

THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

(CIVIL)

ANGUILLA

Claim Number: **AXAHCV 2018/0014**

Between:

ELMOALIS LTD.

Claimant

and

THE ATTORNEY GENERAL OF ANGUILLA

Defendant

Appearances:

Ms. Tara Carter for the Claimant

Mr. John McKendrick, QC with him Mrs. Sherma Blaize-Sylvester for the Defendant

2018: September 12;
October 18;
2019: March 15.

JUDGMENT

- [1] **MATHURIN, J.:** The claimant (Elmoalis) has challenged the decision of the Procurement Board not to award it a solid waste management contract after the review of all interested bids by the appointed Evaluation Committee (EC). The decision of the Procurement Board is stated as follows in a letter to Elmoalis dated 1st February 2018 signed by the Chief Procurement Officer, Ms. Ludianne Leveret-Richardson.

*“As provided for under section 21 of the Public Procurement and Contract Administration Regulations 2016 (**the Regulations**), this correspondence is to inform you that Elmoalis was unsuccessful in its proposals to provide the management of waste collection and recycling services for Zones 1 and 2. This outcome was as a result of the deliberations of an evaluation committee whose recommendations were reviewed and accepted by the Procurement Board in a unanimous decision by the five members present.”*

[2] Elmoalis challenges the findings of the EC with respect to the assessment and grading of vehicles. The EC comprised Mr. Leroy Richardson, Mr. Omari Bourne and Mr. Michael Cowing. The committee was constituted to assess bids in accordance with criteria set out in the invitation for bids to determine if the works, goods or services met the description of what was being procured. This is in accordance with section 39 of the Public Procurement and Contract Administration (Amendment) Act 2016 (**The Act**).

[3] In particular, Elmoalis is seeking review of the following decisions;

- “i. To delegate to Mr. Leroy Richardson the authority to conduct an exercise for the assessment and grading of vehicles;*
- ii. The failure to provide evaluation criteria in respect of such assessment and grading of vehicles;*
- iii. To apply grades for vehicles produced, assessed and determined by Mr. Leroy Richardson; and*
- iv. The consequent findings in relations to the vehicles which were compiled in an evaluation report issued by the EC in about December 2017.”*

[4] Elmoalis seeks the review of the above-mentioned decisions on the grounds of unfairness, improper delegation and illegality. A reading of the fixed date claim herein makes it clear that the decision of the Procurement Board is challenged because of the alleged unfairness, improper delegation and illegality of the EC.

Improper Delegation and Illegality

[5] Counsel for Elmoalis submits that the EC did not meet but rather *“they pooled their findings and conducted independent assessments”*. Counsel adds that the EC was required by the Regulations

“to carry out a precise process of assessment as a cohesive grouping before their recommendation is made.”

[6] Counsel relies on the principle ***delegatus non potest delegare*** that a person to whom a power has been conferred must exercise the power personally unless he has been expressly empowered to delegate it to another. Counsel submits that the authority to assess and grade vehicles was improperly delegated to Mr. Richardson who did not have the expertise and who could not usurp the function of the Evaluation Committee. Counsel further submits that it was legally impossible for the EC to delegate the assessment of vehicles to Mr. Leroy Richardson who made the sole determination as to the grading of the said vehicles. She states that this was the statutory remit of the entire EC. In other words, counsel is asserting that the EC did not act as a whole as is required by law.

[7] The Attorney General submits that the Act and the Regulations impose no duty on each individual member to carry out each individual function of the EC. The objectives of the EC are stated in the Act at section 39 as amended:

“The objective of an Evaluation Committee is to evaluate bids or proposals for large procurements except emergency procurements in accordance with objective evaluation criteria set out in the invitation for bids or requests for proposals to determine if the works, goods or services meet the description of what is being procured.”

Additionally, counsel states that in evaluating proposals for one-stage procurement procedures section 40 of the Act states that the EC shall determine which offeror is responsible and is determined to:

“...(ii) have submitted the lowest responsive evaluated proposal.”

[8] The EC therefore, as part of its function, was required to assess the responsiveness of the proposal including the assessment of specialist existing vehicles and/or investment in provision of vehicles for the contract. This was clearly stated in the Request for Proposal Form (RFP) as follows:

“Provision of a comprehensive resource model including details of specialist existing garbage collection vehicles and/or proposed capital investment in specialist garbage

collection vehicles to provide a minimum of two working vehicles for the contract plus access to a specialist collection back up vehicle as contingency.”

- [9] Section 41 of the Act also states that the criteria for determining the responsive and successful bid, including the relative weight to be attached to each criterion, should be contained in the bid or proposal documents and that the EC should only use the criteria in the bid or proposal documents and no other criteria may be used.
- [10] In determining whether a decision is tainted by illegality, the court must consider the intention, object or purpose of enabling provisions in the Act and determine whether the decision has a rational nexus with the intent, object or purpose of the Act. The court is not concerned with policy, wisdom or efficaciousness.
- [11] The Court of Appeal in **Quorum Island (BVI) Ltd v Virgin Islands Environmental Council**, HCVAP 2009/0021, stated the principle as follows:

“It is a primary tenet of the rule of law that a public authority must act or make decisions within the bounds of the power conferred on it by law. An authority that acts outside of that power, acts ultra vires its discretion or illegally. Illegality may result from doing that which is unauthorized by law or by refusing or omitting to do what the law mandates. It may also result where the public authority purports to act under discretion but acts on irrelevant considerations or bad faith or for an improper purpose. In other words an administrative decision is illegal if the decision maker contravenes or exceeds the terms of power which authorized the decision purports an objective which the conferring power did not contemplate. It follows that, in order to determine whether an administrative act or decision is illegal, the court, as the guardian of legality, must first construe the authorizing power; determine its terms, scope and purpose, and measure the decision or action against this.”

- [12] In my view, Mr. Richardson evidenced considerable experience in the field of solid waste management and disposal to warrant him being the logical member of the Committee to carry out such assessments. Given the nature of the procurement, the Court is willing to accept on the balance of probabilities that this was taken into consideration when he was appointed to the EC by the Procurement Committee.

[13] The authorities provided by counsel were of little assistance as none of them assisted the assertion that the distribution of responsibilities between committee members amounted to illegal and improper delegation. The practice of copying a mere page in a chapter as opposed to the entire chapter did not assist as it could be misleading not affording the court an opportunity to familiarise itself with the subject matter but rather pointing to what could be a narrow, sometimes incomplete conclusion.

[14] In the case of **Allington and Another v Minister of Agriculture and Fisheries** (1948) All ER 278 it is clear that the Executive Officer of the Agricultural Committee acted independently of the committee when he made a notice pursuant to the recommendations of a sub-committee without consulting the rest of the Agricultural Committee. As put by Humphreys J.:

“Instead of (as I think they might probably have done without objection) recommending to the executive committee that this particular field should be cultivated, the Biggleswade district committee seem to have arranged with the executive officer that he should convey their decision to the farmers, and, that was done, the executive officer acting, not on behalf of the executive committee, but as the agent of the Biggleswade committee. In my opinion, that procedure was wrong.”

[15] I am not persuaded that Mr. Richardson’s role in assessing the vehicles being proposed for use by each of the bidders is a delegation by the EC. It is for the EC to decide its process as long as it is within the mandates of the Act and Regulations. I am guided by the words of Lord Selbourne in **Attorney General v Great Eastern Rywy Co.** cited in the **Quorum Island** case above:

“It appears to me to be important that the doctrine of ultra vires... should be maintained. But I agree...that this doctrine ought not be reasonably, and not unreasonably, understood and applied, and that whatever may fairly be regarded as incidental to, or consequential upon, those things which the Legislature has authorised, ought not (unless expressly prohibited) to be held, by judicial construction, to be ultra vires.”

I would therefore disagree that there was an improper delegation to Mr. Richardson or at all but rather that he was a member of the EC acting within its mandate to ensure that the proposals were responsive in accordance with paragraphs 99 to 101 of the RFP.

Unfairness

[17] Elmoalis also claims that the EC failed to provide evaluation criteria in respect of the assessment and grading of vehicles. Elmoalis also claims that the evaluation criteria were not fully disclosed in particular as it relates to the assessment of the vehicles. The claimant asserts that there was no grading system as required by law and that the application of the grades was inconsistent and unfair. As an example, the claim states that *“one bidder did not meet the minimum criteria of 2 trucks but scored higher than the claimant.”*

[18] Section 41 of the Act which deals with criteria for evaluations states as follows:

“(1) The criteria for determining the responsive and successful bid including the relative weight to be attached to each criterion shall be contained in the bid or proposal documents.

“(2) The Evaluation Committee shall be responsible for the evaluation of the bids using the criteria in the bid or proposal documents and no other criteria may be used.”

[19] The Request for Proposal Form (RFP) published in August 2017, (Bundle 2, Tab 14) paragraph 99 states that *“ the four (4) evaluation criterion in accordance with section 41 Public Procurement and Contract Administration Act shall be as described in Table 9 below.”* It also states that a maximum of 20 points shall be given to each of the criterion.

The responsibility criteria described in Table 9 are as follows:

1. Provision of a comprehensive resource model including details of specialist existing garbage collection vehicles and/or proposed capital investment in specialist garbage collection vehicles to provide a minimum of two working vehicles for the contract plus access to a specialist collection backup vehicle as contingency.
2. Company profile qualifications and experience of key professionals.
3. Project approach – provision of comprehensive bin placement details and understands the work, including key service requirements.
4. OH&S and Contingency plans.

- [20] Section 101 of the RFP goes on to state that the Committee shall use a twenty point rating scale for each of the four(4) criteria and that the lower priced proposal which scores a minimum of 48/80 and is responsive, wins. Section 102 states that if two or more proposals are responsive and obtain the minimum of 48/80 but the price for these proposals is the same, then the proposal with the highest score out of 80 wins.
- [21] The RFP at Table 10 lists the points for responsiveness. It is noted that all six participants in the bidding were found to be responsive and they all fell within the point range of 13 to 16 points which meant that requirements of all bidders were covered in all material aspects. A point range of 17 to 20 would mean that the bidder demonstrated exceptional ability to convey exceptional provision of the requirement. The EC Report states at para 2.2 that all proposals submitted exceeded the pass mark of 48/80 or 60%.
- [22] Elmoalis has asserted that the EC did not disclose criteria for grading of the vehicles in section 1 above of responsibility criteria. The four criteria and the relative weight to be attached to them were clearly disclosed at Table 9 of the RFP. The claimant, in essence, is asking the court to reconsider the evaluations on the comparative basis relating to the conduct of the assessment relating to the suitability of vehicles and the amount of vehicles vis-à-vis any proposals for future investments in vehicles. The claimant finds this objectionable and unfair.
- [23] The EC was appointed to do the evaluation of the bids using the criteria in the RFP. It is, however, for the EC to decide its process once it is within the mandates of the Act. It is not inconceivable that the EC would formulate some system by which they evaluate the criteria to determine points to be awarded. The court cannot substitute its views for that of the EC. Elmoalis has not satisfied the court that the EC has acted outside of the Act so as to warrant a finding that the evaluation was unfair. Further, the claimant has not disputed that the four (4) criteria listed in the RFP were not adhered to. The point appears almost moot when one considers that all of the bidders including Elmoalis were covered in all material aspects of the responsibility criteria in Table 9.
- [24] A reading of section 101 of the RFP is instructive at this point. The Committee, having determined responsiveness, was obliged then to consider the lowest priced proposal. Section 2.2 of the EC Report states that in order *“to determine which proposal offers the lowest price, it is necessary to calculate the cost of service for the 5 year term.”*

[25] Mr. Cowing, the chairman of the EC, agreed with counsel for Elmoalis that the EC, in addition to Table 9, was required to determine the lower priced proposal to decide who was the successful bidder and that this was done by calculating the costs to the Government over a period of 5 years taking into consideration the annual increase as submitted either by percentage variation submitted by the interested bidder or in accordance with the consumer price index for Anguilla which was 2.7%.

[26] Mr. Cowing recognised that it could have been an error which caused Elmoalis' percentage variation to be calculated at 2.7% as opposed to 3%, which is what was submitted by Elmoalis. Mr. Cowing also agreed with counsel for Elmoalis that an error in the percentage variation which reflects the annual increase to the Government could have impacted the calculation of the total costs by Elmoalis for the 5 year period. However and importantly, Mr. Cowing also stated that if it was indeed an error, Elmoalis' projected costs to the Government would be even higher than projected in the report.

[27] The evidence of Mr. Richardson at paragraph 13 of his affidavit is as follows:

"I conducted site visits to evaluate the condition of the waste collection vehicles being proposed for use by the respective proponents. The Applicant passed the vehicle inspections and the technical part of the evaluation. However the Applicant was always the highest bidder and this was a key factor in the ultimate recommendation made by the Evaluation Committee to the Procurement Board."

Mr. Richardson reiterated that this remained his position on re-examination.

[28] Mr. Bourne in his affidavit at paragraph 5 stated that:

"I submit that I acted fairly and objectively in my deliberations and had absolutely no bias in this exercise. In fact, I personally rated the Applicant high as I felt that it had the most experience. However, the Applicant was always the highest bidder and this was a key factor in the ultimate recommendation made."

This view is substantiated on cross examination when Mr. Bourne stated that *"Elmoalis was my recommendation, I wrote to the Committee."*

The report of the EC at Tables 2, 3 and 6 also illustrates that the full term calculations for Elmoalis for Zones 1 and 2 and the combined offers afforded the least savings to the Government.

[29] Despite robust cross-examination, the evidence demonstrates not only that the EC members assessed the lowest bid proposal but that they held the same views with respect to the lowest bid. It is clear that Elmoalis did not and could not have had the lower bid proposal as any upward adjustment of the 2.7% submitted to 3% would have made the cost to the Government greater. This is not refuted. Elmoalis, in my view, has not satisfied the court that the inconsistencies in the percentage variation would impact on the calculation of the lower priced proposal so as to conclude that the EC acted unfairly as claimed or that it would have yielded a different result for Elmoalis.

[30] In conclusion, the court is not satisfied that Elmoalis has negated the evidence of the members of the EC, that they reviewed the bids in accordance with the evaluation criteria set out in the RFP to determine if the bidders met the description of what was being procured. The court finds that the claim on the grounds of unfairness, improper delegation and illegality is without merit.

[31] The court hereby orders as follows:

- (1) That the claim herein is dismissed.
- (2) That Elmoalis pays costs to the defendant in an amount to be agreed or assessed.

Cheryl Mathurin
High Court Judge

By the Court

Registrar