

Your reference:
Our reference: AGSS310/2012/3-8.36/14
Action officer: B.K. Vitata

29th November, 2012

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

Dear Chairman,

Naima Investment Limited Proposal

1. I refer to your verbal conversation with Mr David Manoka, Deputy State Solicitor of my office on the 19th October, 2012 regarding clarification on the process in dealing with the above subject matter. I sincerely apologize for the delay in responding.

Background

2. During the special GOAC meeting of 3rd October, 2012, you briefed the members, including myself, of the proposal by Naima Investment Limited ('NIL') for the development of a 24-storey building, to be propose-built for various State tenants. The members were informed that the construction costs of the base building and the fit-out works will be borne by NIL. During that meeting the group was also informed that after the term of the lease, the title of the land and building will be transferred to the State.
3. Given the forgoing you sought legal advice on how the State should proceed with this arrangement.

Question and Short Answer

4. The question/s and short answer/s is as follows:

Q1: What is the law that governs the proposal made by NIL to the State?

A1: Section 40 (5) of the Public Finance Management Act which requires a public tender. NIL should be seen as one of the possible parties who can satisfy the accommodation need of the State but not the only one. Public tender is required by law and is also an appropriate way to find who else can satisfy the accommodation needs of the State whether they will make a better offer.

Q2: What is the structure of the transaction?

A2: On my understanding of the Transaction the private entity will construct the building and undertake fit-out works and the State will lease the building for a specified term and then the title will be transferred to the State (this is subject to your confirmation). This is a form of public private partnership.

Q3: What are the tender requirements?

A3: The Request for Tender should focus on the current and future office accommodation needs of the State, include the proposed Transaction Documents and Design Brief. The tenderers should be asked to submit proposals including Concept Design, proposed rental and term of lease and any proposed divergences from the transaction documents.

Q4: What are the documents needed for the Request for Tender (RFT)?

A4: The proposed transaction documents Agreement to Lease and the State Standard Lease. The RFT document including the Design Brief (incorporating accommodation needs, timelines, design requirements, performance specifications and standards).

Q5: *What further instructions are needed by the State Solicitor?*

A5: The current and future accommodation needs of the State, the required dates for completion of construction, the desired term of the lease, the performance specification and quality of construction, details of the required fit-out works, and the status of the leases of those state agencies interested in moving into the new building once completed.

Q6: *Whether DPM needs to prepare a Cabinet submission pending the tender process?*

A6: Yes, pending the tender process at least an Information Paper to Cabinet to inform them.

Reasons

What is the law that governs the proposal made by NIL?

5. Section 40 (5) of the *Public Finance Management Act* ('PFMA') provides as follows:

"In relation to contracts for the supply of works and services, the provisions of this section and of Section 41 shall apply to –

a) Turnkey contracts; and

b) Build-operate transfer contracts; and

c) Contracts which in substance are similar to turnkey contracts or build-operate transfer contracts; and

d) Contracts involving the expenditure of public funds."

6. Section 40 of the PFMA provides for the requirement to comply with the tender process for the purchase, disposal or supply of property, stores, works or services where the prescribed amount is beyond K300,000.00. NIL should be seen as one of the possible parties who can satisfy the accommodation needs of the State and whether they will make a better offer.

7. I understand that the transaction is similar to a build-operate transfer contract and even though the construction cost and fit-out costs will be borne by NIL, the State will still end up paying for the construction costs, fit-out costs plus the returns on investment expected by NIL through rental payments. Indeed, this form of transaction is over the lifetime of the arrangement considerably more expensive than the State constructing the building itself in the first place.

8. From past experience, when the State pre-commits itself to lease arrangements similar to the one proposed by NIL, the transaction was rarely properly captured under appropriate legal documents that protected the interest of the State and therefore the State usually experienced problems with such arrangements. As such, my advice to you with the Vulupindi Annexure was to have an MoU to facilitate the construction phase of the building and then a lease agreement would be entered into after the building was constructed and certain conditions were met by the developer.

9. The proposal made by NIL is similar to the Vulupindi Annexure, however, given that the indication from the Minister for Public Service is that the way forward for the State is to go by Public Private Partnership (PPP) arrangements, my office is now developing a legal document that would govern such PPP arrangements for leasing of office accommodation. This document is an Agreement to Lease and will basically govern the construction phase up until the leasing of the premises once the building is completed.

10. As I had advised you verbally, the Public Private Partnership Bill (PPP Bill) will govern this types of transactions where the value of the contract will be determined but it is likely that it will be based on the

total value over the life of the contract which in this case will be the sum of all rental payable under the arrangement. The Bill is expected to be passed in the November sitting of Parliament, and when it comes into operation (on a date to be subsequently proclaimed), and depending on the value of the contract, the procedures under the Bill must be complied with. In absence of that Bill, Section 40 (5) of the PFMA currently provides the basis for these transactions.

11. In addition to the requirement to tender the proposal. Please ensure that an Authority to Pre-Commit expenditure ('APC') must also be obtained from Department of Finance pursuant to Section 47B of the PFMA.
12. The APC will be for the rentals for the fixed term of the lease. The APC must first be obtained before the request is put for tender because the APC will show that there are funds available to cover the rentals under the proposal.
13. Your Department will need to liaise with the Department of Finance and Treasury on the financial and budgetary implications of the proposal because the budget that was approved by Parliament is for a 5-year term.

What is the structure of the transaction?

14. From information provided to me by yourself and through my officers, the following is my understanding of how the proposed transaction is to be structured.
15. Firstly the private entity will need to secure the title to the land on which the proposed development will take place and all relevant development and building approvals from relevant authorities.
16. The private entity will then construct the building and undertake the fit-out works in accordance with the agreed design documents and by a specified date.
17. Once the building and fit-outs have been completed, the State will lease the building for a term and rent as specified in the lease agreement.
18. The private entity will operate and maintain the base building in accordance with applicable performance specifications and once the term of the lease expires, the private entity will transfer the lease to the State.
19. Please note that from my initial understanding of the transaction proposed by NIL, the title to the land and building is to be transferred to the State upon the expiration of the lease. My officers have more recently been advised that the title will not be transferred. This part of the structure of the transaction needs to be clarified.

What are the tender requirements?

20. Since this proposal will need to go through the tender process, the State will need to prepare something like a Design Brief to be included in the Request for Tender. It would need to specify what the project has to achieve, by what means and within what time frame.
21. The Request for Tender would have to detail the State's office accommodation needs. It should specify how much office space is needed and when such an office space is needed together with any other requirements for that office space such as location, car parking and special facilities. The tender request should also outline the accommodation needs of the State over time and not just its current office needs. This is the place any project like the proposed one should start and it requires very carefully planning. It may for instance make more sense for the project to be in stages over the next 10 years with a series of smaller building rather than a single large building.
22. The tender request must also specify the quality and standards of the accommodation needs and the performance specifications. Since the fit-outs will also be undertaken by the private entity, the fit-out requirements of the State must be specified clearly in the tender request.
23. In their bid the tenderers should be asked to provide a detailed concept design for the base building and the fit-out works including performance standards and quality, proposed location of the building, propose

rental and term of the lease and so forth. They should also be asked to detail any proposed deviation from the transaction documents.

24. It is advisable for your department to seek the advice of relevant experts to advise you on the best form of transaction and tender to satisfy the office accommodation needs, especially regarding the structure of the transaction, the best way to approach the market, to prepare the Design Brief documents, especially in relation to the fit-out works. The Central Supply and Tenders Board can provide assistance in relation to how to structure the tender request and also with your input, what other relevant information to include in the request for tender.

What are the documents needed for the RFT?

25. The documents needed for the RFT are the following:
- a) Request for Tender document
 - b) Design Brief (incorporating accommodation needs, timelines, design requirements for base building and fit-out works, performance specifications and standards)
 - c) Agreement to Lease
 - d) Lease
26. My office can assist you in preparing the Agreement to Lease and the State Standard Lease Agreement can be used. It is my view that for the documents relating to the RFT, advice should be obtained from Central Supply and Tenders Board who can also advise on how to structure the tender request and also what other relevant information may be needed. However, the RFT documents should be settled by my office.
27. With regard to putting together the Design Brief for the base building and fit-outs, expert assistance should be obtained. You may be able to get this assistance from the GOAC's technical team or it may be that an expert needs to be engaged to advise your Department on how to put together the Design Brief.

Whether DPM needs to prepare a Cabinet submission pending the tender process?

28. It is my considered view that an Information Paper at least be prepared by your Department to inform Cabinet of the proposal by Naima and also informing Cabinet that its approval will be sought via the tendering process after a recommendation is made by the Central Supply and Tenders Board.

Further instructions needed:

29. In order to assist me in finalizing the Agreement to Lease, the following instructions are needed:
- a) Details of the accommodation needs of the State (how much office space is needed currently and in the future and when is such office space required)
 - b) Proposed term of the Lease
 - c) Timing for completion for construction of base building and fit-out works
 - d) Performance specifications and quality of construction of base building and fit-out works
 - e) Whether after the term of the lease, the title to the Land and the building will be transferred to the State
 - f) Details of the status of the leases of the potential tenants and how they will be finalized.
 - g) Whether the fit-out works will be done by the private entity or will be done by the State.

30. 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 any further information in relation to this advice.
31. 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

cc: Chief Secretary
Secretary for Justice