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LEGAL & INVESTIGATIONS DIVISION

23rd May, 2013

OPINION

NAIMA INVESTMENTS PROPOSAL

This second opinion is provided on the above matter in view of further information made available to the writer which was not available at the time the previous opinion was given.

Documents which have now been sighted are;

1. Documents from OGAPSH relating to Kitpeng Haus provided for comparative analysis.
2. Documents from OGAPSH relating to Vulupindi Haus Annexure for comparative analysis.
3. Documents from OGAPSH on the Kimas Centre for comparative analysis.
4. Letter from State Solicitor to John Kali dated 3 April 2013.
5. Copy of Memo from Minister for Public Service Sir Puka Temu to John Kali dated 5 September 2012 directing the latter to work on the proposal by Naima Investments Ltd (NIL).
6. Copy of MoU between Naima Investments Ltd and Government Office Allocation Committee signed on 25 September 2012.

The background of this matter has already been covered in the advice from the State Solicitor as referred to in my previous opinion on the matter dated 8 May 2013. In light of the advice by the State Solicitor, the objective of this second opinion is to provide views on alternative or options which may be considered in trying to find a way forward on what is importantly a proposal and not an offer made in response to an invitation to bid in a tender process.

The State Solicitor advises that the Public Finances (Management) Act (PFMA) applies and relies specifically on the application of Section 40 (5) of the subject Act. I beg to differ on two fronts. Firstly, as stated above this is a proposal. To subject it to the tender process will mean the withdrawal of the proposal and the risk of losing out on a potential opportunity to cater for the need to house government departments in one place and possibly save cost in the long term.

Secondly, I am not totally convinced that Section 40 (5) applies. Section 40 deals with two major activities of financial bearing namely;

- a) The purchase and disposal of property, and
- b) The supply of works and services.

A deal to build would not come under either of the above. Rental of property will come under supply of services. However the provision will apply in relation to the making of the transaction itself as and when the transaction is being made. The question that naturally arises in this case is; Is the State entering into a lease now? If the answer is yes then we look at what the actual intention is and how we might be able to accommodate that intention. Again I reiterate here that for the State Solicitor to treat it as a matter that has to go back for tender ignores the peculiar nature of this proposal and the risks posed by such an approach. The risk is that the proposal may be withdrawn and the opportunity to house 19 government departments at the one location and at universal cost would be lost.

From the documents I now have I take particular note of a copy of a Memorandum of Understanding (MoU) dated 25 September 2012 signed between NIL and the Government Office Allocation Committee (GOAC) in relation to the building of what is to be known as the Naima Centre. Clause B of the Recitals states; “Whereas, in consideration thereto, the Parties agree to execute this MoU to establish the process leading to the Lease between the Parties”

This clearly speaks about an intention to enter into a formal Lease arrangement in the future. In terms of what it seeks to achieve without any compelling necessity to apply the provisions of the PFMA at this stage, this MoU would be ordinarily be sufficient.

A memorandum of understanding (MoU) is a legal document describing a bilateral or multi-lateral agreement between two or more parties. It expresses a convergence of will between the parties, indicating an intended common line of action. (The Free Encyclopedia).

It is a more formal alternative to a gentleman’s agreement, but lacks the binding power of a contract.

Hence with the signing of the MoU referred to above the intention of NIL and GOAC can be said to have been captured. By signing NIL indicates what its intention which can be reasonably assumed that it does not wish to be subjected to any tender process in the proposal it has put to the State. The MoU does not cover the change from 24 to 29 storey building including a 1 storey convention building plus a 4 storey podium so these will have to be approved and catered for in the similar way.

In a proposal such as the one put forward by NIL the following type of arrangements would be considered;

- a) BOT (build-operate-transfer)
- b) BOOT (build-own-operate-transfer)
- c) BOO (build –own-operate)
- d) BLT (build-lease-transfer)
- e) DBFO (design-build-finance-operate)
- f) DBOT (design-build-operate-transfer)
- g) DCMF (design-construct-manage-finance)

A BLT would appear to be very appropriate. Under BLT a private entity builds a complete project and leases it to the government. In this way the control over the project is transferred from the project owner to the lessee. In other words ownership remains with the shareholders but operation purposes are leased. At the end of the lease period the ownership of the asset and the operational responsibility are transferred to the government at a previously agreed price. For a foreign investor such as NIL when taking into account country risks such as a change of government, BLT provides good conditions because NIL maintains the property rights while avoiding operational risks. However, all the above forms of arrangements are normally contracts and this will obviously pose some difficulty in terms of the application of the PFMA.

There is also what is called a Memorandum of Agreement. A memorandum of agreement (MoA) or cooperative agreement is a document written between parties to cooperatively work together on an agreed upon project or meet an agreed upon objective. The purpose of a MoA is to have a written understanding of the agreement between parties. (The Free Encyclopedia).

It can be a legal document that is binding and hold the parties responsible to their commitment or just a partnership agreement. It is used also as a written document resulting from dispute resolution such as the industrial disputes between the Public Service and the Public Employees Association of PNG.

This form of agreement falls short of an actual contract such as a turnkey contract or a build-operate-transfer contract. A turnkey project is a type of project that is constructed so that it could be sold to any buyer as a completed product. It is a contract whereby the essential design emanates from, or is supplied by the contractor. Turnkey refers to something that is ready for immediate use, generally used in the sale or supply of goods and services. It is often used to describe a home built on the developer’s land with the developer’s financing ready for the customer to move in. If a contractor builds a “turnkey home” they frame the structure and finish the interior. Everything is completed down to the cabinets and carpet. I note in this case that the MoU signed as referred to above already pronounces at Clause B of the Recitals that the NIL proposal is to be recognized as turnkey and not BOT.

Build-operate-transfer is a form of project financing, wherein a private entity receives a concession from the private or public sector to finance, design, construct and operate a facility stated in the concession contract. This enables the

project proponent to recover its investment, operating and maintenance expenses in the project. On this point, the State Solicitor in his advice under paragraph 7 raises concerns on the ultimate cost to the State in that, as he states; “...the State will still end up paying for the construction costs, fit-out costs plus returns on investment expected by NIL through rental payments.”

His concerns stems from the fact that by nature BOTs are long term arrangements and fees are usually raised during the concession period. The rate of increase is often tied to a combination of internal and external variables which in NIL’s case, will allow for it to reach a satisfactory internal rate of return for its investment. All I say to that is that this is the nature of the beast. If this proposal was subject to the PFMA under a BOT arrangement then the State will be obliged to pay nevertheless. In any case however, his concern fades into irrelevance when he was already adopted the position that the PFMA applies.

The PFMA as the State Solicitor pointed out, does make mention of this two types of contracts being subject to the provisions of the Act, in particular Section 40 (5). In my view this provision is ambiguous. The ambiguity is created in the construction and the interpretation of the intent and purpose of Section 40 (5) of the Act as I explained my previous opinion in that the focus is on the supply of works and services and not so much on the type of project. There would be no ambiguity if the provision specifically says all turnkey, BOT and other related contracts shall be subject to tender.

To avoid fruitless legal argument on the application of this one ambiguous provision I propose the following options for consideration on the way forward:

1. To investigate and confirm the type of commitment to lease as expressed in the MoU already signed and adopt the same course to accommodate for the change from 24 to 29 storey building and others. In that regard where there is an issue in relation to land the Minister for Lands can utilize his powers under Section 69 (2) (d) to exempt land from advertisement for application or tender in favor of NIL.
2. To explore the possibility of an Option Agreement. A previous Option Agreement done under the MRDC Pty Ltd (Privatization) Act is exempted from the Part VII according to Section 38A of the PFMA. An Option Agreement is a contract that you enter into now that gives you the power to exercise some right at some point in the future.
3. To consider the possibility of having a commercial entity owned by the State to undertake the project on behalf of the State.

I would recommend that these options be put to the State Solicitor for consideration and further advice particularly on what these options entail.

In the course of writing this opinion it was informed that the government’s latest instructions communicated through the Minister for Public Service is for a Pre-Lease Agreement to be entered into with NIL. Pre-Lease Agreements are not defined specifically in the Land Act. There is no provision authorizing the making of what is now being called “Pre-Lease”. The arrangements discussed above cater for what is intended by Pre-Lease arrangement. It is therefore advisable not to use a term which does not exist in law.

MoUs have been used on more than one occasion already for Vulupindi Haus, Kimas Centre and Kitpeng House according to GOAC and unless there are compelling reasons why we should not employ that same course. Monies for rental should not be an issue as I understand this is always catered for in all budget appropriations. The long term benefit of the project should dictate its pursuit and not risk losing the opportunity presented.

[Signed]
Isikel Mesulam
Director