

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE**

MONTSERRAT

CLAIM NO. MNIHCV 2020/0015

BETWEEN:

[1] K.T. ENGINEERING CONSULTANTS LTD.

Claimant

and

**[1] DIGICEL GROUP LTD.
[2] CARIBBEAN CABLE COMMUNICATIONS
trading as DIGICEL MONTSERRAT LTD.
[3] DIGICEL ST. VINCENT**

Defendants

Appearances:

Ms. Chivone Gerald for the Claimant
Mr. Justin Simon, K.C. for the Defendants

2024: FEBRUARY 22

2024: MAY 27

JUDGMENT

FITZPATRICK[AG.]:

THE COURT CONSIDERED THE FOLLOWING:

- [1] The parties are engaged in ongoing litigation commenced in 2020 where the Claimant alleges that he entered into a binding agreement to provide engineering and contracting work related to the Defendant's installation of a subsea to land link to provide a fibre optic network for Montserrat. The Defendants deny that any agreement with the Claimant was reached.
- [2] The trial of this matter lasted less than one day. The Claimant presented one witness and the Defendants two. All three witnesses adopted his/her filed Witness Statement as evidence in chief and each was cross-examined.

Trial Evidence

- [3] The Claimant is a Montserrat corporation engaged in engineering and infrastructure works and consultancy ("KTEC"). William Keith Thomas ("Thomas") is the principal of the Claimant.
- [4] The Defendants are related corporations involved in providing telecommunications and entertainment networks across the Caribbean, Central America and Oceania regions (together "Digicel").
- [5] As above noted, Digicel was retained by the Government of Montserrat to install a subsea to land link to provide a fibre optic network for the island. As part of this endeavour, Digicel created a Request for Proposal ("RFP") for invited contractors to bid for the works therein identified.
- [6] The following provisions of the RFP bear upon the issues in this case and offer some context for the communications detailed subsequently:

Section 12. Cancellation and Acceptance of Proposals

Digicel, for whatever reason, reserves the right to reject any or all of the Proposals and to cancel the Request for Proposal at any time.

Section 17. Contract Negotiations

After a full and complete evaluation of the Supplier's Proposal, Digicel may decide to enter into negotiations with the Supplier for the purpose of determining the following:

Completeness and inclusiveness of the Proposal

Completeness and inclusiveness of associated costs

Understanding and commitment to the project

Understanding the Supplier's knowledge and understanding of Digicel's requirements.

Section 18. Contract Award

After the negotiation stage, the successful Supplier shall be invited to enter into a Contract Agreement with Digicel.

The Contract Agreement shall incorporate the Contract Documents and the agreed Proposal prices.

The Contract Agreement shall allow the issuing of work at the sole discretion of Digicel.

- [7] The material communications between the parties were all in writing, namely by email sometimes with attachments, over a period of about one month at the beginning of 2020. The trial evidence was focused on the contents of these written communications given it is the interpretation of the email content that will determine the outcome of this action. The relevant email communications and related chronology are reviewed below.
- [8] The RFP was sent to KTEC by Digicel through an email from it's Program Manager, Krystle Francis on December 13, 2019.
- [9] On January 10, 2020, KTEC submitted an initial itemized bid (Bid 1) priced at \$1,385,000 (USD) for the RFP scope of work.
- [10] Digicel, again through its Program Manager, Krystle Francis, emailed KTEC on January 17, 2020 at 9:19 a.m. seeking revised pricing as follows:

Subject: Message regarding event: DIGICEL RFP MONTSERRAT SUBSEA BUILD

Dear Vendor,

Due to the disparity in pricing, we are requesting that all vendors resubmit revised pricing by Tuesday 21st January 2020 at 5pm.

Please note that any additional technical questions should be sent by Monday 20th January 2020 by 4pm.

Once an agreement is reached with a vendor, no additional fees or rates will be considered.

Sincerely,

Krystle

- [11] In response, on January 21, 2020, KTEC submitted a second itemized bid (Bid 2) with a revised price at \$1,399,900 (USD) for the RFP scope of work.

[12] KTEC, through Mr. Thomas, emailed Digicel on January 30, 2020 at 12:13 p.m. by way of follow up to the submitted revised proposal as follows:

Subject: RE RFP - Montserrat Subsea Terrestrial Build

Good Day,

In respect to the revised submission made, do you have a tentative date for a response of the bidder selection?

Best regards,

William Keith Thomas

[13] Digicel, this time through it's Head of Procurement, Annette Griffiths, responded to KTEC by email dated January 31, 2020 at 2:57 p.m. as follows:

Subject: Digicel Counter offer to KTEC (Montserrat Project)

Dear Mr. Thomas

Firstly let me introduce myself, I am Annette Griffiths, Head of Procurement at Digicel Group. Thank you for your proposal in relation to the subject matter. We sincerely appreciate the effort that you have put in submitting such a comprehensive proposal for Digicel. We have reviewed the proposal in details and are pleased with most aspect of it. At the same time there are some key concerns which will probably delay us in awarding your company the contract. We are given specific budget for this project and was tasked to award the contract to the most competitive bidder.

We see your company with high potential to secure this bid, however your price should be minimum 10% lower at a final price of \$ 1.25mil versus US\$1.39mil.

We sincerely hope you will consider our counter offer as this will put us one step closer to closing this deal with your company. We do hope to receive your favorable response before close of business Monday February 3rd.

Thanking you in advance.

Best regards,

Annette Griffiths

- [14] KTEC's preliminary response to Digicel's message was by return email from Mr. Thomas to Ms. Griffiths dated January 31, 2020 at 2:21 p.m. as follows:

Subject: Re: Digicel Counter offer to KTEC (Montserrat Project)

Dear Miss Griffiths

Certainly we are most grateful for the opportunity and would be reviewing the numbers over this weekend. I should not see an issue here but would have a confirmation on or before the business day of Monday February 3rd, 2020.

Best regards

William Keith Thomas

- [15] KTEC, through Mr. Thomas, forwarded the following correspondence dated February 3, 2020 to Ms. Griffiths:

Dear Miss Griffiths

I must acknowledge our gratitude of having been given the opportunity to bid on this project. Furthermore, it is most humbly to be selected as the preferred bidder for negotiations. Therefore, we are hereby accepting the offer as presented.

Attached is a reconsideration of the rates and amounts equating to a sum of US\$1.25M.

N.B: This email was set [sic] since early this morning, please respond ASPA [sic] if you have received.

Best regards

William Keith Thomas

[16] A copy of the above correspondence was produced at trial. Although the evidence was not entirely clear, it would appear that this correspondence was sent by email along with KTEC's now third itemized bid with a further revised price of \$1,250,000.00 USD.

[17] Digicel, through Annette Griffiths, followed up on its January 31st message by email to KTEC dated February 3, 2020 at 2:13 p.m. as follows:

Subject: RE: Digicel Counter offer to KTEC (Montserrat Project)

Dear Mr. Thomas

This consider this mail as a friendly reminder on the below request. Please let us hear from you.

Best regards,

Annette Griffiths

[18] KTEC subsequently communicated its response, again through Mr. Thomas, by email dated February 3, 2020 2:14 p.m. providing KTEC's now third itemized bid with the revised price at \$1,250,000 (USD) noting that the revised bid had also been uploaded to the Digicel portal:

Subject: Re: Digicel Counter offer to KTEC (Montserrat Project)

Dear Miss

I have also loaded the revised offer into the portal.

Best regards

William Keith Thomas

[19] Digicel, again through Annette Griffiths, responded to KTEC by email dated February 3, 2020 at 4:12 p.m. as follows:

Subject: RE: Digicel Counter offer to KTEC (Montserrat Project)

God [sic] day Mr. Thomas

I am confirming receipt of your offer and will be in touch within the earliest possible time with our decision on the matter. Thank you.

Best regards,

Annette Griffiths

[20] KTEC messaged Ms. Griffiths, again through Mr. Thomas, by email dated February 5, 2020 at 1:52 p.m. where he stated:

Subject: RE: Digicel Counter offer to KTEC (Montserrat Project)

Dear Griffiths,

I am following up on the status in response to the counter offer that submitted on Monday.

Looking forward to a favourable response.

Best regards

William Keith Thomas

[21] The responding communication was Ms. Griffith's email dated February 5, 2020 at 4:23 p.m. to KTEC where she stated:

Subject: RE: Digicel Counter offer to KTEC (Montserrat Project)

Dear Mr. William,

We regret to inform you that we have considered another offer. The project was awarded to an existing business partner who is currently under contract with Digicel working on multiple projects.

Their offer was very attractive, one we could not refused [sic].

Thanks for your participation and we will continue to include your company in our tender process.

Best regards,

Annette Griffiths

[22] The final salvo was an email from KTEC through Mr. Thomas to Ms. Griffiths dated February 5, 2020 at 5:50 p.m. presenting KTEC's position as follows:

Subject: [EXTERNAL] Re: Digicel Counter offer to KTEC (Montserrat Project)

Dear Miss Griffiths,

Re: Digicel counter offer to KTEC

Your response indicating that Digicel has considered another offer, came as quite a shock, as based on your email of Friday 31 January 2020, you indicated that Digicel was pleased with the aspects of my proposal, but given your specific budget, you counter offer a reduced price of \$1.25mil, which I agreed and accepted on Monday 3 February 2020, as requested by you.

Having already made a counter-offer, which I accepted, I have realistic and reasonable expectations that I would be awarded the contract. I have started making arrangements personally and professionally with relevant parties, as a result of the communications and conversation held.

I look forward to your reconsideration within the next 24 hours, and please be put on notice, that I will be seeking legal advice on this position.

Best regards

Analysis

[23] The focused issue before this Court is to determine whether the parties, through their written communications, entered into a binding agreement for KTEC to install the subsea to land fibre optic network for Montserrat. The determination of this issue is on the objective standard, namely how would an objective person (the “reasonable person”) interpret the communications. This standard was expressed by Lord Hoffman in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, para 14:

“There is no dispute that the principles on which a contract (or any other instrument or utterance) should be interpreted ... It is agreed that the question is what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean.”

[24] The reasonable person is contextual. Here, we have a commercial setting with two experienced, business entities speaking through their respective non-legal representatives. As such, the lens of interpretation here is that of the reasonable experienced, non-legal business person engaged in commercial dealings.

[25] The parties were engaged in a bid process with the protocol outlined by the RSP. Digicel set an initial deadline for the invited vendors to submit bids. KTEC responded by providing its initial bid by the set deadline. Digicel was not satisfied with the pricing of the initial bids and requested the vendors to resubmit “revised pricing” by January 21, 2020. KTEC responded by providing its amended bid by the set deadline. Digicel remained dissatisfied with the pricing and requested that KTEC resubmit with revised pricing by February 3rd. KTEC responded by providing its final bid by the set deadline.

[26] The communications between the parties were all done by email. Not surprisingly, the parties have polarized views of the interpretation and legal consequence of their communications.

[27] The factious communication in this case was the email from Ms. Griffiths dated January 31st.

- [28] KTEC's position is that Ms. Griffiths' January 31st email "expressed [Digicel's] willingness to enter into an agreement with the Claimant, which was accepted by the Claimant. [Digicel] is bound by its email counter-offer of January 31, 2020 upon the Claimant's acceptance of it" (see: paragraph 29. of the Witness Statement of William Keith Thomas filed June 28, 2021). KTEC relies on its correspondence of February 3rd with related final bid as the foundation of its argument that it accepted the purported counter offer and thereby reached a binding agreement on all terms with Digicel.
- [29] The necessary and logical starting point of analysis is the interpretation of the Digicel email of January 31st itself.
- [30] Ms. Griffiths' wrote the January 31st email in her capacity as procurement head for Digicel. She starts this communication with the subject line "Counter Offer". Ms. Griffiths goes on to say that Digicel has reviewed KTEC's final bid and were "pleased with most aspect of it". She goes on to note Digicel still has "key concerns". That said, Ms. Griffiths only identifies one specific concern, namely the price quoted in KTEC's proposal. It is worth noting that price was the only issue identified by Ms. Francis in her email on January 17th soliciting revised bids.
- [31] Ms. Griffiths' January 31st email further advises that Digicel had a fixed budget and was tasked to award the project to the most competitive bidder. Ms. Griffiths then suggests that KTEC's price "should be minimum 10% lower at a final price of \$1.25mil versus US\$1.39mil". Ms. Griffiths refers to this suggested lower price as "our counter offer" asking KTEC to give it consideration "as this will put us one step closer to closing this deal with your company".
- [32] How would the reasonable person interpret the content of Ms. Griffiths' email?
- [33] Clearly, price was an essential concern for Digicel given they twice identified only that issue when seeking revised bids through the emails of their representatives on January 17th and again two weeks later on January 31st.
- [34] I appreciate that Ms. Griffiths' email was to KTEC singularly noting the price concern and specifically seeking at least a 10% reduction in KTEC's proposal. However, she clearly prefaced this request by noting Digicel had a plurality of "concerns" with KTEC's amended bid without

itemizing any of these other issues. A failure to itemize cannot reasonably be interpreted to mean that there was only one concern, namely price.

- [35] Reasonably interpreted, Ms. Griffiths is seeking a price reduction of at least 10% in the KTEC extant bid given Digicel's specific budget for the project. If received then the reduced price would be an amendment to and form part of the ongoing consideration of KTEC's entire proposal not the final item facilitating an overall agreement. In other words, KTEC would be "one step closer" in its quest to be selected as the "successful Supplier" with its proposal amended to reflect the price reduction requested by Ms. Griffiths. As Mr. Thomas conceded during his trial testimony, being one step closer is not the same as being one step away. A price reduction was not the final step.
- [36] A review of Ms. Griffiths' January 31st email itself directs this Court to reject KTEC's claim that the email was a true counter offer available for KTEC to accept and thereby achieve an overall agreement for the project.
- [37] Another angle for interpretation is to consider what is not stated in Ms. Griffiths' January 31st email. To undertake this, reference must be made to the RSP itself. Sections 17 and 18 of the RSP present two steps as the designated protocol: first the evaluation and negotiation stage and, subsequent to that, the contract stage.
- [38] The RSP states that Digicel may enter into the negotiation stage with a supplier following its "*full and complete evaluation of the Supplier's Proposal*". Section 17 of the RSP is clear that the negotiation stage would involve Digicel engaging with the supplier to ensure the completeness of the proposal, including costs, and the supplier's understanding of the project, including Digicel's specific requirements therein. The parties would only move on to the second stage upon Digicel being satisfied with the results from the negotiation stage.
- [39] At the second stage, Digicel would invite the selected supplier to enter into a contract, which terms would need to be finalized, including the agreed upon proposal prices and any other contractual terms.

[40] Following the protocol presented at sections 17 and 18 of the RSP, KTEC's argument that an agreement was reached when it accepted the purported counter offer requires that Digicel's January 31st email unambiguously communicated:

- a. that Digicel had selected KTEC as the "successful Supplier";
- b. that every element of KTEC's proposal, save and only excepting price, was reviewed and Digicel was satisfied with the completeness of the proposal, including costs and KTEC's understanding of the project and Digicel's specific requirements;
- c. that KTEC and Digicel had then entered into the negotiation stage with the only term to resolve being price;
- d. that Digicel had invited KTEC to enter into a "Contract Agreement"; **and**,
- e. that Digicel's request for KTEC to reduce its price quoted by "a minimum of 10%" was an unequivocal offer meaning that if KTEC agreed to at least a 10% reduction in price then the final outstanding term would be resolved and the parties would have then achieved a meeting of the minds on all fundamental terms thereby reaching an agreement for the project.

[41] The necessary stream outlined above is not supported by the reasonable interpretation of the communications between the parties. The contents of Digicel's January 31st email alone and what is not said therein belie KTEC's argument that a full agreement was reached upon submission of its final bid with requested reduced price.

[42] The language used in the January 31st email is simple and unambiguous. This email reasonably interpreted clearly establishes that:

- a. There was never a communication by Digicel that it had fully reviewed and accepted all elements of the KTEC proposal except for price. To the contrary, Ms. Griffith's said that Digicel has "key concerns" plural;
- b. There was never any communication by Digicel to KTEC that it had been selected as the successful supplier as outlined at paragraph 17. of the RSP;
- c. There was never a communication by Digicel to KTEC that the parties would reach a binding agreement on all material terms upon a price being determined; and,
- d. There was never any communication by Digicel inviting KTEC to enter into a contract with Digicel as outlined at paragraph 18. of the RSP.

- [43] KTEC's argument is that Digicel's January 31st email only seeking an amended price evidences Digicel having made a "full and complete evaluation of the Supplier's Proposal" automatically transitioning the parties into the negotiation stage with the only item outstanding for negotiation being price, which in turn would catapult the parties into a binding agreement on all material terms upon price being determined. This argument is nothing more than cumulative assumptions made by KTEC on the basis of its, understandably, self-serving and hopeful interpretation of the January 31st email unsupported by the whole of the contents of that email.
- [44] This Court is, again, directed to reject KTEC's claim when reasonably interpreting Ms. Griffith's email with consideration to the relevant provisions of the RSP and what was not stated in that email as noted above. Digicel did not communicate that KTEC had been selected as the successful Supplier. Digicel did not communicate acceptance of KTEC's proposal except for price. Digicel did not communicate that the parties would achieve an overall agreement upon KTEC reducing its bid price by at least 10%. Digicel did not invite KTEC to enter into a contract for the project.
- [45] Again, a reasonable interpretation based on the contents of the January 31st email and the relevant provisions of the RSP was that Digicel was seeking a reduction of at least 10% to the price quoted by KTEC in its proposal towards meeting the specific budget for the project. This was the second time Digicel had requested bids to be resubmitted with the only change requested being revised pricing. If the price reduction of at least 10% was received then the entire KTEC proposal would continue to be considered for selection as the successful supplier. In other words, it was not reasonable to interpret Ms. Griffith's January 31st email to be a counter offer whereby a binding agreement would be reached upon KTEC agreeing to reduce its proposal price by 10% to \$1,250,000.00 USD.
- [46] Even if this Court found that Ms. Griffiths' January 31st email was an unambiguous counter offer whereby a full agreement would be reached upon KTEC accepting the suggested reduced price, the evidence before this Court is equivocal on whether KTEC communicated such an acceptance.
- [47] KTEC's argument that it had reached an agreement at the point it forwarded the correspondence of February 3rd purporting to accept the counter offer is undermined by the emails subsequently

sent by KTEC that same day and following. Simply stated, there is an unexplained and fundamental incongruity between the content of KTEC's February 3rd correspondence and the other emails subsequently exchanged by the parties.

[48] The material exchange begins with KTEC's February 3rd correspondence accepting the purported counter offer from Digicel's January 31st email.

[49] KTEC's February 3rd correspondence states "N.B: This email was set [sic] since early this morning please respond ASPA [sic] if you have received." In his trial testimony, Mr. Thomas confirmed that the word "set" was meant to say "sent". What early morning sent email is being referenced? There was no related email or other document tendered to confirm this. I note that neither the KTEC February 3rd correspondence nor the email of earlier that morning noted in the body of that correspondence were referenced by either Mr. Thomas or Ms. Griffiths in their respective Witness Statements filed as evidence in chief on this trial.

[50] Given the above, the Court has no documentary confirmation of when the KTEC February 3rd correspondence was sent or when the related amended bid was uploaded into the portal. Mr. Thomas' testimony did not address this in any detail except where he testified to his recollection of having "accepted the counter offer ... by 2:41 or two something" that afternoon. Ms. Griffiths' testimony did not touch upon this in any meaningful way. This is only the beginning of the difficulties with the communications evidence in this regard.

[51] Digicel emailed KTEC on February 3rd at 2:13 p.m. sending a "friendly reminder" to KTEC for a response to the January 31st email where Digicel suggested a 10% price reduction. Why would it do so if KTEC had that morning sent the correspondence of February 3rd accepting the purported counter offer from Digicel's January 31st email? The narrative becomes even more perplexing when considering the response to this reminder from KTEC.

[52] KTEC's next communication is by email of February 3rd sent at 2:14 p.m. attaching KTEC's now third itemized bid with a revised price at \$1,250,000 (USD) for the RFP scope of work. Does KTEC in the body of this February 3rd email reference its prior February 3rd correspondence whereby it communicated acceptance of the Digicel counter offer and confirm the parties thereby earlier that day had achieved an overall agreement? No. Does KTEC in the body of this February 3rd email reiterate acceptance of the Digicel counter offer and confirm the parties had achieved

an overall agreement? No. Instead, Mr. Thomas simply writes “I have also loaded the revised **offer** into the portal” [emphasis mine].

- [53] Digicel responded to KTEC on February 3rd by email sent at 4:12 p.m. “confirming receipt of **your offer** and will be in touch within the earliest possible time with our decision on the matter” [emphasis mine]. Again, Digicel makes no reference to the February 3rd correspondence from KTEC. Digicel simply acknowledged KTEC’s offer while clearly indicating that Digicel remained in the process of evaluating KTEC’s proposal.
- [54] KTEC responded to Digicel’s reminder within one minute on February 3rd at 2:14 p.m. with it’s “revised offer”. It is beyond non sensical that KTEC would in the afternoon forward it’s revised offer with absolutely no mention of there being a consummated agreement if earlier that morning it sent the February 3rd correspondence accepting the Digicel counter offer. KTEC does not seem to be aware of its February 3rd morning correspondence when emailing Digicel in the afternoon. Similarly, Digicel makes no reference to the February 3rd letter of acceptance in its communications in the afternoon of that same day. This state of affairs continues into February 5th.
- [55] KTEC’s next communication is by email on February 5th at 1:52 p.m. “*following up on the status in response to the counter offer that submitted on Monday [February 3rd]. Looking forward to a favourable response.*” KTEC is following up on the Digicel message of February 3rd where they acknowledged receipt of KTEC’s revised offer and promised a response once a decision had been made. Why would KTEC be soliciting a hoped for favourable response to the proposal it submitted February 3rd if KTEC had already accepted Digicel’s offer through its February 3rd letter? Why would KTEC not reference its February 3rd letter of acceptance in its February 5th email?
- [56] How would the reasonable person interpret KTEC’s February 3rd email sent at 2:14 p.m.?
- [57] KTEC’s February 3rd email was presenting a revised proposal to Digicel for consideration, which included a reduced price in response to Digicel’s request for same. KTEC was making an offer to Digicel, as it so stated in its own unambiguous language.

- [58] Digicel similarly viewed KTEC's February 3rd communication when it responded on the same date by email at 4:12 p.m. "confirming receipt of your offer and will be in touch within the earliest possible time with our decision on the matter." Digicel clearly considered the February 3rd email with the reduced price proposal from KTEC as an offer requiring and awaiting a decision to be made by Digicel.
- [59] Given the above, there is no doubt of the mindset for both parties as of the end of the business day on February 3, 2020. KTEC made a third, final bid proposal with a reduced price and Digicel was considering that amended final offer. Neither party thought that they had achieved consensus on all material terms and thereby entered into an agreement.
- [60] KTEC did not consider it had a binding agreement as late as February 5th when emailing Digicel *"following up on the status in response to the counter offer that submitted on Monday [February 3rd]. Looking forward to a favourable response."*
- [61] The only reasonable interpretation is KTEC is seeking a *"favourable response"* to its February 3rd offer. It is definitely not KTEC taking the position that they have entered into a binding agreement with Digicel. KTEC's February 5th email makes it clear that it did not believe an agreement had by then crystalized.
- [62] KTEC does not assert that an agreement had been reached until February 5th at 5:50 p.m. and then only in response to Ms. Griffiths' email that day at 4:23 p.m. advising another party had been selected as the successful supplier for the project.
- [63] The above evidentiary conflicts were not addressed by Mr. Thomas during his testimony on behalf of KTEC or by any other witness. These unresolved conflicts leave this Court unable to find that KTEC unambiguously accepted the counter offer from Digicel. The evidence of KTEC's acceptance of that purported counter offer is, at its highest, equivocal and, therefore, not persuasive.

Conclusion

- [64] There is no doubt that the language used by Ms. Griffiths in her email of January 31st, in particular her use of the phrase "counter offer", could have been better chosen. That said, the use of a

phrase does not alone determine the content of communications. The whole communications of the parties must be interpreted objectively.

- [65] Digicel's January 31st email interpreted through the lens of the reasonable experienced, non-legal business person engaged in commercial dealings was nothing more than a request for KTEC to specifically revise the price quoted in its then operative proposal towards meeting the specific budget for the project. If done then all of the elements of the KTEC proposal, including the reduced price, would continue to be considered to determine if KTEC would be the selected successful supplier.
- [66] KTEC was never notified that it had been selected as the successful supplier. KTEC never made it to the RSP negotiation stage. In other words, KTEC's last, best offer was not successful.
- [67] KTEC in its own words responded to the Digicel January 31st email by providing its reduced price "offer" by email on February 3rd at 2:14 p.m. KTEC followed up with Digicel by email on February 5th at 1:52 p.m. seeking a "favourable response" to the February 3rd offer. KTEC's email during the afternoon of February 5th makes it clear that KTEC did not believe an agreement had by then crystalized.
- [68] KTEC does not assert that an agreement had been reached until February 5th at 5:50 p.m. and only in response to Ms. Griffiths' email of earlier that day at 4:23 p.m. advising another supplier had been selected for the project.
- [69] The highlighted evidentiary conflicts were not addressed at trial with the result that KTEC has failed to persuade this Court on the civil standard that KTEC unambiguously accepted the purported counter offer from Digicel. KTEC never entered into an agreement with Digicel.
- [70] In conclusion, the Claimant has failed to prove its case on the civil standard. The Claimant's Claim is dismissed entirely.

IT IS HEREBY ORDERED THAT:

1. The Claimant's Claim is dismissed.

2. The parties should attempt to resolve the issue of costs between them. They should do so with particular consideration to my earlier comments with respect to Ms. Griffiths' choice of wording in her January 31st email. If they are unable to then this matter shall return before me on a date to be scheduled to speak to the matter of costs of this trial and action.

The Hon. Dale Fitzpatrick
(Ag) High Court Judge

By the Court

REGISTRAR