

IN THE HIGH COURT OF FIJI

AT SUVA

CIVIL JURISDICTION

JUDICIAL REVIEW NO.: HBJ 42 OF 2007

BETWEEN:

THE STATE v. PUBLIC WORKS TENDER BOARD

Respondent

EX-PARTE: BRIGHT INTERNATIONAL LIMITED

Applicant

Mr. H. Nagin for Applicant

Ms N. Karan for Respondent

Date of Hearing: 28th February 2008

Date of Judgment: 19th March 2008

JUDGMENT

Background:

On 30th June 2007, the Public Works Tender Board invited tenders from reputable building contractors for the construction of sterile and cytotoxic manufacturing unit at CWM Hospital. The tenders were to be sent to the Secretary and to reach him by 12.00 noon on 12th July 2007. The tenders were to be accompanied by \$1,000.00 tender deposit either in cash or bank cheque. The advertisement stated that ***"Tenders that do not conform to the above requirements are deemed as non-conforming and will be disqualified from***

further evaluation". It also stated that *"The lowest or any tender shall not necessarily be accepted"*.

At the close of tenders, two tenders had reached the Board. One was by the applicant Bright International Limited for \$185,000.00. It was accompanied by a Bank cheque. The second was from Cope Construction Limited for \$127,820.00. It was not accompanied by cash or bank cheque but by company cheque.

On 31st October 2007 the Board wrote to Bright International Limited informing it that Cope's tender had been accepted. This led to letters being written on behalf of Bright International Limited questioning the acceptance of tender which did not conform to the requirements of the advertisement as it was not accompanied by cash or Bank cheque.

On 6th November 2007, the Permanent Secretary for Works wrote to the solicitors for the applicant advising that the Tender Board had rescinded its earlier decision to award the tender to Cope and decided to call for fresh tenders. The solicitors for the applicant wrote back stating that there was no need to re-advertise and that the applicant's tender should be accepted. That did not happen so the applicant filed this application for judicial review seeking a certiorari to quash the decision of the Tender Board and a mandamus directing the Tender Board to accept the applicant's tender.

Financial Management (Public Works) Regulations 2005:

The tender process is governed by the above regulations which are made pursuant to Section 81 of the Financial Management Act. Section 3 of the Regulations requires that all tenders to carry out any public works must comply with the provisions of the Regulations. Section 4 establishes a Public Works Tender Board which shall consider every tender called for by the Secretary. It may authorize the acceptance of the tender. The Board is under a mandatory obligation to reject unreasonable or collusive tenders: Section 5(2).

Once invitation for tenders has been advertised and tenders received, they shall be opened by the Secretary in the presence of two of the Board Members and recorded in a register: Section 7.

Those who submitted tenders are entitled to be present when the tenders are opened. The Secretary of the Board informs the person whose tender has been accepted. The actual contract to carry out any public works is to be signed by the Chief Executive Officer (CEO) or someone authorized by him.

As the Regulations stand the Board considers the tenders and ***“may authorize the acceptance of the tender”***: Regulation 5(1). The final say is still with the Chief Executive Officer because it is he or someone authorized by him who can sign the contract for the carrying out of any public works. The CEO can for good reason refuse to sign the contract. It may be that the works are no longer necessary. Even a bidder whose tender has been accepted can withdraw his offer or tender. Simply because the Board has authorized acceptance of the tender does not mean the contract has come into existence. That occurs only when the CEO has executed the contract. Support for the above view can be found in the judgment of Justice Coventry in The State v. Major Tenders Board ex-parte: Pacific Connex Limited – HBJ 12 of 2005. Even though Justice Coventry was considering Financial Management (Supplies and Services) Regulations 2005, the provisions are similar to those of regulations now under consideration.

Policy behind the Regulations:

The policy behind the Regulations is to protect the public purse. It also enables the government to obtain services from the most advantageous source at competitive price. It promotes transparency and accountability and discourages collusive contracts or allegations of favouritism. Tenderers are entitled to be present at the opening of tenders so it is open transparent process.

Mr. Nagin stated that Cope tender was accepted in bad faith. It was a non-conforming tender and should not have been accepted. I agree the Tender

Board owed a duty of fairness to the tenderers. It was obligated under the terms of the advertisement to treat Copes tender as non-conforming and have no discussion on it. It should have treated Cope's tender as if it had not been made at all. There was no clause in the advertisement stating that the Board reserved the right to accept non-conforming tenders. Therefore it could not accept non-conforming tender.

Nicholas Seddon in Government Contracts states that ***“the nature of the tender process is such that the government body is obliged not to accept non-complying tenders (unless it had said in the request for tender) that it reserved the right to accept non-complying tenders”*** page 283 of 3rd edition.

Even if Cope's tender was left out as suggested, it did not mean the applicant's tender would have been accepted as if right. The Tender Board could have rejected it. The advertisement had the privilege clause stating ***“the lowest or any tender shall not necessarily be accepted”***. The Board had the final say.

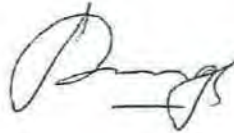
The Board has re-advertised. The applicant I was told has not reapplied in view of this pending litigation. I had granted stay that tenders not be opened until finalization of this action. In light of the fact that the Board has rescinded its decisions to award the tender to Cope, there is no need for a certiorari to quash the original decision.

Because of the privilege clause, I cannot grant an order of mandamus. However considering the policy behind the Regulations, I am of the view that fresh tenders be advertised. Any tenders which have been received are to remain unopened until the time for fresh tenders has expired.

Final Orders:

I refuse to grant an order of mandamus. The Public Tender Board is to advertise fresh tenders if it wishes to continue with the works. All tenders already

received shall remain unopened until the tender period has expired. The applicant is at liberty to file fresh tenders. No order as to costs.

A handwritten signature in black ink, appearing to read 'Jiten Singh', with a horizontal line underneath the name.

[Jiten Singh]

JUDGE

At Suva

19th March 2008