

Our reference: AGSS310/2012/3-8.36/14
Action Officer: B. Masamdu

03rd April, 2013

John Kali, OBE
Chairman
Government Office Accommodation Committee
PO Box 519
WAIGANI
National Capital District

Dear Chairman Kali,

Naima Investment Limited new proposal to construct a 29 storey building, Convention Centre and Podium for the State to lease

1. I refer to the above subject matter and my letter dated 29 November 2012.
2. I have been briefed by my officer that during the meeting in Singapore, Naima has now diverged from their initial proposal of building a single 24-storey building and are now proposing to build a 29-storey building, including a 1-storey convention building and a 4-storey podium dedicated for the Prime Minister's office. This proposal was captured in an MoU that Naima representatives wanted to be signed between them and the State team that attended the meeting.
3. I note that during the meeting there was agreement reached with the representatives of Naima that because the NEC Decision No. 03/2013 was for the 24 storey building, the new proposal by Naima will need a new approval from NEC. On that basis, the MoU was not signed.
4. I note that you were also of the view that when NEC gave the approval for Naima to construct the initial proposal for a 24-storey building, there was no need to go through the tender process.
5. In the last GOAC meeting held on the 8 March 2013, you informed the members that the Prime Minister was in agreement with the new proposal by Naima made in Singapore and that a new Cabinet submission was being prepared for Cabinet to endorse.
6. The new Submission as I understand would rescind the earlier NEC Decision No. 03/2013 and will direct GOAC to negotiate the Commercial terms of the pre-lease agreement. You further advised that this was being done in accordance with the advice from me. However, as I recall, my advice to you dated 29 November 2012 was for your department to prepare an Information Paper to inform Cabinet of the initial proposal by Naima and I had further advised you that the tender process must be complied with regarding that proposal. My advice to you was not for you to seek Cabinet's approval because under the *Public Finance (Management) Act* ("PFMA"), NEC will only act on the recommendation of the CSTB. Unfortunately this was not done for the initial proposal by Naima Investment Limited.
7. A special GOAC Meeting was again held on the 21 March 2013, in which you informed Committee members that a delegation from Naima was coming to Port Moresby to meet with the Committee to discuss among other things, the pre-lease agreement. From this meeting, the Submission would be forwarded to NEC.

Questions and Short Answers

8. The question and short answer is as follows:

Q1: Is the tender process under the Public Finance (Management) Act required to be followed for the new proposal by Naima Investment Limited?

A1: Yes

Reasons

9. I refer to my earlier advice to you dated 29 November 2012 in which I advised in detail about the law governing BOT arrangements and the steps that your Department would need to take to facilitate such arrangements.
10. As I had advised you in that letter referred to in para.9 above, Section 40(5) of the *PFMA* is clear, such transactions are subject to the tender process and therefore the requirements of the *PFMA* must be complied with. To deviate from the process would result in a breach of that law and would invalidate the awarding of that contract to Naima Investment Limited. The National Courts have held in *The State v. Barclay Bros (PNG) Ltd* that a contract that does not comply with the tender requirements under s.40 (1) of *PFMA* is void. The Supreme Court has adopted and applied this principle in *Fly River Provincial Government v. Pioneer Health Services Limited* and thus this case is the authority that the tender process under the *PFMA* must be complied for before a Contract is awarded. Hence, the same applies to the Naima proposal for the new office complex under the BOT arrangement and requires compliance of the *PFMA* or else the Contract will be void.
11. I therefore, advice that you should not continue discussions with Naima Investment Ltd on the essential terms of the Pre-lease agreement amongst other things until the procurement process has been complied with. Naima would believe that it has been awarded the Contract.
12. Your Department will therefore need to prepare a Cabinet Submission to rescind the earlier NEC Decision and start facilitating the tender process with CSTB.
13. As such, any meetings by GOAC to progress the Naima proposal would be contrary to my earlier advice to you dated 29 November 2012 and this advice and we may not attend the meetings.
14. Please feel free to call the action officer/my deputy Mr David Manoka on 301 2890 or myself if you have any questions or require my further information in relation to this advice.
15. In any further correspondence with this office, please include the file reference and the action officer's name as identified above.

Yours sincerely,

[Signed]
Daniel Rolpagarea
State Solicitor