

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE

ANGUILLA

Claim Number: AXAHCV2014/0066

Between

WEBSTER'S MANAGEMENT GROUP LTD.

Claimant

And

THE ATTORNEY GENERAL OF ANGUILLA
LUDIANNE LEVERETTE RICHARDSON (Sued in her capacity of
Chief Procurement Officer and in her personal capacity)

Defendants

Appearances:

Mr. Thomas Astaphan QC with him, Mrs. Keesha Carty for the Claimant
The Attorney General, Mr. Rupert Jones for the Defendants.

2014: December 1st, 12th

2015: January 7th

JUDGMENT

- [1] **MATHURIN, J.;** On the 11th August 2014, the Claimant (Webster's) was given leave to file judicial review proceedings with reference to the decision of the 2nd Defendant Ms. Richardson, the Chief Procurement Officer (CPO) to not open envelopes submitted at the bidding process on the 25th July, 2014 for the tender of 5 projects advertised by the Government of Anguilla for solid waste disposal services in Anguilla. In this particular instance, the CPO caused to be disseminated two procurement notices to the public in May 2014 inviting bids for Management of Solid Waste

Collection Services for Zones 1, 2, 3 and 4 and the Management of Solid Waste Disposal Services at Corito Dumpsite. This meant that there were five contracts available for tender.

- [2] The Public Procurement and Contract Administration Act, No. 6 of 2012 (the Act) regulates the procurement and contract administration procedure and provides for matters connected with and incidental to that power. The CPO is the head of the Procurement Unit and is responsible amongst other things for the opening of bids in the case of a two envelope bidding process.
- [3] The advertisement stated that bidding would be conducted through a two- envelope Competitive Sealed Bid Procedure in accordance with the Act and Regulations to the Act. Bidders were invited to purchase the Bid Documents which according to the Regulations includes all instructions to the bidders as to what was required of them for the purpose of Bidding. The Regulations provide for the submission of bids and section 9(5) states that bids should be submitted in the form and in accordance with the requirements specified in the Bid Documents. Section 9(6) states that;
- “A bid, including a bid that requires a two-envelope process or a two stage bidding process, shall be submitted in a sealed envelope; and where a two envelope process is used, one shall be labeled “technical” and one shall be labeled “financial” as appropriate.”*
- [4] The “two envelope bidding process” is defined in the Act to mean “a competitive sealed bidding process in which two bids are submitted at the same time, the first envelope containing a technical bid and the second envelope containing a priced bid, on the understanding that the first envelopes submitted by the bidders will be opened and the bids evaluated before the second envelopes.”
- [5] The Bid Documents which were circulated to the prospective bidders described the submission process as follows;

2.3 Bid Lodgment

Technical and Financial bids to be contained in separate sealed plain envelopes or packages and marked: **“CONFIDENTIAL”**. The closing date for submission is July 4th, 2014 at 12:00 noon.

Technical Envelope should be clearly marked:

Attn: Chief Procurement Officer
Procurement Unit
Technical Bid for the Solid Waste Collection Services Zone number -----

Financial Envelope should be clearly marked:

Attn: Chief Procurement Officer
Procurement Unit
Financial Bid for the Solid Waste Collection Services Zone number -----

Both the financial and the technical envelopes should be placed in one sealed envelope marked "**CONFIDENTIAL**" and submitted to the Procurement Unit addressed as follows:

Attention: The Chief Procurement Officer
Procurement Unit
Ministry of Finance
The Government of Anguilla
The Secretariat
The Valley
Anguilla, B.W.I.

Bid For: Management of Solid Waste Collection Services

...

2.6 Number of Copies of Bid

The Bidder is required to lodge **one (1)** original Bid plus **three (3)** copies (including copies of all supporting documentation), each of which shall be certified by the Bidder to be true copies."

[6] For the purposes of the bidding process, the Act, at section 23(6), provides that in the case of the two-envelope bidding process, the CPO or her designate appointed for the purpose shall;

- "(a) when the first envelope is opened –*
 - (i) read aloud the name and address of each bidder or offeror, and*

- (ii) *refrain from disclosing any other information contained in the bid or proposal;*"

The Facts

- [7] The following is not disputed. On the 25th July 2014, the CPO was opening bids for the five projects referred to above. Upon the bids being opened for each of the projects, the CPO found that each of Webster's five envelopes contained four envelopes inside each marked "Confidential". She declined to act any further and refused to open any of those four envelopes. To clarify these facts and to avoid repetition, I will refer to what happened when the bids were being opened for Zone 1. It is to be noted that the same procedure was adopted by the CPO with reference to all the five envelopes submitted by Webster's.
- [8] The CPO states that due to the fact that none of the four envelopes for Zone 1 had any indication whether they contained a technical or financial bid, it was her belief that the envelopes did not conform to the bid lodging requirements and she considered them to be a non-conforming bid. She explained that the issue she faced was that she may have inadvertently opened a financial bid and compromise the whole process thereby requiring the whole process to be restarted and incurring the additional expense of re-advertising etc;.
- [9] Counsel for the CPO further submitted that the objective of the two-envelope bidding process is to ensure a fair evaluation of a bidder's proposal by considering the technical criteria without any influence from the financial proposal.
- [10] Mr. Webster explained that she should open the envelopes as each one contained a sealed technical bid and a sealed financial bid. Mr. Webster explained that he enclosed the required copies of the technical and financial bids in the same manner thus accounting for why there were four confidential envelopes in each of the envelopes relating to all five bids. The CPO did not open the envelopes despite his explanation.

- [11] So it appears that whereas the CPO interpreted the directions for bid lodgment to mean that the Technical Bid with three copies would be enclosed in a sealed envelope clearly identifying it as the Technical Bid and the Financial Bid would similarly be enclosed in a sealed envelope. For its part, Webster's interpreted the direction to mean that the Technical Bid and Financial Bid would each be enclosed in a separate sealed envelope and these two envelopes would be enclosed in another sealed envelope. Webster's also understood that this process was to be repeated three times to provide three copies of each bid. Thus, for Webster's there would be four envelopes. And these four envelopes would all be placed in another envelope to be submitted.
- [12] To amplify, it is clear the CPO interpreted the directions to require that Bidders enclose the separate Technical Bid envelope and the separate Financial Bid envelope in another (main or outer) envelope marked "Confidential" and addressed to the Chief Procurement Officer. Therefore, the CPO considered the two-envelope process called for the submission of two envelopes, to be enclosed in a third outer or main envelope. In contrast Webster's interpreted the direction to mean that a separate Technical Bid envelope and a separate Financial Bid envelope should both be enclosed in a (presumably larger) envelope marked "Confidential" and that this confidential envelope should further be enclosed in a (main or outer) envelope addressed to the Chief Procurement Officer. Therefore, Webster's considered the two-envelope process called for the submission of two envelopes, to be enclosed in a third envelope, which was in turn to be enclosed in a fourth, main or outer envelope.
- [13] The CPO decided not to act any further upon opening Webster's envelopes and finding four envelopes marked "Confidential" instead of the two that she states she was expecting. This is the gravamen of the matter that finds itself before the Court. In considering the direction, I am of the view that a correct interpretation of the direction is for Technical Bids and copies to be sealed in an envelope identifying them as Technical Bids and for the Financial Bids to be treated similarly. The two envelopes are then to be placed in an envelope marked confidential and addressed to the Chief Procurement Officer. I therefore uphold the CPO's interpretation of a three envelope process.

The Substance and Aim of the Act

[14] The Act, according to its preamble, was enacted to reform the procurement and contract administration procedures of the Government of Anguilla as well as to provide for matters connected therewith and incidental thereto. Section 4 of the Act states specifically that;

"The purposes of this Act and the regulations are to simplify, clarify and modernize 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.*

It seems to me that the purpose of the statute generally apart from identifying the best qualified bidder with firstly, the technical expertise and secondly, the most financially viable bidder, is to provide an impartial, transparent, competitive and fair process among potential bidders for any given project put up for tender by the Government.

[15] The Learned AG has submitted authorities in support of his submission that procedural non-compliance with the procurement process is strictly approached in other jurisdictions. He submits that this strict approach was upheld in Barriere Construction Co Llc v Terrebonne Parish Consolidated Government Court of Appeal Louisiana where the General Bidding Requirements stated that "*Bids must be prepared and submitted in accordance with Section 102 of the Standard Specifications*". In that instance, Section 102 required that all the information on the envelope were to be filled in to indicate its contents. Barriere's bid did not meet the requirements as it did not include the name and number of the project on the envelope. A reading of the judgment also identified that the problem was that there were other bids on that day and that the officer assigned

to the opening of the bids was unsure as to which bid it related. The Court upheld the decision not to open the bid stating that there was non-compliance with the law. The Public Bid Law however specifically states the "*the provisions of this section and those stated in the advertisement for bids shall not be considered as informalities and shall not be waived by any public entity*" and the Court recognized this new amendment to the Law was to restrict previous waivers by the relevant entities. The Act has no similar provision.

[16] In Harrow v Legal Services Commission (2011) EWHC 1087 (Admin) in essence what the Claimant in fact sought was an amendment of the bid after it had been opened on and determined on the ground that there was an error. The Court refused his appeal recognizing not only the responsibility of the bidder to ensure documents are accurate but also to ensure that all tenders are considered in a fair, like for like and reasonable manner, not affording an applicant an opportunity to amend the bid and improve its prospect of success in the competition after the submission date had passed. Similar consideration by the Courts was given to R (On the application of All About Rights Law Practice v Legal Services Commission (2011) EWCH 964 (Admin). It seems to me however that in the judgments referred to, such absence of compliance necessarily entailed a **substantive or fundamental** non-fulfillment of a statutory procedural requirement.

[17] In considering the necessary criteria in order to establish whether the provisions of a statute were mandatory or directory in nature if the requirement which has not been observed may fairly be said to be an integral and indispensable part of the statutory intendment, the courts will hold it to be truly mandatory, and will not excuse a departure from it. But if, on the other hand what is apparently a requirement is in essence merely a direction which is not of the substance of the aim and scheme of the statute, non compliance may be excused. See **De Smith's Judicial Review**, 7th ed; Sweet & Maxwell; Para 5-052 Mandatory and Directory Duties and Powers.

[18] My view is that the opening of the envelopes by the CPO at that stage is more of a mechanical exercise given that all that is required of the CPO at that stage is to call out the Bidders names and addresses and disclose nothing else. In fact, after the Technical Bid is opened, the content is analyzed by an evaluation committee formulated for the purposes of assessing whether the technical proposals are viable. Can it be said then in the circumstances that the mistaken

enveloping process compromised the integrity of the bids? Can the error of Webster's fairly be said to have compromised an integral and indispensable part of the statutory intendment as defined in section 4 of the Act referred to in paragraph 14 above?

- [19] In considering the Act and submissions with authorities of Counsel, I am of the view that the labeling of the envelopes to identify the nature of the contents in a two-envelope bidding process is a substantive requirement as the need to keep the Technical and Financial bids apart has been clearly explained. The CPO clearly has the responsibility of ensuring that this process is adhered so as to prevent any predisposition towards cost without the expertise being clearly evaluated.
- [20] In some situations the violation of a provision will, in the context of the statute as a whole and the circumstances of the particular decision, not violate the objects and purpose of the statute. In order to assess this, the Court considers the whole scope and purpose of the enactment and assesses the importance of the provision that has been disregarded, and the relation of that provision to the general object intended to be secured by the Act. The importance of the procedural requirement in the overall administrative scheme can also be considered.
- [21] In considering the purpose of the statute is to identify the best qualified bidder with firstly, the technical expertise and secondly, the most financially viable bidder, as well as to provide an impartial, transparent, competitive and fair process among potential bidders for any given project put up for tender by the Government of Anguilla, I am of the view that in these particular circumstances, that no prejudice has occurred to the procedure of the opening of the bids save in the most technical way. I do not consider that a bidding process which involved no more than a dozen bids could cause the administrative disarray that clearly influenced the amendment to the Public Bid Law referred to in paragraph 15 above.
- [22] The opening of the bids was done in public and Webster's was present to explain in public that his understanding of the enveloping process did not compromise the integrity of the Technical and Financial Bids. Webster's clearly gave an on the spot explanation of a bona fide attempt to comply which was not accepted. In these particular circumstances, I find that there was no good reason for the CPO to have rejected Webster's explanation.

[23] I therefore conclude that it would have been reasonable for the CPO to have opened the envelopes and that the mistake of the enveloping process by Webster's contravened a direction which is not of the substance of the aim and scheme of the statute and as such non compliance may be excused. I accordingly grant an order of certiorari quashing the decision of the CPO not to open Webster's envelopes. In consideration of the fact that it was the error of Webster's that occasioned this judicial review hearing, I make no order as to costs.

[24] The evidence however, in my view, does not disclose a personal cause of action against the CPO who was clearly acting in accordance with the Act and regulations and as such the claim against her personally is dismissed with costs assessed in the sum of US\$1,500.00.

[25] The Court further orders as follows;

- (a) That the injunction dated the 11th August 2014 is hereby discharged.
- (b) That the Chief Procurement Officer opens the Claimant's bid and continue the procurement process with reference to Management Collection Services for Zones 1 to 4 and Management of Solid Waste Disposal Services at Corito Dumpsite.

I thank Counsel for their assistance in this matter.



Cheryl Mathurin
High Court Judge