No. 11
(March 2012)

Cenpower Domini Ltd.	-	Complainant
Vs.		
Central Tender Review Board (CTRB)	-	Respondent

Tender:
(Request for Proposals –Bonyere Thermal Power Project-Domunli Thermal Power Project)

Petition by Complainant – Cenpower Domini Ltd. dated 5th October 2011, for administrative review of the refusal of the Central Tender Review Board (CTRB) to grant concurrent approval in respect of a recommendation for *Cenpower Domini Ltd*. to partner the Volta River Authority (VRA) as a joint venture investor to implement the Alstom Power Project, following a competitive tender and due evaluation process.

Brief Facts:

In line with Ghana's power sector reform and as part of Government's short to medium term plan to improve electricity supply sufficiency, the Ministry of Energy (MoE) in conjunction with the Ghana National petroleum Corporation (GNPC), the Volta River Authority (VRA) and other stakeholders decided to harness gas from Ghana's Jubilee Oil fields for power generation. The Alstom Gas Turbine Generators (2 x 111.7MW GT11N2) procured for installation in Tema under the Kpone Thermal Power Project (KTPP) was therefore to be relocated to Bonyere in the Western Region [the Bonyere Thermal Power project (BTPP)], now officially referred to as the *Domunli Thermal Power Project* (DTPP).

The project was to be developed in phases, of which Stage 1 of Phase 1 comprised the completion of installation of the 2 Alstom gas turbines by the 2nd quarter of 2013, projected to produce approximately 220MW of additional electricity onto the national grid, and Stage 2 comprised the construction of a steam component to produce an additional 110MW of power. Depending on the availability of gas from the oil fields, a total of 1000MW of future power generation was anticipated.

In line with government policy of encouraging independent power producers to participate in the power generation industry, Government directed that the BTPP be developed under a Joint Venture (JV) partnership between the VRA and a strategic partner. Having already received a number of unsolicited proposals from private investors, the MoE mandated the VRA to initiate the selection process.

Of thirty five (35) prospective investors who collected documents for the pre-qualification process, seven (7) submitted applications by the deadline of 29th July, 2010, four (4) of which were subsequently pre-qualified and invited in December 2010 to submit final tenders, via a Request for Proposals, for the selection of a joint venture partner. Proposals submitted were duly assessed for responsiveness, qualification and eligibility and investors commitment to the future expansion and development of the project.

The Complainant (a consortium of three (3) companies comprising Cenpower (Domini) Limited (Ghana); Consolidated Power Projects (Pty) (South Africa) and GMR Infrastructure (UK) emerged the most responsive evaluated tender.

The Complainant in establishing its qualifications as an eligible tenderer during the tender process, disclosed a shareholding interest of the Chief Executive Officer of the VRA (CEO of VRA) in another company (*Cenpower Holdings Ltd*.) which held shares in Cenpower (Domini) Limited – [Complainant herein, and member of the winning consortium above]. In further

support of this disclosure, the Complainant also stated in its offer letter that the CEO of VRA had remedied a conflict-of-interest arising from his involvement with Complainant, in compliance with *Section 2.4 (5) of the Volta River Development (Amendment) Act, 2005 (Act 692)* and section 7(5) of its Standing Orders.

Central Tender Review Board:
Subsequently, an application for the concurrent approval of the Central Tender Review Board (CTRB), required for the contract to be awarded, failed on the basis that a financial conflict-of-interest existed on the part of the CEO of the VRA, in respect of his interest in Cenpower Domini Ltd. through *Cenpower Holdings Ltd*., which conflict-of-interest had not been satisfactorily remedied by the VRA nor the Complainant

The CTRB based its decision on a legal opinion issued by the Attorney-General & Minister for Justice on the matter, which among others questioned the veracity of various documents submitted to show that the conflict-of-interest had been remedied. In the AG's opinion, documents presented to prove the surrender of business interest in Cenpower Domini Ltd. (i.e. letter of resignation as a Director of *Cenpower Holdings Ltd*.) and relinquishment of shares thereof), were neither convincing nor adequate and had not sufficiently addressed the extent of disclosure required to remedy the conflict-of-interest situation which had arisen.

AG's Legal Opinion:
It was the AG's opinion that during the entire bidding process, the CEO of VRA had a financial interest in Cenpower Domini Ltd. one of the 3 firm consortium which had won the BTPP/DTPP bid) That the timing, the 'limited' nature and unconvincing manner of disclosure seemed calculated to suppress, mislead and divert the attention of the VRA Board from the financial interest aforementioned. And finally, that the requisite written declaration was not properly made to the VRA Board prior to selection of the winning consortium, as required under Section 2.4(5) of the Volta River Development (Amendment) Act 2005 (Act 692) which states:-

> "4 (5) *A member of the Authority who has an interest in a contract or other transaction proposed to be entered into with the Authority or an application before the Authority shall disclose in writing the nature of the interest and is disqualified from participating in any deliberation of the Authority in relation to the contract, application or transaction*."

It was the AG's opinion that in any case, the 'letter of declaration' presented by the Complainant came too late in the process to ensure a level playing field for the other prospective tenderers. That transparency and accountability of that tender process was therefore compromised. The AG argued that as at the outset of the tender process, an interest disclosure properly made, should have been in writing from the CEO to the VRA Board, which obligation could not be discharged by the Complainant on his behalf. From the foregoing, the AG finally contended that this conduct offended Section 93(1) of the Public Procurement Act, 2003 (Act 663). This section requires compliance with the conflict-of-interest provisions of Article 284 of the Constitution by public officers.

Additionally, the AG was of the opinion that *CenPower Holdings Ltd*., to the extent that it had failed to disclose its business interest with the CEO of VRA, had equally contravened the conflict-of-interest provision of Section 93 (1) of Act 663 and was liable under Section 92(1) of Act 663. That this conduct of both parties readily inferred collusion and influence to gain an unfair advantage in the award of the contract, contrary to Section 92(2)(b) of the Public Procurement Act, 2003 (Act 663).

Complainant:
The Complainant petitioned the PPA for administrative review of the matter, requesting a timely investigation, proper determination of facts, and reversal of the decision of the Central Tender Review Board (CTRB), which in Complainant's view was misdirected and one-sided, in as far as it did not duly factor in the side of all parties involved.

Complainant contended *inter alia*, that it had to the best of its efforts sufficiently disclosed the interest of the CEO of VRA *in Cenpower Holdings* in its tender documents, that the CEO of VRA

had made the necessary interest disclosures in linkage to Cenpower Domini Ltd. (the local joint venture partner of the preferred consortium for the DTPP) and had infact severed business links with Cenpower Domini Ltd. through the relinquishment of his shares in *Cenpower Holdings Ltd.* (a shareholding company of Cenpower Domini Ltd.). Moreover, he had resigned as a director of Cenpower Generation upon assumption of office as CEO, which was widely known and had duly informed the VRA of the sale of his interest in that company.

The Complainant maintained that the CEO had recused himself entirely from the tender process and most importantly, that the AG's opinion had failed to incorporate the decision of the Ministry of Energy (MoE) on the matter.

Ministry of Energy:
Though the MoE acknowledged the possibility of a conflict-of-interest it submitted that this could be cured if the CEO made the necessary disclosures and recused himself from participating in any decision making process relating to the joint venture. The MoE was content that appropriate action had been taken, the CEO of VRA having taken a number of essential steps to cure the conflict-of-interest, which included the consistent disclosure of a sequentially diminishing involvement in one 'shareholder' of the local JV partner of the recommended consortium, and also declining to participate in any discussions relating to the project.

Solicitor for CEO of VRA:
In his own defense through his Solicitor, the CEO of VRA also faulted the AG's opinion as incomplete, having failed to invite and duly incorporate the true state of affairs concerning the alleged conflict-of-interest. He contended that at all material times he had declared his interest in the Complainant and its affiliates; that he had accordingly declined to participate in the tender process, and finally, had taken necessary prior steps to dispose of his interest in the Complainant and its affiliates in compliance with VRA's Standing Orders and Act 46 (as amended).

VRA Board:
On its part, the VRA Board, taking note of the sequence of events from pre-qualification to the final approval of Evaluation Panel's recommendation by the VRA Entity Tender Committee (ETC) and the provisions of section 4(5) of Act 46 as amended and VRA Standing Order 7(5), held the view that indeed full disclosure had to be made at the time a transaction is proposed to be entered by the VRA or when an application is made. The CEO ought therefore to have made a formal disclosure of his interest in *Cenpower Holdings Ltd*. at the time of submission of the pre-qualification bid to partner the VRA in July 2010, or at any rate, prior to evaluation of the bids, which was not done. For these reasons, the VRA Board decided against contesting the CTRB's decision on the matter.

The VRA Board in mitigation however noted that indeed, established procedures for handling tenders within the VRA did not involve the CEO until the submission of an Evaluation Report (containing recommendations) before the ETC, of which he is a member. Secondly, that the CEO did in fact give a formal written confirmation of his interest in *Cenpower Holdings Ltd*. at its 24th February 2011 meeting, and recused himself from discussion of the Evaluation Report on the selection of a JV partner for the Domunli (DTPP)Project.

The VRA Board maintained that prior to these formal disclosures, the CEO's interest had been widely publicized long before the Domunli tender process and disclosed in documentation submitted by the Complainant at pre-qualification, and confirmed that contrary to the opinion of the Attorney-General and Minister for Justice, the CEO did not mislead or attempt to mislead the VRA Board in respect of his interest in the company aforementioned.

Issue(s):

Issues considered by the Authority were as follows:-

i. Whether the CEO of VRA had a financial conflict-of-interest and whether this was adequately remedied;

ii. Whether VRA's Evaluation Report and recommendation of a winning tenderer was technically compromised;

iii. Whether the Complainant contravened the conflict-of-interest provision of Section 93 (1) of Act 663 and was liable under Section 92(1) of Act 663 for contravention of Section 92(2)(b) of the Public Procurement Act, 2003 (Act 663) as asserted by the Hon. Attorney-General & Minister for Justice;

iv. Whether the conflict-of-interest situation created should adversely affect the implementation of this project.

Case Deliberation

In addressing the issues raised above and mindful of the need to arrive at an objective decision which would not jeopardize, halt or delay the implementation of a critical government project, the Appeals & Complaints Panel of the Public Procurement Authority (the Panel) considered the following statutory and international best practice rules applicable to the matter of conflict-of-interest, including the common law prohibition against "self-dealing"[1].

1. Section 87 of the Civil Service Act, 1993 (PNDCL 327);
2. Article 284 of the 1992 Constitution;
3. Guidelines on Conflict-of-Interest prepared by the Commission on Human Rights and Administrative Justice (CHRAJ) to assist public officials identify, manage and resolve conflicts of interest (the 'CHRAJ COI Guidelines');
4. Sections 205 to 207 of the Companies Act, 1963 (Act 179);
5. Conflicts of Interest laws and guidelines prepared by the Conflicts of Interest Office[2], Civil Division, Government Law Section of the California Attorney General's Office[3];

Of these rules, the Panel noted that the first two statutory provisions listed above, though applicable to public officers in a public office setting did not contain sufficient guidance to regulate or remedy such situations.

Though the CHRAJ COI Guidelines offered some guidance, the Panel also found the State of California Conflicts of Interest laws and guidelines useful and of persuasive effect, particularly to the extent that the latter regulates both general financial and specific conflict-of-interest situations in government contracts by local, state and legislative officials.

In analyzing whether a conflict-of-interest existed in the case at hand, the Panel considered the financial conflict-of-interest rules specifically dealt with under the California guidelines[4], which covers the following:-

i. both actual and apparent conflict-of-interest situations

ii. establishes a broad, objective disqualification standard between a public official's private interests and his or her public duties, such that, though public officials are not prevented from *owning* or *acquiring* financial interests that conflict with their official duties, and the mere possession of such interests does not require officials to resign from office, there is a basic disqualification from participating in government decisions in which they have a financial interest.

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[1] The common law prohibition against "self-dealing" has long been established in California law. (City of Oakland v. California Const. Co. (1940) 15 Cal.2d 573, 576.) The present Government Code section 1090, which codifies the common law prohibition as to contracts, can be traced back to an act passed in 1851

[2] http://ag.ca.gov/publications/coi.pdf. Download this Guide from the Attorney General's web site at www.ag.ca.gov.

[3] Attorney General opinions, unlike appellate court decisions, are advisory only. However, with respect to conflict-of-interest laws, courts have frequently adopted the analysis of Attorney General opinions, and have commented favorably on the service afforded by those opinions and this Guide. (See Lexin v. Superior Court (2010) 47 Cal.4th 1050, 1087; Thorpe v. Long Beach Community College Dist. (2000) 83 Cal.App.4th 655, 662.)

[4] the Political Reform Act of 1974

iii. Legislates the Common Law prohibition against "self-dealing"[5] which essentially prohibits a public official from being financially interested in a public contract in both the official's public and private capacities[6]. Aimed at avoiding actual impropriety or the appearance of impropriety in the conduct of government affairs, this common law principle requires government officials to disqualify themselves from participating in decisions in which *there is an appearance of* a financial conflict-of-interest[7]

Guided by the processes outlined in the aforementioned guidelines[8] to help determine the existence of a conflict-of-interest in this case, the Panel concluded without doubt (and in agreement with the VRA Board) that the CEO of VRA had an economic interest which qualified as a conflict-of-interest[9]

That said and done, the Panel noted that despite a disqualifying conflict-of-interest, a number of exceptions to the general prohibition (against an official's participation in decision making) applied, which include the limited "rule of necessity". This exception places emphasis on the performance of official duty and applies when an organization must contract for essential services despite a conflict-of-interest. It operates to permit an organization to proceed with a contract, subject to the interested official disclosing an interest in the prescribed manner and disqualifying himself/herself from participating in making the contract.

Decision:

Following extensive deliberation of the case, after due consideration of both verbal and documentary submissions of the parties, the Panel decided as follows:-

i. In arriving at its conclusion on issue number (i) above, the Panel considered four legal provisions, Section 2(4.5) of the Volta River Development (Amendment) Act, 2005 (Act 692); Order 7(5) of the Standing Orders of Members of the Authority; Sections 92 and 93 of the Public Procurement Act, 2003 (Act 663), to conclude that though a financial conflict-of-interest was established on the part of the CEO of VRA and, in agreement with the Hon. Attorney-General, the timing, procedure and level of disclosure required might not have been handled in a consistent manner, there had been an appreciable level of disclosure which provided the mitigation needed to exonerate the CEO of VRA from any wrong-doing.

   As earlier noted from international best practice regulations, the mere possession of a conflict-of-interest does not require officials to resign from office nor impose liability for sanctions under VRA's regulations or Sections 92(2)(b) or 93 of the Public Procurement, Act, 2003 (Act 663). The crux of Sections 2(4.5) of the Volta River Development (Amendment) Act, 2005 (Act 692) and Order 7(5) of the Standing Orders of Members of the Authority is disclosure, which was amply attested to by the VRA Board in its documentary and oral submissions to the Panel. For example, VRA letter no. Exe/1090/029/2463 of 21st December, 2011, among other things, confirmed that the CEO, in compliance with VRA's Standing Orders and regulations, tabled a formal

[5] The common law prohibition against "self-dealing" has long been established in California law. (City of Oakland v. California Const. Co. (1940) 15 Cal.2d 573, 576.) The present Government Code section 1090, which codifies the common law prohibition as to contracts, can be traced back to an act passed in 1851

[6] Lexin v. Superior Court (2010) 47 Cal.4th 1050, 1073.

[7] In the words of the Supreme Court of California, "the purpose of [which] is to make certain that "*every public officer be guided solely by the public interest, rather than by personal interest, when dealing with contracts in an official capacity".*

[8] Prepared by the Fair Political Practices Commission ("FPPC") - Agency responsible for advising officials, informing the public, and enforcing the Political Reform Act, 1974

[9] Qualifying types of economic interest include Investments in or positions with business entities; Investments in or positions with business entities cover both direct and indirect investments; "Business entity" covers all organizations operated for profit, which include corporations, partnerships, joint ventures, sole proprietorships, and any other type of enterprise operated for a profit. An official who has an economic interest in one such entity *is also deemed to have an interest in all the other related entities.* One business entity is related to another business entity, if that business entity or its controlling owner is a controlling owner of the other business entity, or if management and control is shared between the entities.

disclosure of his interest in Cenpower Domini Ltd. at a meeting of the Board held on 24th February 2011 and recused himself from that meeting, at least one month before the Evaluation Report came up for consideration and approval by the Entity Tender Committee (ETC)). Prior to these disclosures, the CEO's interest in another related company had been widely publicized in a number of corporate publications, prior to the Domunli Project.

The Panel noted that some effort was clearly made to disclose the CEO's interest both publicly and internally within the organization aimed at compliance with VRA's regulations aforementioned, on the matter. In any case, the CEO divested himself of any interest in the Complainant company as of 7th April, 2011. From the evidence, no case was made which warranted culpability under section 92(2)(b) of the Public Procurement Act, 2003 (Act 663).

Section 2(4.5) of the Volta River Development (Amendment) Act, 2005 (Act 692) states:-

> "*A Member of the Authority who has an interest in a contract or other transaction proposed to be entered into with the Authority or an application before the Authority shall disclose in writing the nature of the interest and is disqualified from participating in any deliberation of the Authority in relation to the contract, application or transaction*".

Order 7(5) of the Standing Orders of Members of the Authority states:-

> "*Any Member having a financial or business interest in any matter before any meeting of the Authority and/or of its Committees, whether in respect of himself, his wife, or any member of his family, or any business partner or associate, or in any other manner, shall before the matter is discussed at once disclose the nature of such interest to the meeting, and shall take no part in the discussion or voting upon the matter*."

Section 92(2)(b) of Act 663 states:-

> "(2) *The following shall also constitute offences under this Act* [*for which a person will be liable on summary conviction to a fine not exceeding 1000 penalty units or a term of imprisonment not exceeding five years or to both under s92(1)*]:
>
> (b) *directly or indirectly influencing in any manner or attempting to influence in any manner the procurement process to obtain an unfair advantage in the award of a procurement contract*."

Section 93 of Act 663 which deals with Corrupt Practices, states:-

> "(1) *Entities and participants in a procurement process shall, in undertaking procurement activities, abide by the provisions of article 284 of the Constitution*;

Having determined the effect of the conflict-of-interest in the entire process, the Panel was of the view that it should not significantly affect the pressing need to proceed with the project in the national interest.

From the foregoing, and in view of the public policy objectives of paragraph (iv) below, the Panel recommended that henceforth the VRA should enhance its Standing Orders in the light of international best practices highlighted above, by instituting additional procedures or modalities for handling such situations and providing guidance on remedial actions to be taken, from the outset of such situations.

Though the Panel noted that the CEO of VRA divested himself of any interest he had in the Complainant Company as of 7th April 2011, it recommended that the VRA should put structures in place to actively monitor this project to ensure that the said conflict-of-interest remains remedied.

ii. The Panel noted that the evaluation process and subsequent recommendation of a winning tenderer was in no way technically compromised. As earlier noted, the project originated from the Ministries of Energy (MoE) and Finance & Economic Planning, who appointed VRA to implement. Neither the Ministry of Energy, the CTRB, the ETC of VRA nor indeed the Appeals & Complaints Panel found any issue with the evaluation report or faulted it technically.

iii. Having dealt with and disposed of the matter of conflict-of-interest, the Panel concluded that the Complainant could not be faulted either. The company could not be held responsible for the conflict-of interest of a public officer.

Contrary to the A-G's opinion, the Complainant could not be held to have breached Sections 92(2)(b) and 93 of Act 663, because the applicable conflict-of-interest provisions only dealt with public officers whereas the Complainant was a private company. Secondly, the Panel was of the view that from the evidence, the Complainant tried to make requisite disclosures via the tender forms, which constituted a mitigating factor. By indicating the existence of a financial conflict-of-interest in its tender documents, the Complainant in effect publicly disclosed and brought the matter out in the open at a very early stage of the tender process through the Applicant's Information Form, as of 22nd July, 2010, in its attempt to abide by and comply with Section 93(1) of the Public Procurement Act, 2003 (Act 663) which states:

> "*Entities and participants in a procurement process shall, in undertaking procurement activities, abide by the provisions of article 284 of the Constitution*"

Article 284 of the 1992 Constitution reads:

> "*A public officer shall not put himself in a position where his personal interest conflicts or is likely to conflict with the performance of the functions of his office*."

The Panel found no evidence of contravention of Section 92(2)(b) of the Public Procurement Act, 2003 (Act 663) by the Complainant, as asserted in the Hon. A-G's opinion, which section states:

> "The following shall also constitute offences under this Act:
>
> (b) *directly or indirectly influencing in any manner or attempting to influence in any manner the procurement process to obtain an unfair advantage in the award of a procurement contract*"

The Panel reiterated that the existence of a conflict-of-interest situation, of its own, does not translate into a direct or indirect influence calculated to obtain an unfair advantage in a procurement process.

Consequently, the Panel found that the Complainant was not liable under Section 92(1) of Act 663 as asserted by the Hon. Attorney-General & Minister for Justice, which states:

> "*Any person who contravenes any provision of this Act commits an offence and where no penalty has been provided for the offence, the person is liable on summary conviction to a fine not exceeding 1000 penalty units or a term of imprisonment not exceeding five years or to both*".

iv. In view of the critical energy requirements of the nation; the fact that the VRA is the technically suitable institution to conduct and supervise this project; and the urgency

with which the VRA must implement the essential service of putting the 2 Alsthom Gas Turbines, now lying idle, to profitable use, the Panel, in accordance with Sections 80(3)(a) and (b) of the Public Procurement Act, 2003 (Act 663) and by further powers vested under Sections 89 and 90(2)(c) of the same, hereby ratifies the evaluation process undertaken by the VRA and recommends that the PPA mandate the VRA Board to proceed with the tender process as duly evaluated, but subject to the disqualification of the CEO from participating in any decision making thereof, throughout the lifecycle of the entire project, even though he has divested himself of his shares in the Complainant company. These recommendations are also premised on powers vested in the PPA by sections 3(d), (m) and (u) of the Public Procurement Act, 2003 (Act 663). These sections state:-

"3 – In furtherance of its object the Board shall perform the following functions:-

(d) Monitor and supervise public procurement and ensure compliance with statutory requirements;
(m) Organize and participate in the administrative review procedures in Part VII of this Act;
(u) Perform such other functions as are incidental to the attainment of the objects of this Act.

Of persuasive effect also was the limited "Rule of Necessity" from the Political Reform Act 1974 of the State of California.

v. The Panel was unhappy about the refusal of the Central Tender Review Board (CTRB) to respond to and participate in the dispute resolution process, as duly requested. The Panel was of the view that the CTRB's crucial role as an 'administrative structure' within the public procurement system demanded greater cooperation with the sector Regulator, in all matters, particularly in the critical task of dispute resolution.

The CTRB's refusal to grant concurrent approval without a thorough and conclusive investigation of the merits or demerits of the case only created a stalemate without providing any credible solution.

vi. Case decided in favour of the Complainant.