ANALYSIS AND ADVICE ON THE LEGAL EFFECT OF THE COTONOU AGREEMENT ON THE ZAMBIA PUBLIC PROCUREMENT ACT

BY

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ANALYSIS AND ADVICE ON THE LEGAL EFFECT OF THE COTONOU AGREEMENT ON THE ZAMBIA PUBLIC PROCUREMENT ACT

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Being a final year dissertation submitted to the University of Zambia, School of Law in partial fulfilment to the requirements for the award of the Degree of Bachelor of Laws (LL.B)

MARCH, 2010
DECLARATION

I, Daniel Maimbo, Computer No. 92063799, do hereby declare that I am the author of this Directed Research Paper entitled: ANALYSIS AND ADVICE ON THE LEGAL EFFECT OF THE COTONOU AGREEMENT ON THE ZAMBIA PUBLIC PROCUREMENT ACT, and confirm that it is my own original work.

I further declare that, due acknowledgements have been made where other people’s work has been used. I verily believe that this research essay has not been presented in the School or indeed any other learning institutions for academic purposes.

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Dr Patrick Matibini
(SUPERVISOR)
ABSTRACT

This study sought to generate an understanding and knowledge of issues surrounding the utilisation of European Development Fund (EDF) procurement procedures on funds granted to Zambia by the European Union (EU) under the Cotonou Agreement, at the expense of utilising the Public Procurement (PPA) Act of Zambia.

The sample included all the GRZ ministries and agencies that have fundamental role in the initiation, signing and execution of the Cotonou Agreement. The study was conducted using a legal centralist approach. A desk study approach focused on the Agreement and subsequent documents; the Constitution, the PP and the Public Finance (PF) Acts; and judicial precedents. Data was analysed qualitatively.

The most significant findings are that, on one hand, utilizing EDF procurement procedures on EDF funded procurements under the Cotonou Agreement is mandatory; on the other hand, all grants to Zambia are public funds on which the PP Act is applicable unless an alternative procurement system has been approved as per the Act. Despite the EDF procedures not being domesticated, they are being applied by the National Authorising Officer (NAO) of the EDF for all EDF funded procurements. There is need to amend the PP Act so as to make it clearer and realistic on what law is applicable for donor funds with mandatory, but distinct procurement rules and procedures. Where necessary, domestication of alternative rules and procedures has to be effected speedily.
ACKNOWLEDGEMENT

To begin with, I recognize and salute the valuable guidance I received from Dr Patrick Matibini who supervised me in carrying out this research. I also recognise the advice I received from the late Mr A Gaibie who was my initial supervisor under this study.

Second, I recognized the assistance I received from the Zambia Public Procurement Authority and in particular, the Board Secretary, Mrs B. Sombe; and Mr J. Matimuna. In the same vein, I thank Mr H. Kumwenda of the Ministry of Commerce, Trade and Industry and Mr C. Katota of Ministry of Foreign Affairs for their advice on the ratification of the Cotonou Agreement.

Third, I salute the Ministry of Justice as a whole and in particular, Mrs Salasini, who spared time to explain the concept of domestication and encouraged me to forge ahead with the study.

Fourth, I thank Mr Temwani Chihana of the National Authorising Office of the European Development Fund for availing to me the relevant documents on EDF funding to Zambia.

Finally, I salute Etambuyu Anamela Gundersen; my traditional cousin for having read, edited and commented on this report.
DEDICATION

I dedicate this work to my late mother Margaret Milambo Balemu Chona Maimbo who died of liver cancer at 10:35 hours on Sunday 6th December, 2009 at the University Teaching Hospital in Lusaka, Zambia while I was collecting data for this study. Mum, you did not just bore and nursed me, you taught me to love human beings equally and to work hard. I thank the almighty God for giving me such a lovely mother. I wish you lived longer.

By the same margin, I dedicate this work to my father, Mr Dickson Moondonga Maimbo who did not only teach me to work hard, but gave me all the good advice that guides me to date.

I also dedicate this work to my wife Eunice Mweemba Maimbo, who did not only give me support but also gave me all the time I needed to carry out the study.

Lastly, I dedicate this work to my children, Muna, Milambo and Moola who endured my numerous absences from home during the time I have been studying the law programme (2005-2010).
LIST OF ABBREVIATIONS

A-G  Attorney-General
ACP  African, Caribbean and Pacific
CO   Controlling Authority
CoA  Committee of Ambassadors
DFCC Development Finance Co-operation Committee
DNAO Deputy National Authorising Officer
EC   European Commission
ECDPM European Centre for Development Policy Management
EDF  European Development Fund
EIB  European Investment Bank
EU   European Union
EUD  European Union Delegation
EUD  European Union Delegation
FA   Financing Agreement
FR   Financial Regulations
GC   General Conditions of contract
GR   General Regulations
GRZ  Government of the Republic of Zambia
JPA  Joint Parliamentary Assembly
MoFNP Minister of Finance and National Planning
NAO  National Authorising Officer
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<td>PE</td>
<td>Procuring Entity</td>
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<td>PF</td>
<td>Public Finance</td>
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<td>PP</td>
<td>Public Procurement</td>
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<td>PS</td>
<td>Permanent Secretary</td>
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<td>ST</td>
<td>Secretary to the Treasury</td>
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<td>WB</td>
<td>World Bank</td>
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<td>ZNTB</td>
<td>Zambia National Tender Board</td>
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<td>ZPPA</td>
<td>Zambia Public Procurement Authority</td>
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1. Constitution of the Republic of Zambia (as amended by Act No. 18 of 1996), Chapter 1 of the Laws of Zambia

2. Public Finance Act, No. 15 of 2004

3. Public Procurement Act, No. 12 of 2008

4. Zambia National Tender Board Act (as amended by Act No. 13 of 1994), Chapter 394 of the Laws of Zambia

DELEGATED LEGISLATION

Circular No. 1 of 2009, Zambia Public Procurement Authority, 6 January 2009
INTERNATIONAL CONVENTIONS/TREATIES AND RELATED DOCUMENTS


5. General Conditions for Supply Contracts Financed by the European Development Fund, 2008


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CHAPTER ONE

1.0 INTRODUCTION

“An Analysis and Advice on the Legal Effect of the Cotonou Agreement\(^1\) on the Zambia Public Procurement Act” paper arises from the apparent contradiction that exists on the utilisation of funds granted to Zambia by the European Union (EU) via the European Development Fund (EDF), in the discharge of the obligations of the Agreement. There has been incongruity between the EU and the Zambia Public Procurement Authority (ZPPA), regarding the procedures and the law to apply in the utilisation of the said funds. Based on the understanding that all moneys donated to Zambia are public funds, ZPPA has insisted that the Public Procurement Act\(^2\) (PP Act) is applicable and should be applied on procurements funded by the EDF. On the contrary, the European Union Delegation (EUD) in Zambia has been unambiguous that EDF grants are only subject to the procurement procedures emanating from the Cotonou Agreement. There is need to scrutinize and advise on the legal issues surrounding procurements funded by the EDF.

In exercising the powers conferred by the Constitution\(^3\), in June, 2000, the executive in Zambia along with other African Caribbean and Pacific (ACP) states on one hand, and the EU states on the other hand, entered into the Cotonou Agreement at Cotonou in Benin. The Agreement initially involved 77 (now 78) ACP Countries and fifteen (now 25) Member States of the EU. It is a multilateral cooperation between 78 ACP, and 25 EU

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\(^1\) Partnership Agreement signed in Cotonou on 23 June 2000 Revised in Luxembourg on 25 June 2005, Office for Official Publications of the European Communities

\(^2\) Public Procurement Act, No. 12 of 2008

\(^3\) Constitution of the Republic of Zambia (as amended by Act No. 18 of 1996), Cap I
countries. It started in 1957, with the Treaty of Rome. From that Treaty, came Yaoundé I (1963) and II (1963) Conventions. The Conventions continued through Lomé I (1975), II (1980), III (1985), IV (1990) and Lomé IV-Bis (1995) Conventions. Finally, on 1st March, 2000, the Conventions were succeeded by the Cotonou Agreement which was to last for 20 years with revisions after every five years. The Agreement has many provisions. However, this paper is mainly concerned with Development Finance Co-operation, whose objectives through the provision of adequate financial resources and appropriate technical assistance, is to support and promote the efforts of ACP states to achieve the objectives set out in the Agreement. 

The Cotonou Agreement entered into force on 2nd April, 2003. The last revision was signed in Luxembourg on 25th June, 2005. The Agreement structures the European Union’s development assistance to the ACP Countries for more than 30 years. The main objectives of the Agreement are; poverty reduction and ultimately its eventual eradication, sustainable development, and progressive integration of the Caribbean and Pacific (ACP) countries into the world economy. The Agreement in a lot of ways suggests that it is binding upon signatories.

The totality of EDF resources is channelled to the ACP States via two instruments. However, this study is concerned with the non-reimbursable envelope. The Non-reimbursable envelope is further divided into Envelope A and B. This study is concerned

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4 Cotonou Agreement, Revised in Luxembourg on 25 June 2005, Part 4, Development Finance Co-operation, Article 55
5 Ibid., Article 19(1)
6 Ibid., Article 2 of Part 1
7 Françoise Moreau, Head of Unit, Forward Looking Studies and policy Coherence, European Commission, Directorate-General, Development and Relations with African Caribbean and Pacific States, quoted in Cotonou Agreement, Revised in Luxembourg on 25 June 2005, page 18
with Envelope A, which among others, comprises financial assistance in form programmes and projects. Once the EU Delegation Headquarters takes a favourable global financing decision, specific projects or programmes Financing Agreements (FA) are drawn, and signed between the EU and the Government of the Republic of Zambia (GRZ). It is in the implementation of the FA that procurement rules come into play. According to the decision of the Council\textsuperscript{8}, the award of contracts financed by the EDF is governed by the General Regulations (GR) for service, supply and works contracts financed by the EDF. The performance of contracts is governed by the General Conditions\textsuperscript{9} (GC) for service, supply or works contracts financed by the EDF. Arising out of the GR and GC, are Financial Regulations (FR), User Guide to Financial Procedures, Practical Guide to Contract Procedures and Practical Guide to Direct Labour Operations and Programme Estimates.

### 1.1 Statement of the problem

On one hand, the Cotonou Agreement has generated its own procurement rules and procedures on the utilisation of funds granted to Zambia by the EU via the EDF. On the other hand, GRZ has its own procurement 'law' (PP Act) to be applied on all public funds. ZPPA has always required the public procurement entities including the NAO, to utilise the national laws on the use of funds granted to GRZ by the EDF, on the understanding that they are public funds.\textsuperscript{10} On the other hand, the EU has argued that only the multilateral and jointly agreed upon procurement rules and procedures generated under the

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\textsuperscript{8} Decision No 2/2002 of the ACP-EU Council of Ministers of 7 October 2002 regarding the implementation of Articles 28, 29 and 30 of Annex IV to the Cotonou Agreement', Official Journal of the European Communities (23 November 2002), pages 320-321

\textsuperscript{9} Ibid.

\textsuperscript{10} Public Procurement Act, No. 12 of 2008, s3
Cotonou Agreement are applicable on EDF funds granted to Zambia. Arising from this 'standoff', are many questions which this study seeks to answer.

The result of the lack of clarity is that, for EDF funding, one public officer (NAO) has to utilise two different procurement procedures. The practical effect of applying two, but different procurement 'laws', has been delays in the implementation of the EDF funded projects. For example, while the EUD may authorise the procurement on the basis of the EDF procedures, the ZPPA may deny authorisation on the basis of the PP Act. It has not been clear whether procurement rules and procedures arising from the Cotonou Agreement involving many countries could require domestication before being applied in Zambia.

1.2 Purpose of the Study

This study seeks to generate an understanding and knowledge of issues surrounding the utilisation of EDF procurement procedures on funds granted to Zambia by the EU under the Cotonou Agreement with a view to advising and recommending the best way Zambia would accommodate both its treaty and constitutional obligations. The main objectives are as listed below.

1.3.1 Objectives of the Study

(a) To establish whether the grant money donated by the EU via the EDF to Zambia qualifies to be 'public funds', in order to establish the law that is applicable for utilizing those funds;
(b) Taking into account that public officers sign contracts financed by the EDF, to establish the legality of signing of such contracts by Zambian public officers, and the legal consequences;

(c) In view of the provisions of the Public Procurement Act, and the Public Finance Act, to establish the legality of utilizing the General Regulations and subsequent documents for contracts financed by the EDF for the benefit of Zambia, at the Expense of the PP Act; and

(d) Depending on the findings to the objectives above, to give advice on ways of improving the legal environment of procurements financed by the EDF for the benefit of Zambia.

1.3.2 Hypotheses

(a) Grant money donated by the EU via the EDF to Zambia under the umbrella of the Cotonou Agreement does not qualify as 'public funds', therefore, the provisions of the PP Act and the Public Finance Act (PF Act), do not apply to procurements funded by the EDF;

(b) Public officers sign contracts financed by the EDF, for the benefit of Zambia under the Cotonou Agreement, not as public officers, but in the capacity defined by the Cotonou
Agreement. The legal consequences for that is as provided for under the Cotonou Agreement;

(c) The current legislation is inadequate and is not specific in its meaning, definition and application. The GRZ should develop a piece of legislation that clearly excludes donor funded procurements from applying the PP Act.

1.4 Significance of the Study

Like many other ACP Countries, Zambia, has been and continues to receive substantial financial assistance mainly in form of grants from the EU for more than thirty years now. This financial assistance which emanates from the Cotonou Agreement is channelled through the EDF. For example, for the period 2008 to 2013, otherwise known as the 10th EDF, the overall financial assistance to the ACP shall be €23,966 million.\textsuperscript{11} As for Zambia, the period 2008-2013, was allocated €475 million under envelope A and €14.8 million under envelope B.\textsuperscript{12} The period 2001-2007, was allocated €240 million under Envelope A and €111 million under envelope B.\textsuperscript{13} Like most donors, the EU via the EDF prescribes its own procedures for utilising the donated funds. This results into incoherent processes that may reduce efficiency and effectiveness as implementing officers for example need time to learn new procedures, while taking into account the national legal obligations. In his foreword to the Cotonou Agreement, Mr Françoise Moreau\textsuperscript{14}, states that;

\textsuperscript{11} Cotonou Agreement, Revised in Luxembourg on 25 June 2005, Annexe Iib(1) at page 6
\textsuperscript{14} Françoise Moreau in Cotonou Agreement, page 11
Evaluations of Community aid to the ACP countries often demonstrated that insufficient account had been taken of the institutional and policy context in the partner country and this had too often undermined the viability and effectiveness of co-operation.

It must be emphasised that the Cotonou Agreement is just one of the many international and national agreements that influence the policies and priorities of ACP countries. In general, this study is intended to propose the best way the Zambian Government can ensure coherence in procurements rules and procedures for both EDF and GRZ funded projects in order to achieve efficiency. As Zambia has plenty international agreements that employ distinctive award of contract procedures, this analysis may be of equal application to other donor funded procurements such as those funded by the World Bank.

1.5 Operational Definition of Terms

In principle, the operational definitions of terms in this paper shall have the same meaning as in the respective statute. Equally, operational definitions of terms under the Cotonou Agreement shall have the same meaning as in the Agreement itself and or document arising from the Agreement.

'African Caribbean Pacific States', means a group of States that are parties to the Georgetown Agreement, which established the group of African Caribbean Pacific States and also are party to the Cotonou Agreement.

'Agreement' refers to the Cotonou Agreement, and shall have the same meaning as the
contracts financed by the EDF.

'General Regulations', means Decision No 2/2002 of the ACP-EU Council of Ministers of 7th October, 2002, regarding the implementation of Articles 28, 29 and 30 of Annexe IV to the Cotonou Agreement.

'Grant', means a direct payment of non-commercial nature by the EU through the EDF to the ACP Countries under the Agreement.

'Head of European Union Delegation', means the representative of the European Union in third countries.

'National Authorising Officer of the European Development Fund', means a member of a national government of an ACP country, often supported by a special unit, who has been designated as being responsible for the management of EU aid. It shall mean the same as 'National Authorising Officer' or 'NAO'

'Practical Guide', means the latest contract procedures for EU external actions outlining the contract award procedures for EDF Financed procurements.

'Procuring entity', means; a Government agency established and mandated by Government to carry out procurement using public funds.
'Treaty', means an international agreement concluded between states in written form and governed by international law.\textsuperscript{15}

1.6 Research Methodology

The research methodology was divided into five aspects namely; (a) defining the population; (b) deciding the sample and sampling procedure; (c) defining the instruments and procedure for collecting data; (d) analysing data; and (e) interpreting the data which is by way of conclusion.

1.6.1 Targeted Population

In this study, targeted population was not used in its literal meaning. The targeted population included all the GRZ ministries and agencies that had fundamental role in the initiation, signing and execution of the Cotonou Agreement. These Ministries are: Justice, Commerce Trade and Industry; Finance and National Planning and Foreign Affairs; ZPPA; and the EUD. Officers responsible for matters concerning the Agreement were targeted to represent the target ‘population’.

1.6.2 Sample and Sampling Procedure

The whole population constituted the sample. Interviews and clarifications were based on non-probability sampling such as purposive and availability methods. Officers were

\textsuperscript{15} Vienna Convention on the Law of Treaties, signed at Vienna on May 23, 1969, entered into force on January 27, 1980, Article 26
interviewed purposefully as being desk officers on the Agreement or official representatives of the public institutions. Other methods of sampling were inappropriate as what was sought from the sample was merely confirmation of the existence of relevant documents.

1.6.3 Data Collection Methods

The study was conducted using a legal centralist approach. This was because it was centred on analyzing the black letter municipal (PP Act) and treaty law (ACP-EU Agreement) with a view to understanding and reforming the law on public procurement for the sake of both the PP Act and the Agreement. The source of data was secondary although primary sources were used, but only to confirm the existence of secondary sources. A desk study approach, on one hand focused on the Cotonou Agreement, and subsequent documents namely; Decision No 2/2002 of the ACP-EU Council of Ministers of 7th October, 2002, regarding the implementation of Articles 28, 29 and 30 of Annexe IV to the Cotonou Agreement, General Conditions for works, supplies and service contracts financed by the EDF; and Practical Guide to contract procedures for EU external actions. On the other hand, it focused on; the Constitution, the PP Act and the PF Act and judicial precedents.

1.6.4 Data Collection Tools

Where the researcher failed to find answers through secondary sources, primary sources in
form of personal interviews were conducted using the sample. Secondary data was favoured because legal issues are more convincing when there is reference to the existing document. Where primary sources were used, the data collection tool was non-structured questionnaire in form of interviews. The main reason for conducting interviews was to access verifiable legal documentation and not the opinion of the interviewees.

1.6.5 Data Analysis

As analysing the law requires little or no quantitative aspect, the method of data analysis used was qualitative.

1.7 Limitations of the Research

So far, the main limitation of the research was the fact that most relevant correspondence among the EU, NAO and ZPPA on matters concerning procurements funded by the EDF was classified confidential and could not be annexed or quoted directly in this study. In addition, most of the available literature on the Cotonou Agreement focused more on the trade aspect of the Agreement and not on its legal consequences on the national laws of the ACP. With regards to the PP Act, the main limitation was the fact that no written records could be found at ZPPA by the researcher to justify the essence of some relevant sections such as s60. Even the National Assembly debates on the Bill that created the PP Act did not give reasons for some key sections that relate to international agreements.
1.8 Organisation of the Study

The study is organized as follows:

1.8.1 Chapter one provides the background to the study. It includes a brief history, and statement on the main objectives, provisions and institutions of the Agreement. It also includes; statement of the problem, the purpose of the study (objectives and hypothesis), significance of the study, operational definitions, and research methodology (target population, sample and sampling procedure, data collection methods and data analysis) and an outline of the organization of the study;

1.8.2 Chapter two gives an overview of the Cotonou Agreement and the Public Procurement Act (PP Act).

With regards to the Agreement, the chapter is mainly meant to highlight relevant provisions that make the Agreement binding on Zambia particularly in relation to procurement. At the same time, the chapter is meant to highlight provisions that call for respect of good governance. The overview comprises a summary of the General Provisions, Institutional Provisions; Development Finance Co-operation; and Annexxe IV of the agreement, which highlights the implementation and management procedures for EDF, funded projects. The procedures include, the General Regulations, General Conditions of Contracts, and Practical Guide to Contracts Award Procedures.
With regards to the PP Act, the chapter gives a summary of the Parts of the Act that are relevant to the study. In particular, the paper examines; Part I (Preliminary) to establish the applicability of the PP Act; Part II to establish, the powers of the Zambia Public Procurement Authority (ZPPA), and Part III to establish the functions of the Procurement Entities;

1.8.3 Chapter three analyses the legal effect of the Cotonou Agreement on the Zambia Public Procurement Act. The sequence is as follows:

(a) Defining public funds. The objective is to establish whether the grant money donated to Zambia by the EU via the EDF qualifies to be public funds in order to determine the applicable law for the use of that money. Relevant sections of the Cotonou Agreement, the PF Act and the PP Act that explain donor funds are discussed. It also presents the main findings on what public funds mean;

(b) Establishing why public officers sign EDF funded contracts in line with the second hypothesis and the second objective. The approach is to establish; (a) the legal basis for signing EDF financed contracts by Zambian public officers, (b) the legality of signing of such contracts by the Zambian public officers; (c) legal consequences for signing contracts financed by the EDF by public officers;

(c) Analysing the legality of using EDF General Regulations on EDF funded projects.
It begins by highlighting the major differences between the procurement procedures of the EDF and those under the PP Act. Article 28 of Annexe IV to the ACP-EU, which makes it mandatory for NAO's to utilise EDF procedures is analysed. Since s60 of the PP Act provides for alternative procurement systems in order to comply with international relations, it is also analysed. A brief look at international law in relation to domestication of treaties is also presented; and

1.8.4 Chapter four presents the conclusions and recommendations in accordance with the fourth objective of the study, which is; to give advice on ways of improving the legal environment of procurements financed by the EDF for the benefit of Zambia.
CHAPTER TWO

2.0 AN OVERVIEW OF THE AGREEMENT AND THE PUBLIC PROCUREMENT ACT

The objective of chapter two is to give an overview of the Cotonou Agreement, and the Public Procurement Act (PP Act).

2.1 ACP-EU Partnership Agreement

The Cotonou Agreement is divided into six parts. However, only relevant aspects of: the General Provisions; Institutional Provisions; Development Finance Cooperation; and Annexe IV (Implementation and Management Procedures), will be considered.

2.1.1 General Provisions of the ACP-EU Agreement

The General Provisions of the Agreement among others consist of: (a) the main objectives, (b) fundamental principles, (c) and, political dimension.

(a) Objectives of the partnership

The Agreement is centred on the objective of reducing and eventually eradicating poverty. It is consistent with the objectives of sustainable development and the gradual integration
of the ACP countries into the world economy.\textsuperscript{16}

(b) \hspace{1em} \textbf{Fundamental principles}

ACP-EU cooperation is underpinned by a legally binding system and the existence of joint institutions which execute business on the basis of fundamental principles.\textsuperscript{17} Among those principles, the first is equality of the partners, and ownership of the development strategies by the ACP States. The second is dialogue, and the fulfilment of mutual obligations which is central to the partnership and cooperation relations. Therefore, it is equitable that Zambia be obliged to comply with all the provisions of the agreement.

(c) \hspace{1em} \textbf{The Political Dimension}\textsuperscript{18}

The political dimension among others, require each Party to re-affirm the universal democratic principles (good governance), to ensure the legitimacy of its authority as reflected in its constitutional, legislative and regulatory system. It also obliges that, the structure of government and the prerogatives of the different powers should be founded on rule of law, which should entail an executive that is fully subject to the law.\textsuperscript{19} For Zambia, international agreements must be domesticated by Acts of parliament to have force of law in Zambian Courts. It must be noted that, violation of good governance principles may lead to the partial or complete suspension of development cooperation between the EU and

\textsuperscript{16} Cotonou Agreement, Revised in Luxembourg on 25 June 2005, Part 4, Development Finance Co-operation, Article 1
\textsuperscript{17} Ibid., Article 2
\textsuperscript{18} Ibid., Articles 8 and 9
\textsuperscript{19} Ibid., Articles 9
the country in violation. 20

2.1.2 Institutional Provisions

The Institutional Provisions provide for joint institutions on the basis of parity. The joint institutions of this Agreement are the Council of Ministers, the Committee of Ambassadors and the Joint Parliamentary Assembly. The essence of the joint institutions is to facilitate mutual dialogue and mutual ownership of the Agreement. With this participation in the decision making, parties including Zambia are expected to be bound by the Agreement. The study is focused on the Council of Ministers. Suffice to note that, Mr Charles Milupi, Member of Parliament for Luena Constituency in Zambia, is currently a Co-President of the ACP-EU Joint Parliamentary Assembly. 21

(a) The Council of Ministers

The Council of Ministers (CoM) or the Council comprises, on the one hand, the members of the EU; on the other, a member of the government of each ACP States. The Council takes decisions by common agreement of the Parties. It may take decisions that are binding on the Parties. 22 Within the Council of Ministers is the ‘Development Finance Cooperation Committee’, also known as ACP-EU Committee. Among others, it establishes general guidelines (including for procurement) for the effective and timely implementation of projects. It is composed, on a basis of parity, of representatives of the

20 Ibid., Article 96(2)(c)
22 Cotonou Agreement, Revised in Luxembourg on 25 June 2005, Part 4, Development Finance Co-operation, Article 15
ACP States, and of the Union, or their authorised representatives.

2.1.3 Development Finance Cooperation\textsuperscript{23}

This part of the Agreement is responsible for provision of adequate financial resources, and appropriate technical assistance, to support and promote the efforts of ACP States, to achieve the objectives set out in the Agreement. The EU is responsible for taking financing decisions on projects and programmes. The methods of financing for each project or programme are determined jointly by the ACP State or States concerned and the EU. The finances are managed by the EUD.

2.1.4 Annexe IV, Implementation and Management Procedures

Annexe IV of the Agreement provides for the management of the EDF financial resources. Article 34(1) of Annexe IV provides two main methods the Commission undertakes the financial execution of operations carried out with EDF resources, \textit{vis-a-vis}; centralised and decentralised management. A Centralised management is where the EC itself is responsible for the execution of operations; while decentralised management is where the execution duties are carried out by the ACP States in accordance with Article 35. Zambia mainly applies the decentralised management method. Article 28 of Annexe IV to the ACP-EU Agreement makes it mandatory to use EDF procedures for EDF funded projects.

The award of contracts financed by the EDF is governed by the General Regulations\textsuperscript{24}

\textsuperscript{23} Ibid., Articles 55 to 61

\textsuperscript{24}
(GR) for service, supply and works contracts financed by the EDF. The performance of contracts is governed by the General Conditions\textsuperscript{25} (GC)\textsuperscript{26}. The GC are, general contractual provisions setting out the administrative, financial, legal and technical clauses governing the execution of all contracts financed by the EDF. Arising out of the GR and GC, \textit{inter alia} is, the Practical Guide to Contract Procedures (PRAG). The PRAG is mandatory latest contract procedures for European Union external actions. It outlines the contract award procedures for EDF Financed procurements.

\section*{2.2 The Public Procurement Act}

The PP Act is a successor of the repealed Zambia National Tender Board Act,\textsuperscript{27} which was amended by Act No. 13 of 1994. Among others, the objective of the Act is to re-name the Zambia National Tender Board to the ZPPA, and to regulate and control practices relating to public procurement in order to promote the integrity of, fairness and public procurement process.

The Public Procurement Act (PP Act) is divided into nine parts. However, this study is focused on: Part I – Preliminaries; Part II – the Zambia Public Procurement (ZPPA); and Part III – Procuring Entities.

\begin{footnotesize}
\begin{enumerate}
\item Decision No 2/2002 of the ACP-EU Council of Ministers of 7\textsuperscript{th} October, 2002, regarding the implementation of Articles 28, 29 and 30 of Annex IV to the Cotonou Agreement.
\item Ibid.
\item for service, supply or works contracts financed by the EDF
\item Act No. 30 of 1982 as amended by Act No. 13 of 1994, Chapter 394 of the Laws of Zambia
\end{enumerate}
\end{footnotesize}
2.2.1 Part I – Preliminaries

According to s3(1), of the PP Act; the PP Act “... applies to all procurement carried out by procuring entities using public funds, except as otherwise provided under subsection (2).” This means that, if EDF funds granted to Zambia under the Agreement qualify to public funds, then the PP Act should be applied in the utilisation of those funds. Procuring entity (PE) means; a Government agency established and mandated by Government to carry out procurement using public funds.\textsuperscript{28} This paper has to establish the implication of s3 and other related sections of the PP Act on EDF funds.

2.2.2 Part II – The Zambia Public Procurement

The ZPPA is a creature of the PP Act.\textsuperscript{29} Among others, the functions of the ZPPA are to issue standard bidding documents and other standard procurement documents for use by procuring entities;\textsuperscript{30} and to consider applications for deviations to public procurement processes, methods and rules and for the accreditation of alternative procurement systems.\textsuperscript{31} Since, under the Cotonou Agreement, joint institutions are responsible for drawing up guidelines, what does this provision of the PP Act entail? Can delegated authority of the ZPPA amount to domestication?

\textsuperscript{28} Public Procurement Act, No. 12 of 2008, s2
\textsuperscript{29} Ibid., s5
\textsuperscript{30} Ibid., s6(2)(c)
\textsuperscript{31} Ibid., s6(2)(c)
2.2.3 Part III – Procuring Entities

Section 11 of the PP Act establishes PEs which include; the Controlling Officer, Procurement Committee, Procurement Unit and user department. The PE is responsible for management of all procurement activities within its jurisdiction in accordance with the PP Act. A Procurement Committee is the highest approval authority for procurement entities, and is responsible for providing prior authorisation of procurement process in accordance with the procedures specified in the Act. If EDF funds are public funds, procurement from it should be subjected to this approval.

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32 Ibid., s12
CHAPTER THREE

3.0 LEGAL EFFECT OF ACP-EU AGREEMENT ON THE PP ACT

Chapter three analyses the legal effect of the Cotonou Agreement on the Zambia Public Procurement Act. The chapter defines public funds; establishes why public officers sign EDF funded contracts; and analyses the legality of using EDF General Regulations on EDF funded projects. On each of the three parts, the paper presents the factual and legal findings in relation to the first objective of the study.

3.1 What are Public Funds?

This part of chapter three defines, ‘public funds’. The first objective of the study is, to establish whether the grant money donated to Zambia by the EU via the EDF, qualifies to be public funds in order to determine the applicable law for the use of that money. The relevant sections of the Cotonou Agreement, the PF Act and the PP Act that explain donor funds are discussed.

3.1.1 Factual Findings about EDF Funds - the Effective Controller

Except for EDF financial resources granted to GRZ in form of sector budget support, disbursement of funds and payments on direct project support are made and controlled by the European Union Delegation (EUD) in Zambia, and the EU headquarters in Brussels.

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The Government through the National Authorising Officer (NAO) of the European Development Fund (EDF) has no control over the disbursements and payments. Therefore, although the NAO, where appropriate, has power to clear and authorise expenditures,\(^{33}\) in practice, no payment can be made until the EUD has approved it. This means that, regardless of whether EDF funds are by the Zambian law, public funds; the effective controller of those funds is the EU.

3.1.2 Legal Findings and Analysis on What Public Funds Mean

The PP Act, "... applies to all procurement carried out by procuring entities using public funds, except as otherwise provided under subsection (2)."\(^{34}\) According to s2 of the PF Act, Public funds mean, "funds received by an officer by virtue of the officer’s employment and include public moneys." Section 28(1) of the PF Act states that, "All moneys received by way of loans, grants, and donations shall constitute public moneys, and shall be paid into the Treasury Account for the credit of the Consolidated Fund."

As public funds include public moneys and public moneys comprise loans, grants and donation; then, grants and donation are public funds. Therefore, as far as the laws of Zambia are concerned, all loans, grants, and donations to Zambia, qualify to be public funds. Consequently, except as otherwise provided under section 3(2) of PP Act, public officers should in utilising public funds apply the PP Act. In s3(2), the PP Act grants exceptions to its application.

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\(^{33}\) Cotonou Agreement, Revised in Luxembourg on 25 June 2005, Article 37(4) of Annex IV
\(^{34}\) Public Procurement Act, No. 12 of 2008, s3(1)
A procuring entity may, where any procurement involves or relates to international relations of the Republic, modify the application of rules and procedures of procurement set out in this Act only to the extent necessary to protect the public interest and in accordance with such procedures as the Authority may determine.

A procuring entity, in consultation with ZPPA, is allowed to change the use of the rules and procedures only to the extent necessary to protect the public interest. However, the provisions of the Cotonou Agreement, totally exclude the application of national laws on procurement including payments. It is mandatory under the Agreement that payments are made by the EUD in accordance with the rules laid down by the EU.” On the other hand, s3(3) of PP Act states that:

Where a procuring entity undertakes any procurement that is related to or involves international relations of the Republic, the procuring entity shall-

(a) agree with the Authority on the type of goods, works or services to be subject to modified rules and procedures of procurement;

(b) agree with the Authority on the modifications to be made to the rules and procedures provided for in this Act and to be applied to the goods, works and services referred to under paragraph (a); and

(c) apply the rules and procedures provided for in this Act to the procurement of goods, works and services in a manner that is not prejudicial to international relations of the Republic.

Unlike s3(2) which only permits modification to the application of the rules and procedures subject to agreeing with ZPPA, s3(3) permits modification to the rules and procedures, but only on certain types of goods, services and works and after agreeing with

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35 Cotonou Agreement, Revised in Luxembourg on 25 June 2005, Article 28 of Annex IV
36 Ibid., Article 37(4) of Annex IV
ZPPA. Section 3(3) entails that there has to be consensus on the types of goods, services or works to subject to modified rules and procedures; and on the modifications to the rules and procedures between the NAO and ZPPA each time there is a procurement to be made from EDF funds. In addition, the PP Act states:

4(1) A procuring entity shall, before entering into any international agreement relating to procurement, obtain the approval of the Authority, and the advice of the Attorney-General.

(2) Any agreement purportedly entered into without the approval of the Attorney-General is void.

As far as the ACP-EU Agreement is concerned, s4 of the PP Act does not apply. This is because; the Agreement is ratified not by individual procuring entities but by the State itself and the Agreement within itself prescribes the procedures for the award of contracts. The PP Act is not clear as to what happens where an international agreement completely displaces its application. It is however important to note that s4 is contradictory because, whereas subsection 4(1) of the Act refers to the “advice” of the Attorney-General, subsection 4(2) refers to “approval”.

3.2 Why Public Officers Sign EDF Funded Contracts

In line with the second objective, this part of the chapter presents the main factual and legal findings on; (a) the legal basis for signing EDF financed contracts by Zambian public officers, (b) the legality of signing of such contracts by Zambian public officers; and (c) the legal consequences for signing contracts financed by the EDF by public officers. The second objective is to establish the legality of signing EDF funded contracts, by Zambian
public officers and the legal consequences for that.

3.2.1 Factual findings as to Why Public Officers Sign EDF Funded Contracts

It is a fact that, contracts funded by the EDF under the Agreement, are signed by public officers appointed either as, NAO or Deputy National Authorising Officer (DNAO) of the EDF. It is by virtue of being a public officer first, that one qualifies to be appointed, NAO/DNAO, and subsequently, sign those contracts, as Contracting Authority, on behalf of GRZ. However, all EDF funded contracts arising from an open tender process, have to be endorsed for funding by the EUD, before the NAO/DNAO; and the contractor can sign them. Open tender means, a tender advertised to the open market.

3.2.2 Legal Basis and the Legality of Signing EDF Funded Contracts by Public Officer

The Constitution\textsuperscript{37} allows the Executive to enter into international agreements on behalf of Zambia. To that end, GRZ ratified the Cotonou Agreement on 22\textsuperscript{nd} April, 2002. The ratification signified that GRZ agreed to be bound\textsuperscript{38} by the terms and conditions of the Agreement, and to perform in good faith, \textit{pacta sunt servanda} as required by the Vienna Convention. Despite the fact that the Agreement does not explicitly indicate the authority responsible for appointing the NAO, the power of the NAO and DNAOs to sign EDF funded contracts under the Agreement is clearly stated at Article 34(1) of \textit{Annexe IV}:

\textsuperscript{37} Constitution of Zambia, Article 44(2)
\textsuperscript{38} Vienna Convention, 1969, Article 26
Where Fund resources are managed in a decentralised way (as in Zambia), and subject to any additional powers that might be granted by the Commission, the National Authorising Officer shall:
(i) sign the contracts and addenda thereto approved by the Commission;
(j) clear and authorise expenditure within the limits of the funds assigned to him.

It must be noted that, whereas it is clear that a Controlling Office (CO) has powers to authorise the award of contracts within his/her level of authority, it is not clear as to whether, he or she can sign the ensuing contracts. The function of the CO that is closer to signing contracts is, to "... authorise contract documents", but is not equivalent to signing contracts. Further, it is not clear as to whether; it is legal for the NAO and DNAOs to sign contracts emanating from undomesticated 'foreign' procedures.

As already stated, in Zambia, the NAO is also the Minister of MoFNP. He has appointed five DNAOs to assist him in carrying out his duties. The DNAOs include the Secretary to the Treasury (ST) and Permanent Secretary (PS) for Budget and Economic Affairs. Under the PF Act, the ST appointed by the President is the Chief Controlling Officer of all public funds. The ST is responsible for designating an officer to be Controlling Officer (CO). Among other duties, the CO, controls expenditure on public funds under his control. He does that by maintenance of an appropriate procurement and provisioning system in accordance with the PP Act.

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39 Public Procurement Act, No. 12 of 2008, s13(2)(d)
40 Ibid., s13(2)(e)
41 Public Finance Act, No. 15 of 2004, ss7(1), 7(2), 7(3)(c) and (h)
42 Ibid., s6(3)(j)
3.2.3 Legal consequences for signing contracts financed by the EDF by public officers

The Practical Guide, a subsidiary document under the Agreement puts it clearer that:

The tenderers and candidates for these contracts cannot be considered as beneficiaries of the acts carried out by the Commissions' representatives for the implementation and the conclusion of the contracts. They must hold legal bound with the decentralised Contracting Authority and the Commissions' representatives acts may not cause the substitution of a Contracting Authority's decision by a decision taken by the EU. In all these cases, the Contracting Authority assumes full responsibility for its actions and will be accountable for these in the subsequent audit or other investigations.

This provision entails that, under decentralised management system, regardless of the influential interventions of the EUD, towards the conclusion and implementation of contracts financed by the EU, those contracts are solely between the NAO signing as Contracting Authority on behalf of GRZ and the contractor. In other words, it is GRZ to sue and be sued on EDF funded contracts and not the EU. It is the view of this researcher that, if GRZ alone has to bear the legal consequences of the contracts funded by the EDF under the Agreement, it is only equitable that the NAO should have a greater say on the contracting procedures and processing of those contracts than the EUD.

However, Article 37(7) of Annexe IV of the Agreement says that, claims for delayed payments shall be borne by the ACP State or States concerned, and by the Commission from its own resources, for that part of the delay for which each Party is responsible. That

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notwithstanding, the contractor cannot sue the EU for that delay caused by it (EU) but the Contracting Authority. In addition, Article 37(7) means that, depending on the culpability of the parties, there is legal responsibility to meet the financial liability. Recently, MACE Construction sued the A-G and the NAO for over K400 million for failure to pay for materials and services provided by it on the EDF contract entitled, "Rehabilitation and Expanding of Mufumbwe Rural Health Centre.\(^{44}\)

The PF Act provides that the loss of public funds for example EDF funds may be settled by taxpayers. S29(1) states that where –

- (a) any public moneys have been lost or misappropriated; or
- (b) any public stores have been lost, damaged or misappropriated, then subject to the express provisions of this or any other written law, such loss may, with the approval of the Secretary to the Treasury, be charged against moneys appropriated by Parliament for the purpose.

Equally, culpable individuals are legally liable under s30(1) which states that –

Subject to the other provisions of this Part, where a controlling officer fails to perform any financial duties assigned under this Act, and such failure results in a loss of public moneys, a failure to collect Government revenue due to the Government or in wasteful or unnecessary expenditure of public moneys by a ministry or department, the Secretary to the Treasury shall –
- (a) impose on such controlling officer a surcharge equivalent to the loss, wasteful or nugatory expenditure incurred by the Government.

Section 7 of the PF Act may be interpreted to mean that, since the ST is the Chief Controlling Officer of all public funds, the NAO portfolio, can only be at the level of the

\(^{44}\) The Post, Wednesday, April 22, 2009, page 7
ST or lower. Therefore, it is submitted that the ‘appointment’ of the Minister of MoFNP as the NAO is improper as it entails that the Minister is a CO to be designated, controlled and disciplined by the ST.

3.3 The Legality of using EDF Guidelines on EDF Funded Projects

In line with the third objective, this part of the chapter presents the main factual and legal findings on the legality of using EDF General Guidelines on EDF funded contracts under the Agreement. It begins by highlighting the major differences between the procurement procedures of the EDF and those under the PP Act. Article 28 of Annexe IV to the ACP-EU, which makes it mandatory for NAOs to utilise EDF procedures is analysed. Since s60 of the PP Act provides for alternative procurement systems in order to comply with international relations, it is also analysed. A brief look at international law in relation to domestication of treaties is also presented.

3.3.1 Factual findings as to the Legality of using EDF Guidelines on EDF Funded Projects

Except for EDF financial resources granted to GRZ in form of sector budget support, the NAO is utilising the EDF contract award procedures\(^{45}\) as stipulated in Annexe IV of the Agreement. However, it is true that, despite not utilising the PP Act or documents subsidiary to the PP Act, the NAO has launched its open tenders through the ZPPA. The NAO has also sought authorisation of the ZPPA, for the award of contracts from open

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\(^{45}\) Cotonou Agreement, Revised in Luxembourg on 25 June 2005, Article 28 of Annexe IV
tenders. It is true that Zambia follows dualist approach to international law. The study found significant differences between the procurement rules and procedures under the Cotonou Agreement and the PP Act. In brief, the salient differences are as follows:

(a) Whereas the PP Act requires procuring entities to be certified in four different categories (‘uncertified’, Category ‘A’, ‘B’ and ‘C’); procurement under EDF financed projects is either ‘decentralised’ or ‘centralised’ and the two categories are determined by the EUD discretionary. The two types of ‘certification’ have not been reconciled as the certifying authorities and the parameters for certifying differ;

(b) Under the PP Act, there are thresholds stipulating the value below, which a procuring entity has authority to procure without prior authorisation, and above which prior authorisation of the ZPPA has to be sought. By contrast, under EDF procedures, prior approval of procurement documentation and procedures above specified thresholds must be sought from the EUD and not ZPPA. This has been a source of conflicts as in trying to satisfy the requirements of the two authorities (EU and ZPPA); projects funded by the EDF have been delayed mainly because either, the procurement processes have not been authorised with the same speed or two different and conflicting authorisation have been granted. Although, the PP Act provides for “classified audit” for procurements that are subject to modified rules and procedures of

47 Public Procurement Act, No. 12 of 2008, second schedule, s7
48 Cotonou Agreement, Revised in Luxembourg on 25 June 2005, Article 35(1) of Annexe IV
49 Circular No. 1 of 2009, Zambia Public Procurement Authority, 6 January 2009
50 Public Procurement Act, No. 12 of 2008, second schedule, s7(2)
51 Decision No. 2/2002 of the ACP-EU Council of Ministers, clauses 9, 13 and 18

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procurement,\textsuperscript{52} conflicts come from other law enforcement agents such, the Anti Corruption Commission (ACC), and the Auditor-General who mainly rely on the provisions of the PP Act and the PF Act, in matters relating to procurement using public funds. The PP Act requires ZPPA to co-operate with other organs exercising oversight functions over public procurement.\textsuperscript{53} In practice, ZPPA refers all irregular procurements to the Auditor General;

(c) Whereas under the PP Act, all procurements with estimated value of above K500,000,000.00 are undertaken using open bidding or selective/restricted method, and authorised for contract award by the procuring entity tender committee,\textsuperscript{54} the EDF procedures provide different threshold for different procurement methods, and approval is by the EUD in Zambia. As a matter of fact, the EDF thresholds for open tender for services, goods and works are €30,000.00, €200,000.00 and €300,000.00\textsuperscript{55} (K189,886,800.00, K1,265,912,000.00, and K1,898,868,000.00) \textsuperscript{56} respectively. The lack of uniformity of threshold between the EDF and PP Act provisions, lead to misunderstanding and conflict between the government agencies on one hand and the EU on the other hand;

(d) Whereas EDF contracts award procedures provide for a tender evaluation committee comprising an odd number of persons\textsuperscript{57}, and the same evaluation committee is responsible for opening and evaluating the tenders using EDF standard report forms;

\textsuperscript{52} Public Procurement Act, No. 12 of 2008, s3(5)
\textsuperscript{53} Ibid., s10
\textsuperscript{54} Circular No. 1 of 2009, Zambia Public Procurement Authority, 6 January 2009, Item No. 2
\textsuperscript{55} Decision No. 2/2002 of the ACP-EU Council of Ministers, Annex 1
\textsuperscript{56} At the exchange rate of €1.00 = K6.329.56, Official Journal of the European Union for February 2010.
\textsuperscript{57} Decision No. 2/2002 of the ACP-EU Council of Ministers, clause 11.9, 15.8 and 20.8
the PP Act is not explicit on the evaluation committee. It simply states that, "A procuring entity shall prepare an evaluation report for submission to the appropriate approvals authority." Depending on the value of procurement, evaluation reports may be approved by the Controlling Officer or a Procurement Committee. However, in practice, the opening of tenders under PP Act is performed by a standing Procurement and Supplies Unit (PSU) using standard format that is different from that of the EDF. Under PP Act, the evaluation of tenders is performed by an ad hoc evaluation committee appointed for that task, and using standard evaluation form that is different from that of the EDF. The difference in standard report forms for tender opening and evaluation, is another source of conflict as both the Head of EUD and ZPPA insist on their own report format. The evaluation committee under EDF, submits the evaluation report for the approval of an individual called the NAO, who, subsequently submits it to the Head of the EUD for further approval; whilst under the PP Act, the evaluation report for an open tender has to be approved by a Tender Committee. This explains the difference in speed with which approvals are granted under EDF and PP Act;

(e) whereas the PP Act obliges that the use of less competitive methods as a replacement for open tender be granted express authority by ZPPA; EDF procedures oblige prior approval by the Head of the EUD;

(f) the PP Act, obliges that all draft solicitation documents for open tender/selection shall

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58 Public Procurement Act, No. 12 of 2008, s50(6)
59 Decision No. 2/2002 of the ACP-EU Council of Ministers, clauses 11.11.1, 11.11.2, 15.10.1, 15.10.2, 20.10.1 and 20.10.2
60 Circular No. 1 of 2009, Zambia Public Procurement Authority, 6 January 2009, Item No. 2
61 Decision No. 2/2002 of the ACP-EU Council of Ministers, clause 10.1.2, 14.1.2 and 19.1.2
be subject to ZPPA prior review and granting of a "no objection";\(^62\) whilst under the EDF procedures, the NAO is responsible for drawing up tender documents, which have to be approved by the Head of the EUD\(^63\). For service contracts above €200,000.00\(^64\) (K1,265,912,000.00), the EDF procedures allow for the use of a framework contract which does not exist under the PP Act. The PP Act does not provide for the award of grant contracts\(^65\) whilst the EDF procedures does;

(g) Whereas, the EDF procedures allow for single sourcing/direct bidding for procurement under €5,000.00\(^66\) (K31,647,800.00), provided there is no deliberate splitting to avoid other methods of procurement; the PP Act does not indicate the minimum threshold for single sourcing.

By utilising EDF Guidelines on EDF Funded projects, the NAO disregards all the above differences. It may be argued that, the highlighted differences are more administrative than substantive. To the contrary, it is these differences that have serious consequences. For example, whereas there is nothing irregular for the NAO to collect only three quotations for works contract worth less than €300,000.00 (K1,898,868,000.00), the Auditor General may find the purchase to be highly irregular under the PP Act and the PF Act.

\(^{62}\) Circular No. 1 of 2009, Zambia Public Procurement Authority, 6 January 2009, Item No. 2
\(^{63}\) Practical Guide to Contract Procedures for EC external actions, Official Journal of the European Union, s3.3.3, 4.3.2, and 5.3.2
\(^{64}\) Ibid., s3.2.2
\(^{65}\) Ibid., ss6-8
\(^{66}\) Decision No. 2/2002 of the ACP-EU Council of Ministers, Annex 1
3.3.2 Legal Findings and Analysis as to the Legality of using EDF Guidelines on EDF Funded Projects under the ACP-EU Agreement

The starting point is Article 28 of Annexe IV to the ACP-EU Agreement which states that:

The award of contracts financed from the resources of the Fund shall be governed by this Annexe and the procedures which shall be adopted by the decision of the Council of Ministers at the first meeting following the signing of this Agreement, upon recommendation of the ACP-EU Development Finance Cooperation Committee. These procedures shall respect the provisions of this Annexe and the community’s procurement rules for cooperation with third countries.

Pending the adoption of these procedures, the current EDF rules contained in the current general regulations and general conditions of contracts shall apply.

Indeed, the finding of this research is that, except for EDF financial resources granted to GRZ in form of sector budget support, it is mandatory that, all the other direct project support utilise the EDF contract award procedures. The Practical Guide\textsuperscript{67} states that, “In case of non-respect of the procedures established in the present Guide, the expenditure related to the operations involved are ineligible in terms of EU finance.” It means, as long as the EU objects, GRZ has comply so as to access the EU funds.

The more direct link as to the legal effect of the Agreement on the PP Act is provided for under s60 of the PP Act which states that:

\textsuperscript{67} Practical Guide to Contract Procedure for EC external actions, 2008, page 11 of 137
60. The Authority [ZPPA] may in the prescribed manner, accredit an alternative procurement system where a procuring entity-

(c) is required to use an alternative system to comply with the provisions of an international or other agreements.

Before discussing the meaning of s60(c), it is important to note that, the PP Act does not define the phrase “alternative procurement system”. The lack of definition makes the section ambiguous, consequently, subject to different interpretations. The mischief or objective Parliament was addressing in providing for “alternative procurement systems” could not be established from the objectives of the Act or the parliamentary debates.68 According to oral interview with ZPPA, s60 was specifically inserted by donors.

Regardless of the ambiguity of s60, it is clear that Parliament agreed to provide for other procurement rules and procedures external to the PP Act, as Zambia has an abundance of international agreements that utilise unique award of contract procedures.

It is clear from s60(c) that, as long as a procuring entity (NAO) complies with the provisions of the PP Act, utilising alternative procurement system is permissible. The major problem is that unless ZPPA is reduced to being a rubber stamp, it has the discretion to reject a request to accredit an alternative procurement system. Such a rejection will result into an abrogation of the ACP-EU Agreement. If ZPPA becomes a rubber stamp, in that, all applications to use alternative procurement systems are automatically accredited; it will be abrogating the provisions of the PP Act, as it will be failure to execute its duties as by law provided.69

64 National Assembly debates, Tuesday, 9th and 10th September, 2008, pp4-5
65 Public Procurement Act, No. 12 of 2008, second schedule, s6
The EUD to Zambia has always argued that since, Government participates in the decision making meetings of the ACP-EU joint institutions and is also a signatory to the Agreement, there is no need for further authorisation in order to use EDF contract award procedures. The logic is that Zambia alone cannot reject or alter the provisions of an Agreement involving more than 100 other countries. In any case, since it is mandatory to use EDF procedures for EDF financed procurements, seeking ZPPA accreditation for such procurements is superfluous and a waste of time.

However, ZPPA has always argued that, the EDF procurement procedures cannot automatically be applied in Zambia as Zambia follows the dualist approach to international law. Therefore, a ratified treaty does not become automatically applicable in Zambia until appropriate national legislation, has been enacted to give the treaty the force of law domestically. In the case of *Nanzaluka v Zambia Sugar Plc*,70 it was established in clear terms that even though the executive has power to negotiate and sign international agreements, since Zambia subscribes to the doctrine of dualism; acceded or ratified international agreements are not self-executing, but need to be domesticated by an Act of parliament before they can be enforced by the Courts of law in Zambia.

In practical terms, the NAO has not been applying to ZPPA for accreditation of alternative procurement systems. What then needs to be established is whether, the general provision of s60 amount to domestication of the EDF rules and procedures in Zambia, and whether

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there is any need for domesticating the rules at all, or whether by virtue of the general wording of the PP Act, domestication has already been effected for the application of EDF procedures.

Domestication has several ways of occurring. Among them, the treaty rules may be directly incorporated through a drafting technique, which gives the force of law to specified provisions of the treaty, or indeed the whole treaty is scheduled to the transforming Act itself.\textsuperscript{71} The cases below are persuasive though not indigenous to Zambian courts.

\textbf{In Maclaine Watson & Company Limited v Department of Trade and Industry,}\textsuperscript{72} Lord Oliver spelt out the fundamental principle of domestication as follows;

\begin{quote}
... as a matter of the constitutional law of the United Kingdom, the royal prerogative, whilst it embraces the making of treaties, does not extend to altering the law or conferring rights on individuals or depriving individuals of rights which they enjoy in domestic law without the intervention of Parliament.
\end{quote}

However, it can be argued that ratification of an international treaty gives rise to legitimate expectations that the executive, in the absence of statutory, or executive indications to the contrary, will act in conformity with the treaty.\textsuperscript{73} In \textbf{Garland v British Rail Engineering,}\textsuperscript{74} it was stated that there is an English Law of presumption that legislation is

\begin{footnotesize}
\textsuperscript{71} University of the South Pacific School of Law website, 2005. \textit{URL:} http://www.parli.org/oldpits/english/domestication.html
\textsuperscript{72} Maclaine Watson & Co Ltd v Department of Trade and Industry, [1988] 1158 CA.
\textsuperscript{74} Garland v British Rail Engineering Ltd [1983] 2 AC 751, HL
\end{footnotesize}
to be so construed as to avoid breach and conflict with international law.\textsuperscript{75}

Article 27 of the Vienna Convention on the Law of Treaties, says that in so far as treaties are concerned, a party may not invoke the provisions of its internal law as justification for its failure to carry out an international agreement. In addition, Article 46(1) provides that, a state may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of its internal law, as invalidating its consent; unless the violation of its internal law in question was manifest and concerned a rule of fundamental importance.

In the \textbf{Alabama claims arbitration of 1872}\textsuperscript{76}, the United States objected strenuously when Britain allowed a ship to sail from Liverpool to prey upon American shipping. It was held that, the absence of British legislation necessary to prevent the construction or departure of the vessel, could not be brought forward as a defence.

Oral interviews with the Ministries of Justice, Commerce Trade and Industry, Finance and National Planning, and Foreign Affairs confirmed that, domestication of the EDF contract award procedures cannot be done indirectly. There has to be direct reference to the Agreement and the procedures to effect domestication.

In Zambia, domestication of a treaty has either been by extracting the relevant extracts or applying the whole treaty. For example, the Air Services Act\textsuperscript{77} clearly provides excerpts of the Warsaw Convention in a schedule.

\textsuperscript{75} Salomon v Customs and Excise Commissioners of Customs and Excise [1967] 2 QB 143
\textsuperscript{76} United States v Great Britain, (1872) 1 International Arbitrations, 495 at page 656
\textsuperscript{77} Act No. 13 of 1994, Chapter 446 of the Laws of Zambia
CHAPTER FOUR

4.0 CONCLUSIONS AND RECOMMENDATIONS

Chapter four presents the conclusions, and recommendations in accordance with the fourth objective of the study, which is; to give recommendation on ways of improving the legal environment of procurements financed by the EDF for the benefit of Zambia. Both the conclusions and recommendations will follow the sequence of the objectives.

4.1 Conclusions

4.1.1 As to whether the grant money donated by the EU via the EDF to Zambia qualifies to be ‘public funds’ and as to what law is applicable for the award of contracts financed from the resources of the EDF; the conclusion is that:

(a) As far as the Zambian law is concerned, all moneys received by way of loans, grants, and donations, constitute public moneys.\(^{78}\) The PF Act defines ‘public funds’ to include public moneys\(^ {79}\); and defines ‘public moneys’ to include grants and donations. Therefore, EDF grants to Zambia are part of public funds. All procuring entities using public funds, except as otherwise provided under the law are obliged to apply the PP Act.\(^ {80}\) As an exception, the PP Act allows procuring entities to: (a) modify the application of stipulated rules and procedures, but only to the extent necessary to

\(^{78}\) Public Finance Act, No. 15 of 2004, s28(1)
\(^{79}\) Ibid., s2
\(^{80}\) Public Procurement Act, No. 12 of 2008, s3(1)
protect the public interest and in accordance with such procedures as the ZPPA may determine\textsuperscript{81} (b), modify the rules and procedures, and (c) upon accreditation by the ZPPA, to utilise alternative procurement systems for procurement which involve or relate to international relations. Therefore, as far as the PF Act is concerned, the hypothesis has been proven wrong as loans, grants and donations are public funds on which the PP Act is applicable. However, the effective control of EDF grants is with the EU. The PP Act’s definition of public funds is inadequate in that it is restricted to the aspect of receiving and not the effective control of those funds;

(b) The PP Act allows procuring entities to enter into any international agreement relating to procurement as long as they obtain the approval of the ZPPA and Attorney-General (A-G).\textsuperscript{82} Section 4 of the PP Act is inconsistent with itself as subsection 4(1) refers to the “advice” of the Attorney-General, while subsection 4(2) refers to “approval”. The PP Act is also not clear whether long standing multilateral international agreements containing procurement procedures as part of the agreement, such as ACP-EU require to be approved by the A-G and ZPPA prior to utilising the procedures therein. It is also not clear, at what stage, if any; the approval of the AG and the ZPPA should be sought for such agreements.

4.1.2 As to the legality of signing EDF financed contracts by the Zambian public officers and the legal consequences for that; the following are the conclusions:

\textsuperscript{81} Public Procurement Act, No. 12 of 2008, s3(2)
\textsuperscript{82} Ibid., ss4(1) and (2)
(a) The Constitution\textsuperscript{83} allows the executive to enter into international agreements. Although the domestication is yet to be done, the executive ratified the Cotonou Agreement on 22\textsuperscript{nd} April, 2002. The ratification signified GRZ acceptance to be bound\textsuperscript{84} by the terms and conditions of the Agreement, which requires that GRZ appoints a public officer to be the NAO.\textsuperscript{85} The Agreement is not clear as to who appoints the NAO. The responsibilities of the NAO, among others, is to process tendering, sign contracts with contractors and authorise payments for procurements financed by the EDF;\textsuperscript{86} although it is not clear whether, the NAO is legally allowed to sign contracts that arise from non-domesticated Agreement. By signing those contracts and authorising those payments, the NAO assumes the role of a Contracting Authority. Consequently, the NAO is legally answerable on behalf of GRZ for legal actions arising from those contracts and not the EU, regardless of the EU interventions. Therefore, contrary to the hypothesis, public officers who sign contracts financed by the EDF do so in their capacity as public officers, and the legal consequences principally are to the State. The State may settle the legal liability through a charge against moneys appropriated by Parliament.\textsuperscript{87} However, since all EDF funded contracts arising from an open tender process, have to be endorsed for funding by the EUD, before the NAO/DNAO and the contractor can sign, the main authority behind signing contracts is the EU.

(b) Since the EU is involved with the disbursement of the funds, the liabilities that arise

\textsuperscript{83} Constitution of Zambia, Article 44(2)
\textsuperscript{84} Vienna Convention, 1969, Article 26
\textsuperscript{85} Cotonou Agreement, Revised in Luxembourg on 25 June 2005, Article 35 of Annex IV
\textsuperscript{86} Cotonou Agreement, Revised in Luxembourg on 25 June 2005, Article 35 of Annex IV
\textsuperscript{87} Public Finance Act, No. 15 of 2004, s29(1)(a)(b)
from litigation are borne by either the EU\textsuperscript{88} or GRZ\textsuperscript{89} for that part each is ‘guilty’ of. However, the Secretary to the Treasury, on behalf of GRZ, can impose on an individual public officer a surcharge equivalent to the loss, wasteful or nugatory expenditure incurred by GRZ.\textsuperscript{90} Other punitive measures are applicable,\textsuperscript{91} regard had to the circumstances. It is out of the possible punitive consequences that, public officers sign contracts financed from EDF resources, conditional on NAO applying both the EDF and PP Act rules and procedures. Applying two rules and procedures by one procuring entity from the same funding, has sometimes caused costly delays, and conflicts between the ZPPA and EUD.

4.1.3 As to the legality of utilizing the General Regulations and the Practical Guide for contracts financed by the EDF at the Expense of the PP Act; the following is the conclusion.

The utilisation of EDF non budget grants is not governed by the PP Act, but by the rules and procedures emanating from the Cotonou Agreement.\textsuperscript{92} There are significant differences between the PP Act and the EDF procedures. It is not clear whether the utilisation of the EDF contract award procedures can substitute the PP Act without having it domesticated considering that EDF funds qualify to be public funds, and that Zambia follows dualist approach to international law. Parliament has clearly through s60 of the PP Act, granted discretionary powers to ZPPA to accredit an alternative

\textsuperscript{88} Cotonou Agreement, Revised in Luxembourg on 25 June 2005, Article 37(7) of Annex IV
\textsuperscript{89} Public Finance Act, No. 15 of 2004, s29(1)(a)(b)
\textsuperscript{90} Ibid., s7(2)(i) and s30(1)
\textsuperscript{91} Public Procurement Act, No. 12 of 2008, s75
\textsuperscript{92} Cotonou Agreement, Revised in Luxembourg on 25 June 2005, Article 28 of Annex IV
procurement system upon request by the procuring entity. However, the NAO has not
applied for accreditation. Section 60 of the PP Act is a perfect example of the effect of
donors on the PP Act as it was introduced by them.\textsuperscript{93} The PP Act does not define
“alternative procurement system, hence ambiguous. However, regardless of the
ambiguity, s60\textsuperscript{94} attempts to provide for international and other procurement rules and
procedures external to the PP Act as Zambia is party to other international agreements
that employ distinct award of contract procedures. As long as a procuring entity
complies with the provisions of the PP Act, utilising alternative procurement system is
permissible.\textsuperscript{95} However, since it is mandatory to use EDF procedures for EDF funded
procurements, seeking ZPPA's accreditation, is not only superfluous but, also a waste
of time. It may be conclude that compliance with the requirements of the ACP-EU
Agreement and the PP Act can only be attained if:

(a) NAO regardless of the mandatory nature of the ACP-EU Agreement applies to the ZPPA
for accreditation to apply EDF Procedures for EDF funded Procurements, and ZPPA
becomes a rubber stamp for such lawful requests for accreditation by the NAO.
However, rubber stamping will be against the objectives of the PP Act, which among
others is to regulate and control practices relating to public procurement; and

(b) Regardless of the possible delays and conflicting approval decisions, the EDF and PP
Act procurement rules and procedures be applied concurrently on EDF financed
procurements. Mechanisms to address possible delays and conflicting approvals have

\textsuperscript{93} Revealed during the interview with the Board Secretary of ZNTB on 15\textsuperscript{th} January, 2010 at 16:30 hours
\textsuperscript{94} Public Procurement Act, No. 12 of 2008, No. 12 of 2008, s60(c)
\textsuperscript{95} Ibid.
to be put in place. Delays are against the essence of the Cotonou Agreement that requires proper, prompt and efficient execution of projects and programmes.*

In general therefore, the findings and conclusion under the third objective are in agreement with hypothesis No. 3 that the current legislation is inadequate and is not specific in its meaning, definition and application.

4.2 Recommendations

The recommendations of improving the legal environment of procurements financed by the EDF for the benefit of Zambia follow the order of the three objectives of the research. These recommendations may be applied to other similar donor funded procurements.

4.2.1 As to whether the grant money donated by the EC via the EDF to Zambia qualifies to be ‘public funds’; the recommendation is as follows:

(a) Since payments, effective control, and some financial decisions on non-budget EDF financed contracts benefiting Zambia are exclusively made by the EU, there is need to re-define what constitutes public funds in order to include the aspect of ‘effective control’ by GRZ, as one of the determinants of what constitutes public funds. As GRZ alone is the Contracting Authority to EDF funded contracts under the Agreement, it is only equitable that the NAO be granted more powers. Therefore, it is recommended that either the EU be obliged to pay once the NAO has approved the payment or the EU

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* Cotonou Agreement, Revised in Luxembourg on 25 June 2005, Article 57(f) of Part 4
becomes a co-contracting authority with the NAO.

(b) Section 3(2) of PP Act should be amended to accommodate alternative procurement rules and procedures that entirely substitute procurement rules and procedures of the PP Act rather than mere modification. Once the agreement is ratified, such rules and procedures should be speedily domesticated.

(c) Section 4(1) and 4(2) should be amended to be consistent as to whether, in relation to an international agreement; the procuring entity shall obtain an “approval” or “advice” of the A-G. Further, the section should not only provide for individual procuring entities, but also for agreements such as the Cotonou in which matters relating to procurement are just part of the whole agreement involving the entire State and a multiplicity of other States.

4.2.2 As to the legality of signing of such contracts by Zambian public officers and the legal consequences for that; the following are the recommendations:

(a) To avoid delays and conflicting approvals associated with applying the PP Act and the EDF award of contracts procedures concurrently, the PP Act should be clear on what rules and procedures to follow. The PP Act as an indigenous national Act would be easier to amend, to suit the dictates of the Agreement, which is rigid as it involves many states. The PP Act should also be amended to make it clear that the Controlling Officer can sign contracts; and
(b) Article 35(1) of *Annexe IV* to the ACP-EU Agreement needs to be amended to specify the authority to be responsible for appointing the NAO. This is meant to avoid cases where, a politician such as the Minister of Finance and National Planning is appointed or appoints himself NAO. This has led to hierarchical problems and inconsistence in projects execution; as Ministers are not permanent in their portfolios.

4.2.3 As to the legality of utilizing the General Regulations and the Practical Guide for contracts financed by the EDF at the Expense of the PP Act; the following are the recommendations:

(a) The PP Act must be amended to make it clearer, as to whether the authority to allow modification to it, purported to be delegated to the A-G and the ZPPA, is adequate to effect the modifications without the need to domesticate those changes. The PP Act must be made unambiguous as to whether, before utilising the award of contract procedures for EDF and other donors, there has to be domestication. In relation to s60, the PP Act needs to be amended to include the definition of “alternative procurement system”; and

(b) Future studies be conducted to determine what kind of treaties require to be domesticated. Considering that parliament in Zambia has always been controlled by ruling parties, and that, legislators from the ruling party always take the same position as the executive during legislative debates; there is need to establish whether
domestication of treaties beyond ratification is really justified.
5.0 BIBLIOGRAPHY

5.1 Books


5.2 Directed Researches


5.3 Reports/Documents

5.4 Papers


5.5 Websites

National Assembly website.


University of the South Pacific School of Law website, 2005. *URL*:

http://www.paclii.org/oldpits/english/domestication.html
6.0 ANNEXES
6.1 Letter to Ministry of Justice
The Permanent Secretary  
Ministry of Justice  
Lusaka, ZAMBIA

Dear Madam,

SUBJECT: ASSISTANCE IN CONDUCTING A RESEARCH - ANALYSIS AND ADVICE ON THE LEGAL EFFECT OF THE COTONOU AGREEMENT ON THE ZAMBIA PUBLIC PROCUREMENT ACT

I am a student of law at the University of Zambia (UNZA) carrying out a directed research to be submitted to the School of Law of the University of Zambia in partial fulfillment of the requirement for the award of the Degree of Bachelors of Laws (LL.B). I am earnestly requesting for your assistance in explaining with some legal technicalities as highlighted in this letter.

This paper seeks to establish the legal effect of the Cotonou Agreement on the [Zambia] Public Procurement Act, No. 12 of 2008. This is in view of the fact that the multilateral co-operation agreement between the African Caribbean Pacific Countries (ACP) and the European Community (EC) provides for distinct procurement rules and regulations for the execution of the said Agreement.

The EC provides Zambia with substantial financial assistance mainly in form of grants. In order to safeguard the different interests, through joint multinational institutions representing under the Cotonou Agreement, the parties agreed to neutral rules and regulations, and other subsequent standard documents to govern the applicability of the finances.

Article 28 of the annex IV to the Agreement states that,
"The award of contracts financed from the resources of the Fund shall be governed by this annexe and the procedures which shall be adopted by the decision of the Council of Ministers at the first meeting following the signing of this Agreement, upon recommendation of the ACP-EC Development Finance Cooperation Committee. These procedures shall respect the provisions of this annexe and the community's procurement rules for cooperation with third countries.

Pending the adoption of these procedures, the current EDF rules contained in the current general regulations and general conditions of contracts shall apply."

In terms of Zambia, Article 28 means that, the utilisation of EDF grants is not governed by the Public Procurement Act but by the rules and procedures emanating from the Cotonou Agreement.

On the other hand, section 3 of the Public Procurement Act (PPA) states,

3(1) "This Act applies to all procurement carried out by procuring entities using public funds, except as otherwise provided under subsection (2)." Public Funds according to section 2 of the Public Finance Act (PFA), mean "funds received by an officer by virtue of the officer's employment and include public moneys." Section 28(1) of PFA states that, "All moneys received by way of loans, grants, and donations shall constitute public moneys and shall be paid into the Treasury Account for the credit of the Consolidated Fund."

The above provisions confirm that in principle, all grants to Zambia qualify to be public funds. Therefore, except as otherwise provided under section 3(2) of PPA, public officers should in utilising public funds including the European Development Fund (EDF) grants donated to Zambia by the European Community (EC) under the Cotonou Partnership Agreement apply the PPA.

In addressing the qualification of s3(1), section 3(2) of PPA states that,

(2) A procuring entity may, where any procurement involves or relates to international relations of the Republic, modify the application of rules and procedures of procurement set out in this Act only to the extent necessary to protect the public interest and in accordance with such procedures as the Authority may determine.

(3) Where a procuring entity undertakes any procurement that is related to or involves ... international relations of the Republic, the procuring entity shall-

(a) agree with the Authority on the type of goods, works or services to be subject to modified rules and procedures of procurement;
(b) agree with the Authority on the modifications to be made to the rules and procedures provided for in this Act and to be applied to the goods, works and services referred to under paragraph (a); and

(c) apply the rules and procedures provided for in this Act to the procurement of goods, works and services in a manner that is not prejudicial to the security, defence and international relations of the Republic.

Section 4 of PPA states:

(1) a procurement entity shall, before entering into any international agreement relating to procurement, obtain the approval of the Authority, and the advice of the Attorney-General.

(2) Any Agreement purportedly entered into without the approval of the Attorney-General is void.

In addition, section 60 of PPA provides that the Zambia Public Procurement Authority (ZPPA) may in the prescribed manner, accredit an alternative procurement system where a procuring entity-

(c) is required to use an alternative system to comply with the provisions of an international or other agreements.

It is clear that as long as a procurement entity (in this case the National Authorising Office of the European Fund) complies with the provisions of the PPA, alternative procurement system may be permitted.

However, what is not clear is whether this general provisions amounts to domestication of the EDF rules and procedures in Zambia and whether there is need for domesticating the rules at all or whether domestication has already been effected for the application of EDF procedures.

Further, it is not clear whether the authority to allow deviations to the law on procurement in Zambia purported to be given to the Attorney General and the Zambia Public Procurement Authority by the PPA is adequate to do away with PPA.

Section 4 of the PPA means that before international agreements relating to ‘government’ procurements are entered into, they must be approved by the ZPPA. Whereas subsection 4(1) of the Act refers to the advice of the Attorney-General, subsection 4(2) refers to approval. Hence, both the Attorney General and ZPPA must give prior approval before the EDF procurement rules and procedures can apply to EDF grants.
I appreciate you assistance on the specific questions and any other legal opinion you may have on my research.

Yours faithfully

Daniel Maimbo
STUDENT OF LAW, UNZA, COMP. NO. 92063799
6.2 Questionnaire
Questionnaire

Dear Sir/Madam,

I am a student of law conducting a directed research essay to be submitted to the School of Law of the University of Zambia in partial fulfilment of the requirement for the award of the Degree of Bachelor of Laws (LL.B). My topic is “Analysis and Advice on the Legal Effect of the Cotonou Agreement on the Zambia Public Procurement Act”

As an officer responsible partly or wholly responsible for issues relation to the ACP-EU Partnership Agreement, you have been sampled to assist me answer the questions below.

12.4.1 Does the grant money donated by the European Union via the EDF to Zambia qualify to be ‘public funds? Whatever the answer, please cite the provision in a legal document that confirms that.

12.4.2 What and where is the legal basis the EDF funded projects cannot apply the Public Procurement Act?

12.4.3 In what capacity do public officers sign contracts financed by the EDF for the benefit of Zambia and what is the legal basis and effect for that?
12.4.4 Has the Zambian government suffered any legal suit as a result of contracts arising from the EDF funding?

12.4.5 Does the utilisation of the General Regulations and the Practical Guide for contracts financed by the EDF for the benefit of Zambia under the Cotonou Agreement need to be domesticated. Could you confirm by way of legal documentation whether the EDF procedures as applied under procurements funded by the EDF have been domesticated?

Are the Zambian statutes especially the Public Procurement Act and Public Finance Acts clear enough about procurements on donor funded projects. On what legal document is your answer based on?

Be assure that confidential information will not be divulged to anybody.

Daniel Maimbo
Student of Law – Comp No. 92063799
6.3 Newspaper Articles
MACE sues Attorney General

By Maliba Jere

MACE Construction Limited has sued the Attorney General and the National Authorisation office of the European Development Fund (EDF) for over K400 million in construction works.

In a statement of claim filed in the Lusaka High Court, Mace Construction Ltd entered into a contract with EDF to rehabilitate and expand Mutumbwe Rural Health Centre in Mutumbwe district in North Western Province at a cost of K72,442,445.00.

Mace stated that it then undertook the works of rehabilitating and expanding the health centre from April 2001 to December 2003. The statement indicated that upon completion of the said works in December 2003, EDF had not settled the fees for the materials and services provided by Mace amounting to over K400 million.

Mace stated that despite numerous demands and reminders, the defendant had refused or ignored and totally refused to pay the said amount of money.

It also stated that even after the plaintiff was instructed by EDF's project manager in a letter dated May 5, 2003 to use its own materials and after the completion of the project in December 2003, an amount owed to the company had not been paid.

Mace is now claiming K420,820,001.10, including interest and commercial rates per annum as determined by the Bank of Zambia from December 2003 to date.

It is also claiming full payment in respect of the building and construction works on the rehabilitation project at Mutumbwe Rural Health Centre.

EDF has been sued in its capacity as the authorising office of the European Union Development Fund micro-projects programme.
A computer billed at K4.6m on Govt funded contract is quoted K23m on EU funded contract on the same Zimba-Lstone road rehabilitation project.

MORE DISPARITIES EXPOSED AT RDA

By Staff reporters

The Office of the Auditor General (OAG) has recommended that an investigation be instituted on the financial disparities between the government and European Union (EU) funded contracts on the Zimba-Livingstone road works.

The OAG recommendation is contained in its financial and technical audit of... (To page 4)
More disparities exposed at RDA

(From front page)

The Zambian government, with the financial assistance from the EU through the 9th European Development Fund (EDF), embarked on a project to repair and rehabilitate 72.8Km of the Zimba-Livingstone road. The Zambian government funded the rehabilitation of the first 30Km through budget support and the remaining 42.8Km was funded by both the EU and government. The rehabilitation of the last 42.8Km was split into two contracts (A and B) and both contracts were awarded to Geo-Corporation Ltd to rehabilitate the first 30Km of the Zimba-Livingstone road at a contract sum of K105, 190, 000, 640.40 for the duration of nine months. According to the OAG report, the contract price was later revised to K120, 630, 364, 245.40.

According to the OAG report, the 30Km government funded BOQ in contract A was billed at K255, 005, 000.00 while the contract billed the EU the same item Euro 115, 384, 62 equivalent to K897, 602, 340 (Exchange rate 1 Euro – K7900), representing a 216.72 per cent increase in rate. The report revealed that the HIV/AIDS awareness campaign was billed at K770, 000 per month in the GRZ, 30Km contract while the same item was billed at Euro 384, 62 equivalent to K2, 652, 340 per month representing a 249.65 per cent increase in rate, read the OAG report in part.

"Domestic and sanitary service at the camp were billed at K11, 550, 000 lump sum in the 30Km GRZ funded contract and Euro 19, 230.77 equivalent to K134, 615, 390 in the 42.8Km EU funded contract. This represents 16.8 per cent increase in rate," read the report in part.

According to the OAG report, the contractor increased the rate of most items by approximately 40 per cent in contract B. The report revealed that crushed stone base was charged at K231, 000 per cubic metre in the 30Km contract while the same item was billed at Euro 692, 23 equivalent to K484, 610 representing 109 per cent increase in rate.

According to the report, government in partnership with the EU would spend K120, 630, 364, 245.40 on the rehabilitation works of the first 30Km of the Zimba-Livingstone road and K248, 641, 739, 960 on the last 42.8Km stretch.

"The last 42.8Km has cost K128, 011, 375, 750 more than the first 30Km. This represents 106 per cent increase in the contract sum as compared to 43 per cent increase in distance (30 to 42.8Km) on the same road and by the same contractor," read the report in part.

"China Henan and China Geo Corporation were the only contractors who bid for this project hence, lack of competition due to stringent guidelines allowed the contractor to increase his rates which result in an unexpected expenditure of K369, 272, 104, 235.40 on reconstructing a 72.8Km road. It is interesting to note that the same contractor is constructing 82Km of a new road between Choma and Chitongo at a contract sum of K164, 122, 514, 556."

According to the report, a visit to the project site carried out in September 2009, revealed that 14 months into the contract, the contractor had only completed 5Km out of a total of 30Km. The OAG revealed that Acting manager Construction and Maintenance, on four occasions, irregularly instructed the contractor to pay for maintenance of the four vehicles belonging to the RDA but not on the road project.

According to the report in the BOQ series 1400 provides for Euro 1, 402, 654.52 for housing, offices and laboratory for the engineer's site personnel, but an inspection on the site showed that major laboratory supplies were not available at the 42.8Km laboratory site.

"As at 30th September 2009, equipment ordered from China had not yet reached the site. The contractor resorted to borrowing laboratory supplies from the 30Km project which is under a different supervisor Zulu Burrow," read the report in part.