

IN THE HIGH COURT OF FIJI
AT SUVA

CIVIL JURISDICTION

CIVIL ACTION NO. HBJ 0036 OF 2006S

BETWEEN : THE STATE

AND : THE MINISTRY OF AGRICULTURE of Robinson Complex,
Grantham Road, Raiwaqa, Suva
1ST Respondent

: THE MINISTER OF AGRICULTURE of Robinson Complex,
Grantham Road, Raiwaqa, Suva
2ND Respondent

: THE CHIEF EXECUTIVE OFFICE MINISTRY OF AGRICULTURE
Robinson Complex, Grantham Road, Raiwaqa, Suva
3RD Respondent

: THE DIRECTOR, LAND AND WATER RESOURCE
MANAGEMENT DIVISION MINISTRY OF AGRICULTURE
Robinson Complex, Grantham Road, Raiwaqa, Suva
4TH Respondent

: THE MINISTRY FOR WORKS AND ENERGY of Nasilivata House,
Ratu Mara Road, Samabula, Suva
5TH Respondent

: THE MINISTER FOR WORKS AND ENERGY of Nasilivata House,
Ratu Mara Road, Samabula, Suva
6TH Respondent

: THE CHIEF EXECUTIVE OFFICER, MINISTRY FOR WORKS
AND ENERGY of Nasilivata House, Ratu Mara Road, Samabula,
Suva
7TH Respondent

: PUBLIC WORKS TENDER BOARD, MINISTRY OF WORKS
AND ENERGY of Nasilivata House, Ratu Mara Road, Samabula,
Suva
8TH Respondent

- : THE MINISTRY OF FINANCE AND NATIONAL PLANNING of
 Ro Lalabalavu House, Victoria Parade Suva. 9th Respondent
- : THE MINISTRY OF FINANCE AND NATIONAL PLANNING of
 Ro Lalabalavu House, Victoria Parade Suva. 10th Respondent
- : THE CHIEF EXECUTIVE OFFICER, MINISTRY OF FINANCE AND
 NATIONAL PLANNING of Ro Lalabalavu House, Victoria Parade
 Suva. 11th Respondent
- : THE CONTROLLER OF GOVERNMENT SUPPLIERS of
 Foster Road, Walu Bay, Suva. 12th Respondent
- : THE ATTORNEY GENERAL OF FIJI 13th Respondent
- EX-PARTE : REWA-BIRDON CONTRACTING LIMITED of Suva. Applicant
- HALL CONTRACTING PTY LTD
Interested Party

Counsel for the Applicant : S. Valenitabua, Valenitabua Esq
 Counsel for the Defendants : Z. Sahu Khan, Attorney General's Chambers
 Counsel for Interest Party : P. McDonnell, Cromptons
 Date of Judgment : 20 November 2006.
 Time of Judgment : 1:30pm.

EXEMPORE JUDGMENT

The Applicant is seeking leave of this Court to bring a claim for Judicial Review of the decision of the Public Works Tender Board to award the tender for the dredging of the Navua River to Hall Contracting Pty Limited ("the Company"). The decision

was made by the Board at its meeting of 7 June, 2006. The relief sought is an order of mandamus for the quashing of the Board's decision.

The ground relied upon by the Applicant is that the Board had acted unreasonably and/or illegally in awarding the contract to Hall Contracting Pty Limited because the company was not registered locally at the time of the award.

It is agreed that the tender for the dredging of the mouth of Navua River was awarded to Hall Contracting and conveyed to the Company in a letter dated 19 June 2006. The Applicant received the letter notifying of its unsuccessful tender on 28 June 2006. The formal agreement was signed by the Company and the Ministry of Agriculture on 30 June 2006. It is also agreed that Hall Contracting, an Australian based company was incorporated under our laws on 9 August, 2006 and it received its Foreign Investment Certificate ("FIC") from FTIB allowing it to operate locally on 18 August, 2006.

There is no question that all the necessary procedures of the tender process, had been fully complied with by the authorities, including the Tender Evaluation Committee and finally the Public Works Tenders Board, that is as far as all the technical matters are concerned.

The only remained issue is a legal one, and upon which the whole of the Applicant's case rests, is whether the Tender Evaluation Committee and in turn the Public Works Tender Board had acted legally in considering the tender by Hall Contracting, which was yet to be registered under our law.

I have listened to arguments from both sides on whether there is a legal requirement that a Company or an entity should first be registered locally before it can qualify or be considered in a tender. Of course, much depends on the tender documents and the wording itself. If it specifically stipulates that the tenderer should be a local at the time of tender then it can only mean that the tenderer must be a local. Where

there are no qualifications of residential status of a tenderer, as is in this case, is there still a presumption, as argued by the Applicant, that the tenderer must first be local?

Contrary to the Applicant's arguments, the Court is of the view that a company does not need to be first incorporated under an laws and to be already in possession of a FIC by the FTIB, before it makes a tender in Fiji. In the first place, it is quite clear from the details the tender documents, that the tender was open to the world. For example the addresses given for tenderers as points of contact, included, in cases of telephones and facsimile, have (679) code, Fiji's IT access, which can only suggest that the Board expected overseas interests. The project itself would require big and sophisticated machines, which may not be readily available locally. There can be no doubt that the tender was open to both local and overseas companies.

As to whether the company should have been registered first and also to have first acquired a FIC from FTIB before tendering, I can find no legal grounds for the support of such a proposition. These requirements are pre-requisites to the beginning of actual operations in Fiji, but they do not prevent an overseas company or entity from vying for business as in a tender process locally. They, after winning a tender, still have to comply with our laws, including those that have been identified by the Applicant.

Being a successful tenderer does not of itself automatically allow the company to begin operation in Fiji immediately. It still needs to comply with our laws where and when required. That is why it is necessary in this case, for the Board to include as part of the General Conditions of the Contract with the company, paragraph 34.5 stating that the company shall comply with Fiji's Laws and Regulations. Further the Project Engineer from the Ministry of Agriculture on 18 July 2006 wrote to the Company requiring it pursuant to clause 26.1 of the Tender Document to :

"provide the Fiji Islands Trade and Investment Bureau Foreign Investment Registration Certificate to undertake the dredging works and local Company Registration Certificate before commencement of the works."

The FTIB itself after approving the Company's FIC was well aware that the Company still had to conform with our laws writing to it on 18 August 2006 that the certificate was granted subject to the company being registered locally.

Even from a practical point of view it surely will not be in the interest of commercial efficacy in terms of time and money to both tenderer and indeed for the Government, in cases involving millions of dollars, and big operations to require every overseas companies to first get incorporated under our laws and then obtaining a FIC from FTIB before submitting their tenders.

In these circumstances the Court finds that there are no serious or arguable issue raised for leave to be given to the Applicant to challenge the Board's decision. The Board had acted legally and within reasons.

Leave is therefore refused. The interim injunction of 3rd November, 2006 is set aside. Given the delay in which the Respondents had taken to respond to Court's directions for filings of affidavits, I will make no award as to costs.


F. JITOKO
JUDGE