



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

SUIT NO: MNIHCV2012/0021

BETWEEN:

VERNON WHITE
(Trading as WHITE CONTRUCTION SERVICES)
CLAIMANT

AND

THE CENTRAL TENDERS BOARD
THE ATTORNEY GENERAL
DEFENDANTS

Appearances:

Mr. Khari Markham for the Claimant
Mr. Fitzroy Buffonge for the Defendants

2012: JUNE 21

2012: JULY 16

JUDGMENT

Benjamin J (Ag). : This is a claim for judicial review arising out of a decision made by the Central Tenders Board of Montserrat.

On 24 November 2011 the Tenders Board accepted the bid of Vernon White doing business as White Construction Services. On the 22 of March 2012 the Central Tenders Board sent a letter to the Claimant withdrawing the award.

On the 17th day of April 2012, the Claimant filed an Application for Leave to Proceed against the Defendants, the Central Tenders Board and the Attorney General of Montserrat. The Application was heard by Justice Septimus Rudd on the 27th April 2012 and he granted leave on the 30th April 2012 for the Applicant/Claimant to file a Claim Form for Judicial Review within 14 days of the said Order.

[1] By fixed Date Claim Form, filed on May 8 2012. The Claimant sought the following declarations, Orders and reliefs:

- 1) An Order squashing the first Defendant's decision to withdraw the contract of tender awarded to the Claimant by the first Defendant;
- 2) An Order that the Defendants, their servants and agents be restrained from requesting fresh tenders in respect of the Lookout Primary School Expansion Building 6 Project or awarding the contract to carry out the said construction to a contractor, agency, person or body other than the claimant;
- 3) In the alternative the Claimant claims an Order for damages;
- 4) A declaration that the decision taken by the First Defendant to withdraw the contract awarded to the Claimant was:
 - (i) illegal
 - (ii) procedurally irregular
 - (iii) irrational and unreasonable
 - (iv) erroneous at law
- 5) Any other relief that the court deems just;
- 6) Costs.

[2] An appearance was entered on behalf of the First Defendant on the 22nd May 2012. The Defence "*avers that as a matter of law the facts as pleaded by the Claimant do not give rise to any illegality or procedural irregularity. Further the actions of the first Defendant*

in seeking to comply with the Procurement Regulations are not Wednesbury Unreasonable and that the Defendants deny that the Claimant is entitled to the relief sought as alleged or at all”.

[3] The factual background to this Application was agreed by the parties. For ease of reference the Court will adopt the facts as set out by the Defendants in their Skeleton Argument and Authorities filed on 15th June 2012 as set out in paragraph 2 to 6 which states as follows:

2. *The Ministry of Communications and Works issued invitations to tender for the Lookout Primary School Expansion Building 6, to six Tenderers, five of whom submitted tenders.*

3. On or about the 28 day of October 2011 the First Defendant received tenders for the Lookout Primary School Building 6 Expansion project.

4. The tender procedure was governed by 3 sets of Regulations which govern procurement of supplies and services within Government. The existing Legislative framework is contained in the **Financial Orders 1978**; the **Procurement and Stores Regulations SR&O 15 of 2002 made under the Finance Administration Act of 2011**; and the **Public Finance (Management and Accountability) Act 2008 No. 8 of 2008.**

5. Page IT/1 of the Tender Instructions (“the instructions”) states at paragraphs A, E, and F as follows:

(i) (A): Tenderers will be supplied with the following tender documents:-

- (a) Tender Dossier
- (b) Tender drawings.

(ii) (E): One copy of the above mentioned tender documents will be supplied to Tenderers. Tenderers must comply *strictly* with the following instructions; failure to do so is liable to cause your tender to be rejected.

(iii) (F): Documents to be submitted together with the Form of Tender included:

- (a) The schedule of labour rates;
- (b) The schedule of material prices;
- (c) The schedule of construction equipment;
- (d) The list of proposed contractors;
- (e) Construction programme;
- (f) The priced measured works section / Bill of quantities.

6. Page IT/8 of the instructions contained the following instruction:

Time for completion

(a) The time for completion for the complete contract is to be determined by the Tenderer in the form of tender.

[4] The Claimant was one of five persons who Tendered for the Look Out School Expansion Building 6 Project.

[5] The parties agree that the Claimant did not specify the period for completion in the specific sections of the Tender forms IT1 and IT8, but information as to the time for completion was provided in the construction Programme outline in the schedule attached to the Tender form.

[6] By letter dated 24th November 2011 from the Central Tenders Board to the Claimant it is stated:-

"This is to advise that your Tender submission in the Amount of Two million two hundred and Twenty seven Thousand five hundred and thirty seven dollars and seventy seven cents (EC\$2,227,537.77) has been successful".

[7] According to the Claimant he acted upon this advice that his bid was successful by carrying out duties in respect of finalizing the contract, see section 2. (IX) of the affidavit of Vernon White filed April 17, 2012

[8] By letter dated 22 March 2012 the Claimant was informed by the Central Tenders Board as follows (inter alia):

Please be advised that the award of the above tender was challenged and the Central Tenders Board is advised that the tender was non compliant. The Central Tenders Board on reviewing the tender confirmed that the tender failed to comply with instructions to tender and is accordingly non-compliant. In this regard the tender failed to comply strictly with page IT1 paragraph E and page IT8 of the tender instructions (stated inter alia) *"this is to inform you therefore that the award of the contract to your company has been withdrawn"*

[9] The above are the uncontroverted facts. I will now turn to the issues and the law as they relate to the facts in this matter.

[10] **THE ISSUES**

- (1) Did a Contract subsist between the Claimant and the first Defendant?
- (2) Was the tender unlawful or invalidated by the Claimant failing to comply with IT/1 and IT/8 of the tender Instructions?
- (3) Was the decision of the tenders Board to withdraw the award illegal, procedurally irregular, irrational, in bad faith, unreasonable and/or erroneous at law?

- (4) Was the acceptance of the Claimant bid by the first Defendant unlawful and ultra vires?
- (5) Did the award create a legitimate expectation?
- (6) Is the Claimant entitled to damages and/or compensation

THE LAW

[11] Learned Counsel for the Defendant cited the case of **R v Ministry of Agriculture, Fisheries and food Exp. Hamble (offshore) Fisheries LTD [1995] 2 ALL ER 714 731** where Sedley J. States:

“That to bind Public authorities to an unlawful representation would have the dual effect of unlawfully extending their Statutory Power and destroying the ultra vires doctrine by permitting public bodies arbitrarily to extend their power”

- (1) Learned counsel also cited **DE Smith 6th Edition judicial Review at paragraphs 12- 063 and at paragraphs 12-072** where he quoted and contended in his skeleton argument that the decision of the Tenders Board was ultra vires :

“In such Circumstances the expectation did not automatically entitle the person to realization of the ultra vires expectation but may entitle him to other discretionary relief such as compensation when it is within the power of the public body to afford.”

- (2) Learned Counsel for the Claimant cited the case of **Credit Suisse v. Allerdale Borough Council [1997] QB. Pages 336 to 347**. I agree with counsel for the Defendants that the facts in that case are different to these in the present case but I find that the principle of the development of the doctrine of ultra vires as states in Credit Sussie Case is still good law. In particular as relates to the distinction between private and public law. **On page 343 line 12 Newell J States:**

“I know of no authority for the proposition that the ultra vires decision of local authorities can be classified into categories of invalidity”

- (3)Then further on page 347 and I quote:

“I prefer not to express any obiter views on the different question on the effect of the invalidity on other grounds of the Guarantee, Particular when it is the council which seeks to reply on its own improper conduct”

- (4)This appears precisely to be the position in this case, that the Tenders Board the First Defendant, seek to rely on its own error to defeat the claim.

(5) I disagree with learned counsel for the Defendants that the Tenders Board acted ultra vires. The Tenders Board under the Procurement and stores Regulations (no 15 of 2002) section 13 (1) provided the Tenders Board with the power to accept or reject any tender or part of a tender.

Further Learned Counsel's argument rests mainly on the failure of the Claimant to comply with the provisions in Form IT1 and IT8 of the instructions which state:

"One copy of the above mentioned document will be supplied to the tenders. Tenders must comply strictly with the following instructions Failure to do so is liable to cause your tender to be rejected"

(6) I agree with Learned Counsel for the Claimant's submission where he opined that the term *"failure to do so is liable to cause your tender to be rejected"* is not mandatory but discretionary. Therefore the Tenders Board could lawfully accept or reject any part of the tender.

Was the Tender Unlawfully invalidated

[13] By reasons which I herein before stated this argument falls by the way side. The Tenders Board acted within the ambit of the law.

Whether the withdrawal, by the Tenders Board was procedurally irregular, Irrational, unreasonable erroneous in law or in bad faith

[14] (1) Learned Counsel for the Defendants referred the court to a quotation from **Lord Diplock in Associated Provincial V. Wednesbury Corporation [1948] IKB223** where Lord Diplock stated:-

"The court is not concerned with what it regards as the appropriate decision but rather with the quite different test of whether sensible decision matters properly directed in law and properly applying their minds to the matter, could have regarded the conclusion under review as a permissible one".

(2) Learned Counsel for the Defendants in his written submission section 20 referred to Mr. Smith's Affidavit. (This is Hopeton Smith one of the Technical Adviser's to the Tenders Board and a witness for the Defendants. Learned Counsel referred to Mr. Smith as "having given erroneous advice which the tenders followed unlawfully, there was no further need consult him"

(3) It's unfortunate that Mr. Smith's service to the Tenders Board was categorized in this manner and perhaps had they followed his advice, this matter may have been amicably resolved as the words of another witness for the defendant Mr. John Skerritt, then the Chairman of the Tenders Board said in cross examination, *"that had they taken legal advice, the matter would not have reached this far"*.

- (4) I find that the Board acted in bad faith and erred in law when they felt that they had no discretionary power, and without seeking legal advice, withdrew the award.

Was the acceptance of the bid of the Claimant by the First Defendant, unlawful?

[15] I find for the reason herein before stated the Tender's Board had the right to accept or reject therefore I do not find that the acceptance of the bid, despite the failure to complete the IT/1 and IT/8 form was unlawful. It was within their discretionary power to accept or reject any tender.

Did the acceptance of the bid create a legitimate expectation

[16] Learned Counsel for the Claimant relied on the cases of **R vs North and East Devon Heather Authority Exp Coughlan [2001] QB 213** and the case of **R (Zegiri) V Secretary of state for the Howe Department**. It is clear from these cases that the behaviour of a Public Officer (Tribunal or Tenders Board) where an offer (bid) was accepted amounted to a promise which gave rise to a legitimate expectation and to arbitrarily withdraw the award, three months later without taking the advice of the Technical experts or obtaining legal advice amounted to an abuse of power and bad faith, see **R (Zegiri) vs Secretary of State for the Home Department (2002) UK HL3** where the House of Lords deal with the conduct of a Public Officer. The said principles apply to the facts of the case.

"the House of Lords confirmed that conduct by a public officer which was akin to breach of contract or representation could be an abuse of power for which judicial review was appropriate, the denial of legitimate expectation begin one form of the more general concept of abuse power"

Damage/Compensation

[17] (1) It is clear from the facts of this case that the Claimant submitted a Tender (an offer) and that the offer was accepted. The difference between the parties in this matter is that the Defendants argue that the acceptance was unlawful as the Tenders Board acted ultra vires. I have already found that the Tenders Board did not act ultra vires, therefore the issue is whether the Claimant suffered any damage or is liable to compensation

(2) Learned Counsel for the Defendants cited the case of **Rowland v Environment Agency [2003] EVCA C.V 1885**. In that case the Court suggested that in circumstances where the Claimant suffers loss as a result of an unlawful representation, that compensation and not damages be given to the Claimant

(3) In this case both parties did not strictly comply with rules governing the tenders process but the Tenders Board accepted the tender of the Claimant which was within their power so to do.

- (4) The Claimant in his affidavit deposed said that he acted upon the award and therefore is entitled to be compensated for any loss suffered including lose of opportunity as a result of the withdrawal of the award

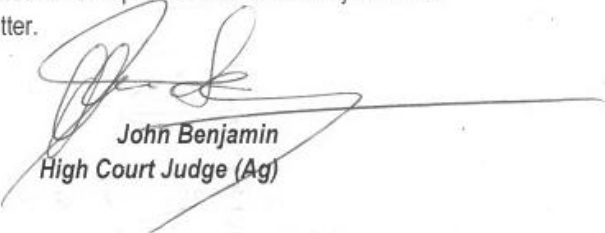
Decision

[18] (1) That compensation be paid to the Claimant to be agreed by the parties

(2) In the event parties cannot agree upon the amount of the Compensation, an application to be made to the court to settle the matter.

(3) That cost in the sum of \$50,000.00 to be paid by the Defendants to the Claimant.

(4) That the Interim Injunction Order granted on 30 April 2012 be lifted subject to the time allotted for any appeal in this matter.


John Benjamin
High Court Judge (Ag)