

**THE EASTERN CARIBBEAN SUPREME COURT  
SAINT LUCIA**

**IN THE HIGH COURT OF JUSTICE  
(CIVIL)**

**SLUHCV2021/0136**

**BETWEEN:**

**COMPUTER AND ELECTRICAL SERVICES LTD.**

Applicant

and

**PERMANENT SECRETARY, MINISTRY OF ECONOMIC AFFAIRS &  
TRANSPORTATION AND CIVIL AVIATION  
PERMANENT SECRETARY, MINISTRY OF TOURISM**

Respondents

**Before:**

The Hon. Mde. Justice Kimberly Cenac-Phulgence

High Court Judge

**Appearances:**

Mr. Deale Lee of Counsel for the Applicant

Mr. Seryozha Cenac and Mrs. Rochelle John-Charles of Counsel for the  
Respondents

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2021: July 5, 21.

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**DECISION**

[1] **CENAC-PHULGENCE J:** The applicant, Computer and Electrical Services Limited (“CES”) filed a notice of application on 8<sup>th</sup> April 2021 for leave to file a claim for judicial review seeking the following relief:

- (a) A declaration that the determination by the PS, Economic Affairs that the CES bid submission was non-responsive pursuant to ITB (Invitation to Bid) 29 of reference SLU-RTCP-G-RFB-SIC-01-20 is unreasonable, irrational and unlawful;
- (b) An order of certiorari quashing the determination by the PS, Economic Affairs that the CES bid submission was non-responsive pursuant to ITB 29 of reference SLU-RTCP-G-RFB-SIC-01-20;

- (c) An order of certiorari quashing the decision of the PS, Economic Affairs to reject CES bid submission;
- (d) A declaration that the PS, Tourism was the sole authority for determining the responsiveness of the CES bid and for awarding the contract pursuant to ITB 38;
- (e) A declaration that the award of the contract ITB reference SLU-RTCP-G-RFB-SIC-01-20 to Sectus Technologies International Ltd. was unlawful, unreasonable and irrational;
- (f) An order of certiorari quashing the decision of the PS, Economic Affairs to award the contract under ITB reference SLU-RTCP-G-RFB-SIC-01-20 to Sectus Technologies International Ltd.;
- (g) A declaration that being the lowest responsive bidder, CES has a legitimate expectation of being awarded the contract;
- (h) An order directing the PS, Tourism to determine that the CES bid is the lowest responsive bid;
- (i) An order directing PS, Tourism to award the contract of the supply and installation of the baggage carousel and for related training to CES;
- (j) Alternatively, an award of the sum of \$95,800.00 being the profit CES would have earned on the award of the contract;
- (k) Damages
- (l) Costs.

[2] The application is supported by an affidavit and certificate of exhibits.

[3] CES also sought an order staying the award of contract SLU-RTCP-G-RFB-SIC-01-20 for the supply and installation of a baggage carousel and related training to Sectus Technologies International Inc. until the determination of the application. This part of the application was refused by order dated 25<sup>th</sup> May 2021 as the evidence showed that the contract had already been awarded and the award as per the ITB documents was binding and final.

### **Background Facts**

[4] On 28<sup>th</sup> May 2020, the Department of Economic Affairs, Transport and Civil Aviation issued the bidding document for project reference number SLU-RTCP-

G-RFB-SIC-01-20-the Invitation to Bid (ITB) inviting tenders for the supply and installation of a baggage carousel at the Customs Hall at the Ferry Terminal situate at Faux a Chaud, Castries and for provision of related training. Funding for this was under the OECS Regional Tourism Competitiveness Project with funds obtained from the World Bank. Section 1.1 of the Bid Data Sheet included in the ITB specified that the purchaser is the Ministry of Tourism. The tendering process was open to suppliers from any member country of the World Bank.

- [5] CES submitted a bid by tender document dated 29<sup>th</sup> July 2020 in response to the ITB ("the CES bid"). The bids were opened by the Central Tenders Board at its meeting on 29<sup>th</sup> July 2020 in accordance with ITB 25.1 and 25.3. The record of the bid opening reported that 5 bids were received as follows:

| Name of Bidder                            | Bid Amount      |
|-------------------------------------------|-----------------|
| 1. Goertz H-Vac Industries Ltd.           | USD\$429,950.00 |
| 2. Unit Export Ltd.                       | USD\$133,665.00 |
| 3. CES Ltd. (Applicant)                   | XCD\$218,800.00 |
| 4. Glidepath Systems Ltd.                 | USD\$129,500.00 |
| 5. Sectus Technologies International Inc. | USD\$324,493.00 |

- [6] According to CES the ITB and in particular the Bid data sheet sets out in detail the conditions to be met for a bid to be found to be responsive. The ITB at ITB 34-38 also details the functions of the Ministry of Tourism in evaluating the bids, determining responsiveness and awarding the contract to the lowest responsive bid.

- [7] CES alleges that on 30<sup>th</sup> December 2020, it received a letter from the PS, Economic Affairs dated 20<sup>th</sup> September 2020 informing that its bid was not responsive because the manufacturer's authorization required by ITB 17 had not been properly provided. The letter alleged that the manufacturer's authorisation had been provided by Liaoning Material & Metallurgy Group Company Ltd. (LMM Group) while the Department of Economic Development had determined that the manufacturer was PCM ME (FZE) of the United Arab Emirates. No attempt was made to seek clarification or confirmation from CES

before the PS, Economic Affairs determined that the CES bid was nonresponsive.

- [8] The determination that the CES bid was non-responsive is not supported by CES documents submitted in support of the bid. CES asserts that these documents state clearly that LMM Group was the manufacturer of the baggage carousel it was supplying.
- [9] CES alleges that the determination of the PS, Economic Affairs that the CES bid was non-responsive was unlawful, as the ITB does not provide any role for the PS, Economic Affairs or the Department of Economic Development in the evaluation of the tenders submitted in response to the ITB. CES received no communication from the named purchaser, Ministry of Tourism with regard to its tender submission or its responsiveness and therefore failed to carry out its functions under the ITB.
- [10] By letter dated 5<sup>th</sup> January 2021, CES wrote to the PS, Economic Affairs challenging the determination that its bid was non-responsive and requested that the contract award process be halted in light of the error made. CES avers that it received no response to its letter.<sup>1</sup> By letter dated 24<sup>th</sup> January 2021, CES through its lawyer again wrote demanding that the determination that its bid was non-responsive be reversed and that the award to Sectus Technologies be rescinded and again there was no response.
- [11] CES says that the PS, Economic Affairs and PS, Ministry of Tourism have failed to comply with the terms of the ITB and have acted unlawfully and to frustrate CES' legitimate expectation of being awarded the contract.

### **Applicant's Legal Contentions**

- [12] The following are CES' legal contentions:
- (a) the tendering process and the award of the contract are governed by the ITB which contained provisions setting out in detail the conditions to be

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<sup>1</sup> There was a response dated 16<sup>th</sup> February 2021 acknowledging receipt of the 5<sup>th</sup> January 2021 letter and informing that a response would be provided soonest.

satisfied to be a responsive bidder and the powers and functions of the purchaser in evaluating the bids and awarding the contract. The parties are bound by the terms of the ITB.

- (b) ITB 29 sets out the conditions for responsiveness. Among other things it speaks of the 'Purchaser's determination of a bid's responsiveness.' The ITB clearly mandates the Purchaser to conduct the evaluation of the bids for responsiveness. The purchaser is defined in the ITB as Ministry of Tourism.
- (c) The determination that the CES bid was not responsive by the PS, Economic Affairs was carried out in contravention of ITB 29 and 34 and therefore unlawful. ITB 38 provides that the award of the contract is to be made by the Purchaser to the lowest responsive bidder. ITB 38 states that  
    "...the Purchaser shall award the Contract to the Bidder whose bid had been determined to be the **lowest evaluated bid and is substantially responsive** to the Bidding Documents, provided further that the Bidder is determined to be qualified to perform the Contract satisfactorily."
- (d) ITB 38 does not authorise any party other than the Purchaser to award the contract and as a consequence the awarding of the contract by the PS, Economic Affairs was unlawful.
- (e) The failure to seek clarification or confirmation from CES of the identity of the manufacturer of the baggage carousel was unreasonable and irrational because ITB 27 provides for the clarification of bids where such clarification does not affect the substance of the bid. Seeking such clarification would have enabled the PS, Ministry of Tourism to correctly interpret the purchase order submitted and the failure to do this has resulted in CES tender being improperly rejected.
- (f) The only reason cited for disqualifying CES bid was the failure to provide a valid authorisation from the manufacturer. But for this incorrect determination, CES would have been awarded the contract and therefore the decision to award the contract to Sectus Technologies defeats CES legitimate expectation that being the lowest responsive bid it would have been awarded the contract. CES claims that as a result of the unlawful rejection of its bid, it has been deprived of the contract and has suffered loss and damage as a result.

- [13] CES claims that there are no alternative forms of redress. It wrote seeking resolution of its challenge to the determination that its bid was non-responsive and the award of the contract and got no response. CES says that there has been no inordinate delay in filing this application.

**The evidence of the respondents and the applicant's reply**

- [14] Mr. Claudius Emmanuel responded to the application by way of affidavit on behalf of the respondents. He is the Permanent Secretary in the Department of Economic Development, Transport and Civil Aviation which department he states is responsible for procurement and therefore was the proper party to issue all communication in respect of the procurement decision.
- [15] Mr. Emmanuel refers to the ITB as a strictly commercial transaction engaged in by the respondents for the purpose of entering into a private contract with the successful bidder and was not a public act. Given the amount of the tender, the Central Tenders Board was responsible for the decision which he communicated to CES. Notwithstanding, CES was made aware pursuant to clause 37 of the ITB that "the Purchaser reserves the right to accept or reject any bid...prior to the contract award without incurring any liability to Bidders.'
- [16] Mr. Emmanuel states that on 30<sup>th</sup> September 2020, he informed CES that it was not successful and the reason for that decision. The application for leave was filed on 8<sup>th</sup> April 2021, more than six months after that letter. He also states that on 24<sup>th</sup> September 2020, a contract for the supply and installation of the carousel was entered into and the carousel was expected to be in Saint Lucia on 30<sup>th</sup> June 2021. He avers that the application for leave to file judicial review has not been made promptly.
- [17] CES bid was non-responsive for the reason stated in the letter of 30<sup>th</sup> September 2020. He also states that the manufacturer's authorisation was issued by the agent and not the manufacturer and the agent did not provide evidence that it was an authorised representative of the manufacturer. CES he says did not

provide the manufacturer's declaration in accordance with the ITB. Mr. Emmanuel therefore urges that the application be dismissed with costs.

[18] In its reply affidavit, CES, by its director, Mr. Goddard Darcheville denies that the invitation to tender was simply a commercial undertaking. Mr. Darcheville avers that the ITB set out strict procedures for evaluating and awarding the contract and the respondents failed to follow the conditions set therein. Further he says the contract is for the procurement of goods by the Government of Saint Lucia for use at a public facility. He avers that the invitation to tender expressly states that the evaluation and determination of the most responsive bid was to be made by the Ministry of Tourism. No reference was made to the Central Tenders Board in the invitation to tender other than as the depository for the bids. No communication was received from the Central Tenders Board in relation to CES' bid or the award of the contract. CES expected that the respondents would adhere to the rules of competitive bidding and the terms of the invitation to tender and award the contract to the lowest responsive bidder in accordance with clause 38.

[19] It is Mr. Darcheville's evidence that the letter dated 30<sup>th</sup> September 2020 was only emailed to CES on 30<sup>th</sup> December 2020 and he exhibits a copy of the email communication. It was then that CES took steps to resolve the matter without resort to the Court and it was only when a response was not forthcoming that the application for leave was filed.

[20] Mr. Darcheville avers that the respondents failed to read the document properly i.e the manufacturer's authorisation and so failed to act in a reasonable manner in addressing any doubts they may have had regarding the status of LMM as the manufacturer.

### **Applicant's Submissions**

- [21] CES contends that the thrust of its claim is that the PS, Economic Affairs usurped the tender assessment process thereby acting unlawfully. He failed to follow the terms of the invitation to bid in determining that CES bid was unresponsive and in awarding the contract to a bid that was not the lowest responsive bid as required by clause 38 of the ITB rendering these actions unreasonable and irrational.
- [22] CES argues that the invitation to bid was issued on behalf of the Ministry of Tourism, a ministry of Government for the supply of a baggage carousel to be installed at the Ferry terminal which is a public facility and for training of government employees. The process of inviting tenders involved the procurement of goods and services by the Government of Saint Lucia. They contend that this is a public function. Consequently, the process of evaluating the tenders and awarding the contract is subject to review by the Court.
- [23] The procurement process was governed by a set of terms and conditions set out in the ITB which clearly established that the Ministry of Tourism was the purchaser of the goods and services. The ITB provided that the Ministry of Tourism was to evaluate the bids and make the award of the contract. The ITB also required the purchaser to notify the unsuccessful bidders (clause 40).
- [24] CES argues that the ITB provides no role for the PS, Economic Affairs or the Central Tenders Board. CES argues that the PS, Economic Affairs says he was acting on behalf of the Central Tenders Board, however none of the correspondence issued by him discloses this. CES therefore contends that the permanent secretary has arrogated to himself powers which are not provided for under any legislation or the ITB.
- [25] CES further contends that the process by which its tender was determined as non-responsive was flawed as the evidence does not support the PS, Economic Affairs' contention that it did not provide the necessary manufacturer's authorisation. Even if this were to be accepted that this was the case, it would have been an ambiguous submission and it would have been reasonable to

seek clarification from the applicant. The alleged non-compliance by CES was nonmaterial because it did not affect price, quality or origin of the carousel being supplied. The PS, Economic Affairs' determination that the bid was unresponsive did not afford CES the opportunity to respond to his concern regarding the manufacturer's authorisation.

- [26] CES contends that the PS, Tourism simply abdicated her responsibilities as permanent secretary of the purchaser to ensure that the purchaser performed its obligations under the invitation to bid.
- [27] CES argues that while generally the tendering process is seen as subject to private law the process is not immune from judicial review. This is particularly the case where the public authority acted unlawfully. They say that the court is empowered to review the actions of public authorities to ensure that they are in conformity with the governing laws. They refer to the case of **Mass Energy Ltd. Birmingham County Council**<sup>2</sup> where the court of appeal reviewed a tender process to ensure that it complied with the terms of the issued invitation to tender and the governing law.
- [28] CES contends that it has put forward documents in support of its contention that the respondents' actions were unlawful and unreasonable whereas the respondents have not put forward any documents to support their contention that the decision was made by the Central Tenders Board. Additionally, apart from the bald assertion that the management authorisation was non-conforming, the respondents have presented no evidence to support this contention.
- [29] CES therefore submits that it has satisfied the requirements of having an arguable ground for judicial review with a realistic prospect of success.
- [30] CES contends that in looking at the aspect of delay, unreasonable delay must be looked at in the context of the particular case. They argue that in this case, they only got notice of the decision in relation their bid in December 2020 albeit

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<sup>2</sup> [1993] 3 Env LR 298 (Lexis Citation 2440).

the letter is dated 30<sup>th</sup> September 2020. They then sought to engage the PS, Economic Affairs in January 2021 and got a response at the end of January 2021. They argue that in these circumstances, it cannot be said that CES has been guilty of delay.

### **Respondent's Submissions**

- [31] The respondents submit that the alleged decision for which leave is sought to judicially review concerns matters of a strictly commercial nature which does not give rise to any public law rights. The very nature of judicial review presupposes that the impugned decisions would be governed by a law. They refer to the decision of **The Minister of Agriculture, Lands, Housing, Co-Operatives and Fisheries et al v Eustace Nisbett**<sup>3</sup> where Thom J said:

“... the judicial review jurisdiction is a supervisory function of the performance by a public body of the duties imposed upon it in the exercise of its statutory or other powers. Additionally, from the above cases the following propositions emerge (a) the remedy of public law is only available where an issue of public law is involved. (b) **not every decision or action of a public body is amenable to judicial review.**”  
(my emphasis)

- [32] The respondents therefore contend that the decision to award a contract as a result of a tender amounts to nothing more than the participation in a normal commercial activity uncircumscribed by statute. There was no statutory requirement imposed on the respondents to enter into a contract for the baggage carousel. Neither was there some term required by a statutory scheme to be included in the terms of the invitation to bid and which the respondents failed to adhere to. To have a right which can then be the subject of review, it must flow from the statute. No such statute existing, it would not bring the respondents' alleged decisions into the realm of judicial review. The respondents therefore submit that is no need to invoke the supervisory powers of the court.

- [33] The respondents further submit that the statutory framework, **Procurement and Stores Regulations** made pursuant to section 54 of the **Finance**

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<sup>3</sup> SKBHCVAP2019/0020 (delivered 2<sup>nd</sup> March 2021, unreported).

**(Administration) Act** provides that tenders may be invited for the procurement of goods and services but it does not prescribe how the tendering process should be carried out or the process of an award of contract as part of the tendering process.

[34] The respondents contend that the case of **Mass Energy** referred to by CES does not lay down the principle that the tendering process is amenable to judicial review simpliciter but supports their argument that the decision to award a contract for installation of a baggage carousel subsequent to a tendering process in circumstances where there is no statutory underpinning for same, does not give rise to the public law test. The respondents therefore submit that **Mass Energy** is distinguishable from this case.

[35] The respondents refer to the case of **Dannion CE Limited v Attorney General**.<sup>4</sup> In that case the Court of Appeal dismissed an appeal against the decision of the High Court in which the learned judge had dismissed a claim for judicial review of the decision of the Central Tenders Board to award a contract by way of the tendering process to another bidder. The High Court had held that the decision of the Central Tenders Board was not amenable to judicial review as the tendering process for the consultancy contract was of a commercial nature and therefore could only be challenged in private law. The Court of Appeal agreed.

### **Discussion**

[36] There is no doubt that the applicant, CES has standing to bring this application as it was one of the bidders under the ITB and therefore would have an interest in matters related thereto and would be affected by the bidding process and its outcome. However, it is not every decision which adversely affects a party which is justiciable by way of judicial review and the Court must assess the decision complained of against the background of the applicable law before granting leave to file a claim for judicial review.

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<sup>4</sup> SLUHCVP2016/0015, (delivered 17<sup>th</sup> May 2018, unreported).

[37] The test on an application for leave is as stated in the oft-cited case of **Sharma v Browne Antoine**<sup>5</sup> where the court stated:

“The ordinary rule now is that the court will refuse leave to claim judicial review unless satisfied that there is an arguable ground for judicial review having a realistic prospect of success and not subject to a discretionary bar such as delay or an alternative remedy; *R v Legal Aid Board, ex parte Hughes* (1992) 5 Admin LR 623 at 628, and Fordham, *Judicial Review Handbook* (4th Edn, 2004), p 426. But arguability cannot be judged without reference to the nature and gravity of the issue to be argued. It is a test which is flexible in its application. As the English Court of Appeal recently said with reference to the civil standard of proof in *R (on the application of N) v Mental Health Review Tribunal (Northern Region)* [2005] EWCA Civ 1605, [2006] QB 468, at para [62], in a passage applicable mutatis mutandis to arguability:

'... the more serious the allegation or the more serious the consequences if the allegation is proved, the stronger must be the evidence before a court will find the allegation proved on the balance of probabilities. Thus the flexibility of the standard lies not in any adjustment to the degree of probability required for an allegation to be proved (such that a more serious allegation has to be proved to a higher degree of probability), but in the strength or quality of the evidence that will in practice be required for an allegation to be proved on the balance of probabilities.'

It is not enough that a case is potentially arguable; an applicant cannot plead potential arguability to 'justify the grant of leave to issue proceedings upon a speculative basis which it is hoped the interlocutory processes of the court may strengthen'; ***Matalulu v Director of Public Prosecutions*** [2003] 4 LRC 712 at 733.”

[38] At this stage in the proceedings, the role of the court is to determine whether an arguable case has been made out. While the Court cannot proceed to try the case on the basis of the affidavits in order to determine which party has presented the true situation, there can be no doubt that in considering arguability, the nature and gravity of the issues, the cogency of the evidence before the court, and the prospect of success are integral factors which would have to be considered by the court. It is not the Court's role to decide the substantive issues in the matter. It must also be remembered that judicial review is a consideration of the process not the correctness of the decision arrived at. That is very critical to be kept in focus.

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<sup>5</sup> (2006) 69 WIR 379 at 387-388.

- [39] One of the critical questions in this matter is whether the decision is one which is subject to judicial review.

Public/Private Law?

- [40] Counsel for CES recognised that while generally the tendering process is seen as subject to private law, the process is not immune from judicial review and referred to **Mass Energy** in support of his contention that the decision in this case is susceptible to judicial review. In the case of **Mass Energy** however, it was clear that the award of the contract and the process for so doing had its underpinnings in the Environmental Protection Act and in my view, that case is clearly distinguishable from this case.

- [41] The facts in brief are that pursuant to the Environmental Protection Act, the Birmingham City Council was obliged to tender in a particular manner for the award of contracts for waste disposal. The City Council tendered and decided to accept a revised tender from another bidder and awarded the contract to that bidder. Mass Energy contended that the contract awarded was not in accordance with the tender process and sought judicial review of the City Council's decision on the basis that it had a legitimate expectation that the Council would not depart from the tender process.

- [42] This is what the court had to say:

“On its face, this is really a commercial dispute between a successful and an unsuccessful tenderer; a situation which is not, of course, at all uncommon. If there were no statutory requirement that the City Council should enter into a contract for its waste disposal operations, and particularly the construction of the incinerator to be the subject of a contract entered into by tender, but if the Council had sought voluntarily to enter into a contract by tender deciding to adopt that process of its own volition, then in my view there would be no public law element in such a dispute at all. Mass Energy could then only hope to bring an action against the Council on some contractual basis, for instance, if they could persuade a Court that there was some sort of implied term which entitled them to recover the wasted cost of tendering.

Whether they had any such right is a matter with which I do not concern myself. However, ... I accept that because the statutory powers of the Council not to contract by means other than those described in Pt II of Sch 2 of the Act, there is a public law element in this dispute to this

extent (but only to this extent): that it is a proper subject for judicial review to consider whether the Council have complied with s 5(1)(1) and entered into a contract as a result of following the procedure laid down in Sch 2, Pt II of the Act. In my judgment, judicial review has no further place in my judgment in this dispute.”

[43] In the case of **Dannion**, our Court of Appeal was of the view that the salient question was whether the facts necessarily attracted the underpinning of the public law element which was critical to the case. I have quoted extensively from the digest for the Court of Appeal sitting of 17<sup>th</sup> May 2018 as I consider that the court’s observations are relevant to this case. The court stated as follows:

“It is clear that the judge had to consider whether the decision under challenge had a sufficient public element to it and secondly whether the breaches alleged involve breaches of public law obligations which are applicable to the decision-making process. As Mr. Justice Waller stated in *Ex parte Hibbit and Saunders (a Firm) and Another* ((1993) Times, 12 March):

“it is critical to identify the decision and the nature of the attack on it. Unless there is a public law element in the decision and unless the allegations involve suggested breaches of duties or obligations owed as a matter of public law, the decision will not be reviewable.”

On the subject of contractual negotiations Waller J said:

“A governmental body is free to negotiate contracts and it would need something in addition to the simple fact that a governmental body was negotiating the contract to impose on that authority any public law obligations in addition to any private law obligations or duties there might be.”

With respect to the statutory underpinning as a foundation for judicial review Waller J said if a governmental body has an obligation by statute to negotiate a contract in a particular way on particular terms and fail to perform that obligation imposed by the statute one immediately has the additional public law obligation.

**He continued by saying that the point however is to have a right which can then be subject of review, that right must flow from the statute if it is to a statute that one has to look for providing the public law element. It is not enough to say that the governmental authority is acting pursuant to certain statutory provisions without the additional factor that it is those statutes which impose the obligation which is said to have been broken.**

In concluding that judicial review did not arise in the case, Waller J concluded that even allowing for a distinction between a governmental department and an ordinary business man in the approach for tendering

it did not alter the nature of the tendering process. The fact that the decision sought to be reviewed is the placing of a contract with a particular firm seems to me to add force to the contention that there is likely to be any public law element in that decision.” (my emphasis)

[44] In **Dannion**, the court observed that what was referred to, was a letter of invitation and the CDB Handbook and said it was not of the view that these matters engage the public law element which the law calls for. The court went further:

“The courts have indicated that complaints about the tendering exercise itself are unlikely to involve allegations of breach of any applicable principles of public law. Attaching public law labels such as irrationality or breach of a duty to act fairly is unlikely to give rise to any enforceable claim in public law if in truth the claim does no more than challenge a commercial body to prefer one bidder over another. The fact that a public body is exercising a power given by statute implies by itself an element of public law, this is a starting point. The fact that it is spending public money again imply elements in relation to the challenge[d] tendering process but these features by themselves and the matters relied on by the appellant to our mind are not sufficient for the reasons earlier indicated to render the process amendable to judicial review.”

[45] In the case of **Build-Rite Construction Company Limited et al v NIF Resort Management Company Limited, The Attorney General of Jamaica**,<sup>6</sup> the court referred to the case of **R (on the application of Menai Collect Ltd. and others) v Department for Constitutional Affairs and another**<sup>7</sup> where Justice McCombe opined at paragraph 47 as follows:

**“...the tender evaluation process was an essentially commercial process notwithstanding the nature of the services which are to be the subject of the contract. The manner in which the Defendant chose to inform itself as to the merits of the tenders was designed to be as objective as possible. It is not every wandering from the precise paths of best practice that lends fuel to a claim for judicial review. It is, I think, for this reason that the examples given of cases where commercial processes such as these are likely to be subject to review are such as they are in the reported cases, namely bribery, corruption, implementation of unlawful policy and the like. In such cases, there is a true public law element. Here as in Hibbit, the fact that the decision sought to be reviewed is the placing of a contract with one bidder as opposed to another adds force to the contention that there is no relevant public law obligation in issue...”** (my emphasis)

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<sup>6</sup> Claim No. 2014 HCV 05928, Supreme Court of Judicature of Jamaica, delivered 19<sup>th</sup> February 2015.

<sup>7</sup> [2006] EWHC 727.

- [46] The applicant, CES has not demonstrated in its application any particular and specific breaches of the **Procurement and Stores Regulations** which would bring it within the realms of public law. In submissions, Mr. Deale Lee ("Mr. Lee") attempted to raise the fact that pursuant to the **Procurement and Stores Regulations**, it was the Central Tenders Board who was to have made the decision as relates to the bidding process and the award of the contract. Thus, Mr. Lee submitted that the PS, Economic Development acted outside of his powers as under the Regulations he has no stated role to play. Even with the recognition and acceptance that a decision in relation to such a bidding process as in this case was to be made by the Central Tenders Board and the contention that the letter to CES was written by the PS, Economic Affairs and so the assumption must be that he made the decision as regards the tender, the Central Tenders Board was not made party to the application.
- [47] In its application, CES has referred to the ITB as the basis of the breaches alleged against the respondents and whilst the challenge is to a decision of a government functionary, there is no statutory basis or requirements which have been pointed to as having been breached like in the **Mass Energy case**. In addition, although the project to which the tender relates is to be funded by funds obtained from the World Bank, I am of the view that this matter does not engage public law and is a matter of private law. This is a purely commercial process.
- [48] I would therefore conclude that judicial review is inappropriate and the application for leave must be refused. There would therefore be no need to consider the other requirements necessary for the grant of leave. However, in the event that I am incorrect, I will go on to consider the requirements for the grant of leave as set out in **Sharma**.
- [49] At the outset I will say that I am of the view that CES has not raised any arguable grounds with a realistic prospect of success for the following reasons.
- [50] CES contends that that the decision of the PS, Economic Affairs was unlawful in that it did not follow the procedure outlined in the ITB. The ITB has no statutory basis. Any decision taken in accordance with the ITB cannot therefore

be unlawful as there is no breach of any statute or regulations which CES has pointed to.

[51] CES contends that it had a legitimate expectation in keeping with clause 38 that it would have been selected given that it had the lowest responsive bid but for the error in judgment as regards the manufacturer's authorisation.

[52] I have a fundamental difficulty with that proposition for a few reasons. Firstly, CES has not shown that the PS, Economic Affairs or PS, Tourism by practice or promise made a commitment to select the lowest responsive bid.

[53] In **R (Bibi) v Newham London Borough Council**,<sup>8</sup> Schiemann LJ saw three questions arising in legitimate expectation cases:

"The first question is to what has the public authority, whether by practice or by promise; committed itself; the second is whether the authority has acted or proposes to act unlawfully in relation to its commitment; the third is what the Court should do."

[54] In **Paponette and other v The Attorney General of Trinidad and Tobago**<sup>9</sup> endorsed the test in **ex parte Coughlan** in determining whether a legitimate expectation of a substantive benefit had arisen:

"Where the court considers that a lawful promise or practice has induced a legitimate expectation of a benefit which is substantive, not simply procedural, authority now establishes that here too the court will in a proper case decide whether to frustrate the expectation is so unfair that to take a new and different course will amount to an abuse of power. Here, once the legitimacy of the expectation is established, the court will have the task of weighing the requirements of fairness against any overriding interest relied upon for the change of policy."

[55] It is for the applicant CES to prove the legitimacy of any expectation:

"The initial burden lies on an Applicant to prove the legitimacy of his expectation. This means that in a claim based on a promise, the Applicant must prove the promise and that it was clear and unambiguous and devoid of relevant qualification. If he wishes to reinforce his case by saying that he relied on the promise to his detriment, then obviously he must prove that too. Once these elements have been proved by the Applicant, however, the onus shifts to the

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<sup>8</sup> [2001] EWCA Civ 607.

<sup>9</sup> [2010] UKPC 32.

authority to justify the frustration of the legitimate expectation. It is for the authority to identify any overriding interest on which it relies to justify the frustration of the expectation. It will then be a matter for the court to weigh the requirements of fairness against that interest.”

- [56] Secondly, CES has focused on clause 38 without considering the effect of the preceding clause 37. Clause 37.1 is clear that:

**“The Purchaser reserves the right to accept or reject any bid, and to annul the bidding process and reject all bids at any time prior to contract award, without thereby incurring any liability to Bidders. In case of annulment, all bids submitted and specifically, bid securities, shall be promptly returned to the Bidders.”**

- [57] It is noteworthy that clause 38 is subject to clause 37.1. In such circumstances where there is clearly a discretion, there could be no legitimate expectation on the part of CES that it would have been awarded the contract even if it had had the lowest responsive bid. As indicated above, this is not a case where the Court can enquire into the merits of the decision made. To accept CES’ submission that it had such a legitimate expectation would require the Court to consider whether the decision not to award CES the contract was a correct decision which the Court is precluded from doing in a judicial review matter.

- [58] Thirdly, CES has also argued that there was a duty under the ITB for the respondents to seek clarification in relation to the manufacturer’s authorisation which is the source of the error which resulted in them making the wrong decision as regards the award of the bid. Mr. Lee also argued that this was more so because the issue with the manufacturer’s authorisation was nonmaterial. Counsel for the respondents however, demonstrated that the manufacturer’s authorisation which was submitted by CES was not in keeping with the template which was to have been used and was provided in the ITB. This suggests that this was a material and significant part of the bid process and was material and failure to comply with the template document was not simply a matter for clarification. A perusal of CES’ document would show that it referred to the signer of the Manufacturer’s Authorisation as the reseller and not the manufacturer.

In any event, when one examines clause 27 of the ITB it is clear that seeking clarification is not mandatory but at the discretion of the purchaser/decision maker. Clause 27.1 of the ITB states:

“To assist in the examination, evaluation, comparison of the bids, and qualification of the Bidders, the Purchaser **may, at its discretion**, ask any Bidder for a clarification of its Bid. Any clarification submitted by a Bidder in respect to its Bid and that is not in response to a request by the Purchaser shall not be considered. The Purchaser’s request for clarification and the response shall be in writing. ...”

I cannot see how this argument could succeed.

[59] CES has made much about the fact that the ITB referred to the Purchaser as being the Ministry of Tourism and the entity responsible to make the decision as to the contract award and to communicate with the bidders. In fact, the very document which CES says refers to the Ministry of Tourism as the Purchaser also refers to that Ministry as the Employer. It is clear that any contract entered into in circumstances such as these would be entered into on behalf of the Government of Saint Lucia and not the individual ministry. In fact, on the cover page of the ITB, the Department of Economic Development is listed as one of the partners in the baggage carousel project.

[60] The fact that the communication as regards the award of the contract and the unsuccessful bids was communicated by the PS, Economic Affairs raises no arguable grounds with a realistic prospect of success that the decision made is irrational or unlawful. In fact, the PS, Economic Affairs is the permanent secretary with oversight of procurement. There is nothing in the PS, Economic Affairs letter to indicate that he was the decision maker and in fact he indicated that he was not, and that the decision was made by the Central Tenders Board and simply communicated by him to CES. The applicant in its oral submissions as much accepted that the decision to award the tender was that of the Central Tenders Board in keeping with the **Procurement and Stores Regulations**. Yet, the Central Tenders Board was not made a party to this application.

### **Delay**

- [61] While it is the case that there is no time limit prescribed in CPR 56 for the filing of applications for leave to file a claim for judicial review, it is the case that such applications are to be made promptly. In **Roland Browne v The Public Service Commission**,<sup>10</sup> it was made clear that the context of the particular case must be the backdrop to a determination of whether delay in making an application is unreasonable. The evidence on the affidavits shows that CES was notified of the decision in relation to its bid in December 2020. CES promptly wrote in January 2021 for clarification and sought to engage the PS, Economic Affairs and then received a response on 16<sup>th</sup> February 2021. CES then waited another month and a half to file this application. Whilst CES does not account for this period of inaction on its part, I do not consider the delay to be unreasonable.

### **Alternative Remedy**

- [62] CES contends that there is no alternative remedy available to it. There is no contract between it and the respondents which it can enforce. This does not automatically mean that the matter is suitable for judicial review and I have already found that there is no public law element in this case.

### **Relief Sought**

- [63] CES seeks among other relief (a) an order directing the PS, Tourism to determine that CES bid is the lowest responsive bid; (b) an order directing PS, Tourism to award the contract of the supply and installation of the baggage carousel and for related training to CES and alternatively, an award of the sum of \$95,800.00 being the profit CES would have earned on the award of the contract;
- [64] The ITB states at clause 40.2 that 'Until a formal Contract is prepared and executed, the notification of award shall constitute a binding Contract.' There is already a binding contract which has been entered into and the Court cannot take steps which would effectively terminate that contract. The reliefs sought are asking the Court to make a determination that CES had the lowest

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<sup>10</sup> SLUHCv2010/0023, (delivered 15<sup>th</sup> December 2010, unreported).

responsive bid which effectively would mean this Court substituting its decision for that of the decision-maker which is not within the remit of the Court on a judicial review claim. Determining that a bid is responsive or not is not a matter for the Court.

[65] As stated earlier, there is nothing compelling a decision maker to award a contract to the lowest responsive bidder as the ITB leaves that discretion in the hands of the 'purchaser'. As I have found that there is no legitimate expectation that the contract would have been awarded to CES. Even if the Court were to find that there is an arguable case with a realistic prospect of success, which I have not found, the Court would not be able to make any of the orders which CES seeks as the contract has already been awarded and as per the ITB is final and binding. Therefore, the entire claim would be an academic exercise and, in such circumstances, it would not be appropriate for the Court to grant leave to file a claim for judicial review.

[66] In light of the foregoing, the application for leave to file a claim for judicial review is therefore refused with no order as to costs.

**Kimberly Cenac-Phulgence  
High Court Judge**

**By The Court**

**Registrar**