

Dear Members of the Tribunal,

**PCA Case No. 2020-21: *Patel Engineering Ltd* (“Claimant” or “PEL”) v. *The Republic of Mozambique* (“Respondent” or “Mozambique”, together the “Parties”), C-50**

1. Pursuant to the Tribunal’s correspondence A-40, and in response to Respondent’s submission R-42, Claimant reiterates its request for the Tribunal to order Respondent to produce the ITD Proposal.
2. At its core, Respondent resists production on the purported basis that (1) Mozambican law (specifically, Article 33 of Decree No. 15/2010 (the “**Public Procurement Rules**” or “**PPR**”)) supposedly prohibits disclosure of alleged confidential information of a third party, ITD; and (2) any confidentiality undertaking would be “*ineffectual*”.<sup>1</sup> Mozambique is wrong on each account.
3. First, Article 33 of the PPR does not prohibit the disclosure of the ITD Proposal **vis-à-vis PEL**, as PEL falls within the express exception to the general rule. Article 33(3) states: “[t]he documents on evaluation and bids by the tenderers are confidential and are only made available to the entity responsible for providing clarification on the results of the evaluation process, **without prejudice to the provisions of paragraph 3 of Article 140 of these Regulations.**”<sup>2</sup>
4. PPR Article 140(3), in turn, provides that “[d]uring the periods for filing a complaint, **tenderers may freely consult the file of the administrative procedure of the tender.**”<sup>3</sup> That file includes all tenderer proposals and Mozambique’s corresponding evaluations. Thus, bidder proposals and evaluations may be consulted by a losing bidder, *i.e.*, in this case, by PEL. While under Article 140(3) that right is exercised within the complaint period, the critical point for this application is that **the ITD Proposal is not confidential vis-à-vis PEL**. The fact that Mozambican law expressly permits a losing bidder to review both competing proposals and their corresponding evaluations demonstrates that Mozambique is wrong when it contends that confidential and/or commercially sensitive information relating to a third party cannot be disclosed to PEL in the current circumstances.
5. This conclusion is confirmed by the principle of transparency, as embodied in PPR Article 4(1): “[i]n the application of these Regulations, the parties must observe the principles of legality, purpose, reasonableness, proportionality, pursuit of the public interest, transparency, publicity, equality, competition, impartiality, good faith, stability, motivation, responsibility, good financial management, expediency and the other applicable principles of public law.”<sup>4</sup> Mozambican law further recognises a general right to access information, as articulated in Law No. 34/2014. Pursuant to that law, entities vested with public authority by law or contract (including the MTC) must make any information available upon request; access can only be refused in the event such information has been classified as a State secret or is otherwise classified as confidential.<sup>5</sup> The rationale for this transparency requirement, and the losing bidder’s ability to view other proposals and corresponding evaluations, is clear: without such transparency, the State would lack accountability. It could conduct sham tenders contrary to the public interest (which is indeed what PEL argues in this case).
6. As a result, Mozambique should produce the ITD Proposal without redaction, and Claimant and its counsel hereby stipulate to keep the ITD Proposal confidential, as it would have had to have done in the ordinary course, had PEL accessed the ITD Proposal during the complaint period in the tender process.
7. Second, in the event the Tribunal prefers Respondent’s position concerning confidentiality under Mozambican law, or would propose that the Parties execute a confidentiality agreement in relation to the ITD Proposal in any event, Claimant disagrees that such an agreement would be ineffectual. To start with, *Global Telecom Holding v Canada* is inapposite. It dealt with communications between regulators and entities in a regulated sector, which that tribunal considered could be recognised as privileged by international tribunals, on the facts and circumstances of that case. That is not a concern here, where Mozambican law expressly allows a losing bidder (*i.e.* PEL) to access the proposals and evaluations of other tenders, including the ITD Proposal. Further, given the passage of time and subsequent events (including the award of the concession to ITD),

<sup>1</sup> Letter from Dorsey & Whitney to the Tribunal (R-42), dated 14 April 2022, para. 13(a).

<sup>2</sup> **CLA-67A**, Decree No. 15/2010, of 24 May 2010, Article 33(3). (Emphasis added).

<sup>3</sup> *Id.* at Article 140(3): “3. No decurso dos prazos para reclamação, os concorrentes têm consulta livre do procedimento administrativo do concurso.”

<sup>4</sup> **CLA-67A**, Decree No. 15/2010, of 24 May 2010, Article 4(1). See also **CLA-65A**, Law No. 15/2011, of 10 August 2011 (PPP Law), Article 13(6): “In any of the PPP forms of contracting, the principles of legality, purpose, reasonableness, proportionality, pursuit of the public interest, transparency, publicity, equality, competition, impartiality, good faith, stability, motivation, integrity and suitability, responsibility, good economic and financial management, promptness, and the other applicable principles of Public Law must be observed.”

<sup>5</sup> **CLA 239**, Law No. 34/2014 of 31 December 2014, Articles 7, 10-11, and 20.

there is no risk of PEL “*competing*” with ITD in relation to the contents of a proposal that has been superseded by a concession agreement and revised plans for the Project’s implementation. Moreover, any information concerning ITD itself would by now be over a decade old and thus inherently stale. In addition, to the best of PEL’s knowledge and belief, it has never competed with ITD in a tender either before or after the Project; certainly, PEL and ITD simply do not compete on a regular basis. In any event, the ITD Proposal unlikely contains any information that is confidential to ITD. Like the bidding documents (**Exhibit C-27**) and the PGS Consortium’s proposal (**Exhibits C-37 and C-190**), most of the information in the ITD Proposal likely relates either to the Project or constitutes public information about ITD (a public company that must disclose information about its shareholders, financial statements in its annual reports). As to Project-related information, Mozambique itself disclosed some of this information in its correspondence with bidders (including information on the concession premium offered by the bidders, *see e.g.*, **Exhibit C-240**). In these circumstances, the disclosure of the ITD Proposal containing complete information related to the Project would not undermine any rights of ITD. Critically, Respondent did not give the Tribunal any indication of the type of the information in the ITD Proposal that is confidential, why the confidentiality protocol (which is for attorneys’ and experts’ eyes only) would be ineffectual, or why redactions to any truly confidential information could not accommodate any confidentiality concerns. Accordingly, Mozambique has failed to explain how the confidentiality undertaking proposed by PEL would be ineffectual.

8. Four further points are worth noting:

- a. **First**, in the Parties’ discussions regarding the submission of a new valuation, no undertakings were made by either side concerning document production. Rather, given Mr Basombrio’s health issues, the merits hearing would have been postponed in any event, and Claimant sought to introduce a new valuation considering the revised schedule, to which Respondent agreed. Mozambique’s attempt to link Claimant’s new valuation and document production is disingenuous.
- b. **Second**, Mozambique’s contention that “*this Tribunal did not find the ITD Proposal was relevant or material*” is wrong. In the section entitled “*Tribunal’s Decision*”, the Tribunal found that “**request (2)**<sup>6</sup> [which includes the ITD Proposal] **is granted as it meets the requirements R1 to R3.**”<sup>7</sup> Requirement R2 is “*relevance and materiality*”. Thus, this Tribunal already ruled the ITD Proposal to be relevant and material. It is relevant and material to both the merits of this dispute and quantum.
- c. **Third**, the Tribunal has not closed the record. Indeed, new documents will be entered into evidence with the forthcoming valuation submissions, and the hearing is more than seven months away.
- d. **Fourth**, the request is made in good faith, is reasonable, and is proportionate (*i.e.*, one document). The balance of equities favour ordering the production of the ITD Proposal. If it is withheld, PEL will be deprived of key evidence relevant and material to both its fair and equitable treatment claims in relation to Mozambique’s sham tender process, as well as the quantification of the value of PEL’s contribution to the Project’s development. Given Mozambique has an opportunity to respond to PEL’s submission in writing, and that the hearing will not take place for over seven months, Mozambique will suffer no prejudice if Claimant’s request is granted. In contrast, the harm and prejudice PEL will suffer if the request is denied will be great, depriving PEL of access to key information relevant and material to both its case on the merits and quantum. In circumstances where the Tribunal has already found the document to be relevant and material, any alleged confidentiality can be managed, and PEL requires the document as part of its case to be fully and fairly heard, the Tribunal should order production of the ITD Proposal.

Yours faithfully,



**CMS Cameron McKenna Nabarro Olswang LLP, Counsel for Claimant**

<sup>6</sup> Request (2) comprised “*the bidding documents provided by the companies that were pre-qualified on 12 April 2013 other than PGS Consortium*”; this includes the ITD Proposal.

<sup>7</sup> Tribunal’s Decision on Claimant’s Document Production Schedule, p. 54, Document Request No. 21.