stadim het die Departement van Openbare Werke benoeming verkies. Die huidige Departement van Gemeenskapsontwikkeling en Owerheidshulpdienste verkies daarenteen nie-benoeming. Dit geld in die algemeen ook vir die Transvaalse Provinsiale Administrasie en vir die Natalse Provinsiale Administrasie wat bepaalde projekte aangaan.

92. Die Departement van Gemeenskapsontwikkeling het die Natalse Provinsiale Administrasie meegedeel dat hy die nie-benoemde subkontrak verkies "because of the problems that arose in connection with mutual claims between the building contractor and the electrical contractor if the electrical work was performed by a nominated sub-contractor".

93. Die Transvaalse Werkedepartement weer het verlede jaar aan die ECA en die Natalse Provinsiale Administrasie geskryf dat hy besluit het om van die benoemde na die nie-benoemde subkontrak oor te slaan weens personeel tekorte en die groot aantal insolvensies onder elektrotegniese aannemers in 1979. Dit is nie heeltemal duidelik hoe personeeltekorte in die prentjie pas nie aangesien die hul van vakkundiges van buite ingeroep kan word as dit nodig is. Wat die insolvensies betref, is daar aan amptenare van die Raad verduidelik dat as 'n benoemde onderaannemer bankrot speel, die werkgewer nie net 'n verlies ly nie maar ook 'n nuwe onderaannemer moet vind. Die Departement verkies dat die bouer hierdie risiko's dra.

94. Laastens het die Natalse Provinsiale Administrasie herhaaldelik die ECA meegedeel dat hy die nie-benoemde subkontrak slegs "in selected cases" verkies. Uit getuienis het geblyk dat in die geval van sommige skoolprojekte die elektrotegniese werk so eenvoudig van aard is dat geen rede bestaan waarom die werkgewer hom nog met die keuse van 'n onderaannemer moet bemoei nie.

95. Wat die moontlikheid betref om moontlike gebreke van die stelsel van nie-benoeming uit te skakel, wil die Raad die aandag vestig op die getuienis van 'n konsultingenieur wat betrokke is by die bou van sekere groot hospitale in Transvaal. Ten aansien van hospitale kan buitengewone eise aan die elektrotegniese aannemer gestel word. Selfs dan is dit, na wat aan amptenare van die Raad gesê is, moontlik om die stelsel van nie-benoeming te gebruik, mits 'n vergelyk getref word soos in verskeie gevalle onlangs gebeur het. Hierby stel die kliënt 'n kontrak vir die hele projek op en dui slegs voorlopige bedrae vir gespesialiseerde werk aan. Na die aanstelling van die hoofkontrakteur word die dokumentasie vir die gespesialiseerde subkontrakte aan hom oorhandig met die opdrag om tenders te vra. Dié tenders kan oop tenders wees of tenders op aanvraag uit 'n keurlys van subkontrakteurs. Die tenders wat die hoofkontrakteur ontvang, word in die teenwoordigheid van die kliënt of sy agent geopen en saam besluit hulle watter tender hulle aanvaar. Die kontrakteur stel dan die suksesvolle tenderaar as 'n nie-benoemde subkontrakteur aan. Dit is belangrik, so is amptenare van die Raad meegedeel, dat hierdie prosedure duidelik in die hoofkontrak uiteengesit word en dat klousules in dié kontrak asook in die subkontrakdokumentasie opgeneem word wat vir wedersydse waarborge voorsiening maak.

tendency for it to be preferred to the nominated sub-contract. Indeed, in a latter "to all members and branch secretaries" dated 19 March 1980, the director of the ECA himself wrote that "it was noted with concern that this method of calling for electrical tenders is being used more commonly in the Industry". Another question is whether, if the non-nominated sub-contract has all those shortcomings, these cannot be eliminated.

91. As to the tenancy to favour the non-nominated subcontract, the public authorities have tended to make increasing use of it. There was a time when the Department of Public Works preferred nomination. The present Department of Community Development and Auxiliary Services, on the other hand, favours non-nomination. So do the Transvaal Provincial Administration in general and the Natal Provincial Administration for particular projects.

92. The Department of Community Development informed the Natal Provincial Administration that it preferred the non-nominated sub-contract "because of the problems that arose in connection with mutual claims between the building contractor and the electrical contractor if the electrical work was performed by a nominated sub-contractor".

93. The Transvaal Department of Works, again, last year wrote to the ECA and to the Natal Provincial Administration that it had decided to change over from the nominated to the non-nominated sub-contract on account of staff shortages and the large number of insolvencies amongst electrical contractors in 1979. It is not quite clear how staff shortages enter into the picture, since the assitance of outside professionals can be called in if need be. As to insolvencies it was explained to officials of the Board that, if a nominated sub-contractor went bankcrupt, the employer not only suffered a loss but had to find a new sub-contractor. The Department preferred these risks to be borne by the builder.

94. The Natal Provincial Administration, finally, repeatedly informed the ECA that it preferred the non-nominated sub-contract only "in selected cases". It appeared from evidence that, in the case of some school projects, the electrical work is of so simple a nature that no reason exists why the employer should concern himself with the choice of the sub-contractor.

95. Turning now to the possibility of correcting what shortcomings non-nomination may have, the Board wishes to refer to the evidence of an engineering consultant who has been involved in the building of certain large hospitals in the Transvaal. In the case of hospitals, exceptional demands may be made upon the electrical contractor. Even so, officials of the Board were told, the non-nominated system could be employed provided a compromise was effected as has happened in several instances recently. The client, in this case, draws up a contract for the whole project, indicating only provisional sums for specialised work. Subsequent to the appointment of the main contractor, the documentation for the specialised sub-contracts is handed over to the main contractor, who is instructed to invite tenders. These may be open tenders or tenders by invitation from a selected list of sub-contractors. The tenders received by the main contractor are opened in the presence of the client or his agent and together they decide which tender to accept. The contractor then appoints the successful tenderer as a non-nominated sub-contractor. It is important, the officials of the Board were told, that this procedure be clearly recorded in the main contract and that safeguards be built into that contract as well as into the sub-contract documentation to provide for mutual guarantees.

3. ***Gevolgtrekking en aanbeveling.***

96. Die Raad glo dat die nie-benoemde subkontrak 'n rol in die boubedryf te speel het, selfs al is dit net op sekere gebiede en miskien meer dikwels op sekere tye as op ander. Waar dit so is, moet die keuse van die soort kontrak aan die eienaar oorgelaat word. Geen argument is aangevoer wat die ECA se beperkende praktyk in die openbare belang regverdig nie.

97. Die Raad besluit dus dat die bedrywighede van die ECA in hierdie saak nie in die openbare belang geregverdig kan word nie.

98. Ingevolge artikel 12 (2) van Wet 96 van 1979 beveel die Raad by die Minister aan dat die beperkende praktyk waarvolgens die Elektrotegniese Aannemersvereniging (Suid-Afrika) sy lede opdrag gee om nie vir nie-benoemde subkontrakte te tender nie, verbied word by wyse van 'n kennisgewing gepubliseer in die *Staatskoerant* ingevolge artikel 14 (1) (c) van die Wet.

D. J. MOUTON, Voorsitter.

H. GOLDBERG, Lid.

J. DE V. GRAAFF, Lid.

*S. J. KLEU, Lid.

A. J. MARAIS, Lid.

S. J. NAUDÉ, Lid.

E. W. VAN STADEN, Lid.

J. A. LAMBRECHTS, Direkteur.

Pretoria, 28 Julie 1981.

* Afwesig.

(R4/1/2/2/3)

3. ***Conclusion and recommendation.***

96. The Board believes that the non-nominated sub-contract has a role to play in the building industry, even if only in certain fields and, perhaps, more often at certain times than at others. This being so, it should be left to the owner to choose the contract form. No argument has been advanced that justifies the ECA's restrictive practice in the public interest.

97. The Board, therefore, concludes that the activities of the ECA in this matter cannot be justified in the public interest.

98. In terms of section 12 (2) of Act 96 of 1979, the Board recommends to the Minister that the restrictive practice according to which the Electrical Contractors' Association (South Africa) instructs its members not to tender on non-nominated sub-contracts be prohibited by means of a notice published in the *Government Gazette* in terms of section 14 (1) (c) of the Act.

D. J. MOUTON, Chairman.

H. GOLDBERG, Member.

J. DE V. GRAAFF, Member.

*S. J. KLEU, Member.

A. J. MARAIS, Member.

S. J. NAUDÉ, Member.

E. W. VAN STADEN, Member.

J. A. LAMBRECHTS, Director.

Pretoria, 28 July 1981.

* Absent.

(R4/1/2/2/3)

INHOUD

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