

THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

(CIVIL)

ANGUILLA

Claim Number: **AXAHCV2016/0024**

Between

WEBSTER'S MANAGEMENT GROUP

Claimant

And

THE ATTORNEY GENERAL OF ANGUILLA

Defendant

Before:

Justice Cheryl Mathurin

Appearances:

Mrs. Keesha Carty for the Claimant

Mr. Ivor Greene for the Defendant

2016: September 23rd;

November 11th

RULING

1. **MATHURIN J**; The Parties agreed that the bifurcation of this matter from the issue of damages would assist in the Court's speedy determination and as such, preliminary issue before this Court is whether Executive Council (**EXCO**) acted ultra vires in extending solid waste collection and

disposal contracts after the passing into law of The Public Procurement and Contract Administration Act 2012 (**The Act**).

2. The commencement date of the Act is December 31st 2012. The Act reforms the law relating to procurement of works, goods and services so as to comply with international standards. It requires among other things public competition wherever reasonably possible and the award of contracts based on fair competition. This is in contrast to the previous regime where prior to the Act, the award of tenders was done by the Tenders Board.
3. The Claimant (**Webster's**) alleges that solid waste collection contracts for zones 1, 2, 3 and 4, which are procurements for services and ostensibly within the ambit of the Act, were extended by EXCO from September 2012 to January 2013. Further, Webster's alleges that these contracts have repeatedly been extended by EXCO since that date to the date of consideration of this preliminary issue. Webster's accordingly contends that the repeated extensions of the contracts entered into before the Act, is ultra vires. It argues that the proper authority for the award of such contracts is the Procurement Board as stipulated by the Act.
4. Counsel for the Attorney General, Mr. Greene, does not dispute as a matter of fact, the extensions. Mr. Greene however submits that EXCO was acting in accordance with law when it purported to extend the said contracts from 2012 to present, notwithstanding that in doing so it was to the exclusion of the Act. In this submission he relies on section 50 of the Act to support his contention that EXCO was not acting ultra vires.

Section 50(2) of the Act states;

"This Act does not apply to procurement conducted by the government prior to commencement."

5. Importantly, it is noteworthy that this is a transitional provision. It follows section 50(1) which provides that the *"...Governor in Council may make regulations providing for any transitional matter arising as a consequence of the coming into force of this Act or a provision of this Act and may make the regulations retroactive to the day this Act comes into force or, if all of the provisions of this Act do not come into force on the same day, to any day after this Act comes into force."*

6. In this regard, it is evident that the legislators had in clear view the rule that without clear words to the contrary, statutes do not apply to the past. First, section 51(1) provided that a regulation could be promulgated in relation to any matter arising as a consequence of the assent to the Act. Second, any such regulation could only have retroactive effect to the date of the Act coming into force. Third, as provided for in section 51(2), the strictures of the Act could only apply to a future procurement after 31st December 2012.
7. Further, in my view, this section cannot be read in isolation. The real meaning to be attached to the words in section 51(2) must be arrived at by consideration of what the Act was intended to remedy and the provisions of the statute as a whole.

Purposes of Act – Section 4

8. Regard therefore must be had to section 4 of the Act. That section provides that:

“The purposes of this Act and the regulations are to simplify, clarify and modernise procurement and to make procurement by the Government transparent and more particularly to—

- (a) require public competition in the procurement process except to the extent that the circumstances or size of the procurement make it impracticable;*
- (b) foster and encourage broad participation in the procurement process by persons in Anguilla;*
- (c) provide for increased public confidence in the Government procurement process by maintaining safeguards to ensure its fairness, openness and transparency;*
- (d) ensure fair treatment of all persons who participate in the procurement process; and*
- (e) ensure the best value is obtained for the procurement dollar.”*

9. To interpret section 51(2) in accordance with Counsel's submission would run counter to the clear stated purpose of the Act. It would mean that EXCO could lawfully continue the operation of these pre-2012 contracts ad infinitum by extending them under the guise that they are procurements conducted prior to the Act coming into force. This would be to the exclusion of the Procurement Board and thereby would oust the power of the proper authority legislated for that purpose. It is

clear from section 4 that the legislature could not have intended this when the law was passed. This is especially so in consideration of section 11.

10. Section 11 of the Act states that *"All procurements shall be made in accordance with this Act."*

It is linguistic sophistry to argue that the extension of a procurement originally made before 31st December 2012 is not a procurement caught by section 11 because it is the renewal or extension of that procurement albeit after 31st December 2012. The intent and the purpose of the Act, and indeed the Act itself, cannot be subjugated to the actions of EXCO in extending contracts that were entered into from before the end of 2012. Once the Act came into force and the Procurement Board was appointed and constituted, section 50(2) of the Act could only refer and be applied to contracts that were in place prior to the commencement date. It follows from this, that any residual power vested in EXCO in respect of public procurement, in order to avoid a lacuna, could only have existed between the commencement date and the constitution of the Procurement Board. In the face of legislation enacted to deal with procurements, EXCO has no authority to supplant its decision for that of the Procurement Board.

11. Counsel for the Attorney General further submits that all processes under the Act were stopped pursuant to a letter from Counsel for the Claimant in 2013. That letter Counsel indicates strongly advised and demanded cancellation of contracts as no Chief Procurement Officer (CPO) had been appointed under the Act. There is no indication from Counsel as to a response from the Attorney General's Chambers in reference to this decidedly legal issue. Notwithstanding this, it may be that it was appreciated that the manner in which a piece of legislation is withdrawn from operation is by repeal. Absent the legislation being repealed, it remains good law.

12. In any event the failure to appoint a CPO would not have impacted on the powers of the Procurement Board. While the CPO is to head the Procurement Unit and is to provide advice to the Board, he or she is not a member of the Procurement Board. The Procurement Board was therefore free to act in fulfilment of its statutory mandate even in the absence of a CPO. Among the powers open to the Procurement Board were those emergency powers under section 17 of the Act. That section provides that in situations where the Board determines that it is necessary, an emergency solicitation may be made.

13. Specifically section 17 of the Act states as follows;

(1) An emergency solicitation may be made when the Board determines –

(a) That there exists a threat to public health, welfare or safety by reason of an emergency condition and the procurement is for the purpose of eliminating or mitigating the threat;...

14. The Act therefore permits the Board to make emergency solicitations and determine what procedure, if any, that is most appropriate in the circumstances. The Act further indicates what the Board shall have regard to in the relevant circumstances such as the time and resources required to prepare an invitation for bids or proposals and the time to permit solicitation by competitive sealed bids.

15. Director of Health Protection, Mr. Ambrell Richardson has stated in his Affidavit that "emergency procurement of work was done in the interest of public health mitigation at the disposal site." This puts the works squarely within the parameters under which the Procurement Board could have taken action if consulted. Counsel for the Attorney General has not however submitted any lawful basis as to why this procedure was not followed as opposed to the continued extensions of previous contracts by EXCO.

16. While the Executive can and often does carry out functions that are decisive in nature, those are in circumstances where the legislature has expressly given that power to it. In and of itself it does not have the power to alter law; that role is for Parliament. In acting to repeatedly extend contracts for procurement without reference to the Procurement Board, EXCO acted to alter the law; it reserved to itself a power which no statute provided. That action was ultra vires.

17. Having so found, the Claimant succeeds in this preliminary issue and the Court hereby declares that EXCO acted ultra vires the Procurement act in purporting to extend continuously, contracts for procurement that were entered into before December 2012. The Court also recognises that any loss suffered by Webster's can be met by an award of damages and as such is not of the view that

setting aside of these contracts which would impact tangibly on the issue of public health and waste management would be a proper use of the Court's discretion. In the circumstances, it is hereby ordered that any future procurements with reference to solid waste management and disposal at the Corito Landfill be awarded in compliance with the Public Procurement and Contract Administration Act 2012 as amended.

18. This matter and the issue of costs is hereby adjourned for assessment of damages upon application unless parties arrive at a resolution otherwise.



Cheryl Mathurin
High Court Judge.