THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

(CIVIL)

ANGUILLA

Claim Number: AXAHCV2018/0020

Between

CWT ANGUILLA LTD.

Claimant

and

WATER CORPORATION OF ANGUILLA

Defendant

Appearances:

Ms. Tara Carter for the claimant

Ms. Jacinth Jeffers for the defendant

2018: July 5th; 16th; 22nd;
September 19th.

JUDGMENT

[1] MATHURIN, J.: The parties agreed that there would be no cross examination on the evidence at the hearing of this matter and that they would address the court in submissions and closing arguments.

[2] The claimant (CWT) is a company which has been providing water production services to the defendant, the Water Corporation of Anguilla (WCA) from November 2015 pursuant to a 10 year

contract. At some point it was decided that WCA would terminate the said contract and purchase the plant with a view to improving efficiency and reliability in the supply of water. The Government was informed and agreed that the Water Corporation should mirror the procurement process in accordance with section 48A of the Public Procurement and Contract Administration (Amendment) Act 2016 (the Procurement Act) which states that;

> *"48A. (1) Statutory bodies and government agencies shall be guided generally by principles and procedures stated in this Act."*

[3] On the 26th January 2018, the WCA published a document called an Invitation to Tender. The Invitation to Tender invited prospective bidders to participate in the tendering for the production and supply of water intended for distribution as drinking water. The WCA intended to sign a Water Supply Agreement (WSA) for the years 2018 to 2028 with stringent conditions, guarantees and enforcement possibilities.

[4] In the Invitation to Tender, WCA stated it would tender the WSA, in view of the investments required and the financial implications thereof, acting in agreement with relevant procurement guidelines. The project included the following;

> "1. A ten-year Build-Own-Operate and Transfer Agreement for the guaranteed daily supply of defined volumes of water;
>
> 2. the buy-out of an Existing Plant with two swro units of 250,000 US Gallons per day per unit;
>
> 3. the construction of a New Plant with a capacity of at least 250,000 US Gallons per day;
>
> 4. the future Expansion, with a similar unit;
>
> 5. the supply of a Storage Reservoir of 1.5 million US Gallons
>
> 6. Appurtenances (lines and valves)"

[5] The Invitation to Tender also stated under a heading "**Tender Documents"** the following;

> *"Tender Documents, may be obtained upon registration and compliance with the following:*

1. *The interested Company shall enter into an Escrow Account Agreement with WCA, facilitated by an established attorney office, the Agent, for the deposit of an amount of 2 million United States Dollars. The funds are earmarked for execution of the WSA, primarily the buyout. The last date for the deposit is February 23rd 2018;*
2. *Payment of a non-refundable fee of Three Thousand US Dollars or Eight Thousand Two Hundred EC Dollars to WCA.*

Tender Documents will be available from: February 5th 2018 to February 23rd 2018; Tender submission date is March 23rd, 2018."

[6] Mr. Mario Bento, the managing director of CWT states that there are several grounds upon which he seeks the relief of declarations of ultra vires; Certiorari quashing decisions to proceed with the procurement with the qualified bidders; injunctions to restrain WCA from proceeding with the bidding process pursuant to the Invitation to Tender; Mandamus to compel WCA to reissue a procurement notice in accordance with the Procurement Act and Regulations by removing the requirement of US$2,000,000 to be deposited to an escrow account; and to set out the evaluation criteria and providing tender information to prospective bidders; and an order that WCA acted in bad faith; and consequential damages amongst others.

[7] Mr. Bento makes repeated reference to procurement documents and bid documents and this is echoed in the submissions of counsel. The Invitation to Tender is the document published on the 26th January 2018 inviting bidders who met certain criteria to access the Tender documents. This Invitation to Tender was accompanied by the following documents,

1. a Company Registration Form, - a form which was required to be filed together with compliance of the Tender Documents in the Invitation to Tender
2. a document headed "Introduction; Tender Documents; Water Supply Agreement 2018 – 2028", this was a basic description of the Project including the requirement to comply with the Invitation to Tender before being able to access the Tender Documents
3. a document headed "Escrow Agreement Agent" – referring interested parties to how they would be able to access the Escrow Agreement and for deposit of the US$2,000,000
4. a document headed "WCA Bank Account" – referring parties to where the US$3,000 was to be deposited.

[8] It should be noted that bid documents are defined in the Regulations as including the invitation for bids, instructions to bidders regarding the evaluation criteria; the method of procurement, the form, timing and procedure for the submission of bids; the bid sheet detailing the specifications including amount and form of a bid or proposal security. Bid documents also include the general conditions of contract, schedule of works, technical specifications and drawings, forms and the requirements for a responsible bidder. These are all in my view indicative of the requirements for the bidding process.

[9] The court's view is that the Invitation to Tender did not commence the bidding process as that process could only be open to qualified bidders i:e bidders who met the criteria under the heading "TENDER DOCUMENTS" in the Invitation to Tender published on 26th January 2018;

> *"Tender Documents, may be obtained upon registration and compliance with the following (my emphasis).*
>
> 1. *The interested Company shall enter into an Escrow Account Agreement with WCA, facilitated by an established attorney office, the Agent, for the deposit of an amount of 2 million United States Dollars. The funds are earmarked for the execution of the WSA, primarily the buyout. The last date for the deposit is February 23rd 2018.*
> 2. *Payment of a non-refundable fee of Three thousand US Dollars or Eight Thousand Two Hundred EC Dollars to WCA.*
>
> *Tender Documents will be available from: February 5th 2018 to February 23rd 2018. Tender submission date is March 23rd 2018."*

[10] Mr. Bento asserts in his second affidavit at para 3 that he "*was registered as an interested bidder*" This of itself is of no assistance to CWT as it had not complied with sections 1 and 2 above. The clause is unambiguous and CWT cannot profess therefore, any entitlement to the Tender Documents. Registration is but one of the steps that CWT was required to take in order to become a qualified bidder.

Ultra vires and illegality

[11] CWT asserts that the Board should determine whether a bid or performance security is required and that the Regulations provide that for a bid security the maximum could only be up to 3% of the

bid amount and that the overall value of the bid was US$ 3 million. CWT asserts that the payment operated as a prequalification which was contrary to the Regulations. Whilst the court is persuaded that the payment was indeed a prequalification, it does not share the view of counsel that it is ultra vires the Procurement Act and Regulations.

[12] Having reviewed section 4 of the Regulations (para 8 above) I accept counsel for the claimant's submission that the requirement of a US$2,000,000 deposit is tantamount to a prequalification process. Counsel submits that section 25 of the Procurement Act states that the Procurement Committee may engage in a prequalification process but this must be approved by the Chief Procurement Officer. This submission however does not accord with the fact that WCA had engaged someone to conduct the procurement and that such procurement was to be guided generally by the principles and procedures stated in the Procurement Act.

[13] There is clear provision in section 25 for a prequalification process with a view to identifying, prior to inviting bids, the bidders that are qualified. Section 25 (3) states that a potential bidder, may be required to be prequalified, as a condition of submitting a bid in the procurement. Subsection 5 states that where a prequalification process has been engaged in, only bidders who have prequalified shall be entitled to continue in the procurement. I am of the view that WCA was within the ambit of being guided generally by the Procurement Act and Regulations in requiring bidders to be prequalified.

[14] That the US$2,000,000 is a prequalification is bolstered further in my view by a reading of section 4 of the Regulations.

> *"4 (1) Subject to subsection (3), the procurement shall, in relation to the method of procurement selected, determine if a –*
>
> *(a) bid or proposal security is required and, if so, the amount; and*
>
> *(b) performance security is required and, if so, the amount of the performance security.*
>
> *…*
>
> *(3) An invitation for bids or request for proposals for works may have a –*

(a) bid or proposal security in an amount up to 3% of the bid or proposal or, if the bid or proposal permits more than one amount to be proposed, the highest of those amounts: and

(b) performance security in an amount to be determined by the Chief Procurement Officer and the Procurement Committee.

(4) The Procurement Committee shall-

(a) in determining whether a bid or proposal security referred to in subsection (1) is required consider the risk that a prospective bidder or offeror will neglect or refused to-(my emphasis)

(i) execute a formal contract, and

(ii) provide the required performance security within the time stipulated in the invitation for bids or request for proposals: and

b) in determining whether a performance security referred to in subsection (1) is required, consider the risk of default by a successful bidder or offeror and the estimated cost of remedying the default."(my emphasis)

[15] Subsection (4)(b) requires the Procurement Committee to determine whether or not a performance security is required only after a successful bidder has been identified after the procurement process is complete. This is in stark contrast to subsection (4)(a) where the determination is made in advance of the bidding process. The Procurement Committee could not have been in a position to determine a performance security at the time when the Invitation to Tender was published.

[16] The explanation of Mr. Christopher Richardson, the Chairman of the Board of WCA, even though herefers to a "*Performance bid security*" also supports the fact that the US$2,000,000 was contemplated in anticipation of the bidding process as a prerequisite. At para 8 of his affidavit he states:

"8 iii. The payment of US$2,000,000 was simply to ensure that the potential interested bidders are serious and committed to the process and the financial viability to execute the Water Supply Agreement. The WCA has had past encounters where bidders lack …the

financial resources and caused much delay in supplying water. In consideration of the current situation, where the claimant fails to supply water to the people of Anguilla efficiently and reliably, it would be a high risk if the successful bidder also lacked the financial resources and maintains the status quo as relates to the water supply situation in Anguilla. To not ensure that bidders have the financial resources would mean that the WCA would have to wait for the successful bidder to find financing which could delay the efficient water supply for another year or two."

This in my view supports the view that this was a determination to be taken before the procurement process started. It was a deliberation by the WCA to prequalify bidders to avoid subsequent delay.

[17] The question for the court's consideration would then have to be whether the process and principles that the WCA used to arrive at the prequalification in the Invitation to Tender warranted the relief that CWT is seeking. Section 25(4) of the Procurement Act requires that the Procurement Committee decide prequalification in accordance with the guidance about responsible bidders as provided for in the regulations. Further section 41(1)(a) states that Regulations may also provide for matters;

"(i) contemplated by or necessary for giving full effect to this Act and its administration, or

(ii) incidental to or consequential upon any provision of this Act."

Section 41(1)(l) permits EXCO to make regulations specifying the manner in which an invitation to prequalify is to be given and the day for the close of applications to prequalify, when they are confidential and when they are not.

[18] Based on a reading of section 10 of the Regulations headed Determination of responsible bidders or offerors, it is clear that the Procurement Committee could therefore prequalify a bidder as to whether he has or will have, when required, sufficient financial resources to perform a project.

[19] A common thread throughout the affidavit of Mr. Richardson, was that the interested bidder must possess the necessary financial resources up front to ensure the buyout of CWT. This is reflected in paragraph 8 where he states that "*It was also imperative that the incoming company possess the necessary financial resources upfront to ensure the buyout of the Claimant …"*

[20] Further, at paragraph 12. ii Mr. Richardson states;

> *"Water is essential and as such potential interest bidders must have the commitment and financial resources to comply with any Water Supply Agreement. Thus, the WCA thought it was necessary to require a US$2,000,000 deposit to adhere to its mandate pursuant to the WCAA. The Claimant would also be paid as per the buy-out process which is also one of the underlying reasons why the US$2,000,000 was required as a bid security."*

[21] Based on the foregoing therefore the court is of the view that the required payment of US$2 million was a prequalification to bidding made in accordance with general guidelines laid down in the Procurement Act and Regulations. One of the advantages of prequalification, in my view, is to reduce the need to evaluate unqualified contractors. It is a way of narrowing the field to only those who have the requisite ability to comply with the terms of the contract and the financial capability to undertake the work.

[22] CWT further states that the evaluation of bids should be against objective criteria that ought to have been identified in the tender package. Counsel for the claimant submits that the evaluation criteria must be disclosed. Counsel asserts that the documents that Mr. Richardson exhibited as JCR2 to his affidavit headed "Tender Documents; Terms of Reference and Water Supply Agreement 2018 – 2028" is not the document that was published on the website. Counsel states this is a material non-disclosure in contravention of the Procurement Act and the Regulations.

[23] Counsel for WCA explains that what was on the website was an abridged version headed "Introduction; Tender Documents and Water Supply Agreement 2018 – 2028" exhibited to the Affidavit of Mr. Bento as A7 and that upon compliance with the Invitation to Tender, all the Tender documents would be made available to the qualified bidder. She asserts CWT never met the criteria. It is noted that at page 5 of the document that the requirements of the Invitation to Tender are repeated. The Invitation to Tender clearly states that the tender documents would be available upon registration and compliance with the terms in the Invitation. I am of the view that this accords with the explanation given by WCA.

[24] CWT further submits that the WCA exceeded its jurisdiction under its own statute in that its powers are limited to entering into agreements for the supply of water whereas the scope of the tendering process was to solicit a vendor for the provision of water distribution and facilities. Counsel for

CWT relies on the dicta of the Court of Appeal in Quorum Island (BVI) Ltd v Virgin Islands Environmental Council HCVAP2009/0021

> *"It is a primary tenet of the rule of law that a public authority must act or make decisions within the bounds of the power conferred on it by law. An authority that acts outside of that power, acts ultra vires its discretion or illegally. Illegality may result from doing that which is unauthorized by law or by refusing or omitting to do what the law mandates. It may also result where the public authority purports to act under discretion but acts on irrelevant considerations or bad faith or for an improper purpose. In other words an administrative decision is illegal if the decision maker contravenes or exceeds the terms of power which authorized the decision purports an objective which the conferring power did not contemplate. It follows that, in order to determine whether an administrative act or decision is illegal, the court, as the guardian of legality, must first construe the authorizing power; determine its terms, scope and purpose, and measure the decision or action against this."*

[25] Counsel for CWT submits that the only power of WCA in this context is set out in 4(c) of the Water Corporation of Anguilla Act is the power to enter into agreements to purchase potable water for distribution by the Corporation. Counsel states this power does not enable WCA to solicit bids for the construction of a plant or the buyout of the existing plant or other remits in the Invitation to Tender published on 26th January 2018.

[26] The authorizing power for the WCA is the Water Corporation of Anguilla Act which states at section 3, the objects of the Corporation as follows;

> *"3. The objects of the Corporation are to engage in activities to-*
>
> *(a) Manage and operate a piped water system in such a manner that the public has a supply of potable water that is reliable efficient and economic*
>
> *(b) Maintain and from time to time to repair, alter or replace, in whole or in part, the waterworks of the Corporation; and*
>
> *(c) Upgrade and extend the waterworks of the Corporation to all parts of Anguilla to the extent that it is reasonable to do so."*
>
> *(d) …"*

[27] The general powers of the Corporation are listed in section 4 which states in part as follows;

> *"4. In addition to the other powers conferred upon the Corporation in this Act and the regulations, the Corporation has the power to do all things necessary for, or ancillary or incidental to, the carrying out of its objects, including the power –*
>
> *…*
>
> c) *To enter into agreements to purchase potable water for distribution by the Corporation*
> d) *To design, construct, acquire by purchase, lease or otherwise and operate facilities to provide potable water for distribution by the Corporation;*
> e) *…*
> f) *To contract with any person for the supply to, or by, the Corporation of any goods or services."*

[28] The objective of the WCA Invitation to Tender is stated as follows;

> *"WCA is pursuing the improvement of the supply of drinking water and will sign a Water Supply Agreement [WSA] for the years 2018 – 2028 [The Project] with stringent supply conditions, guarantees and enforcement possibilities. The Project includes as well the increase of the seawater reverse osmosis [swro] production capacity on the island of a new drinking water reservoir."*

[29] The Invitation to Tender stated that WCA will tender the WSA in view of the investments required and the financial implications acting in agreement with applicable procurement guidelines. It stated that the Project includes;

1. *A ten-year Build-Own-Operate and Transfer Agreement for the guaranteed daily supply of defined volumes of water ;*
2. *The buy-out of an Existing Plant with 2 swro units of 250,000 US Gallons per day per unit;*
3. *The construction of a New Plant with a capacity of at least 250,000 US Gallons per day;*
4. *The future expansion, with a similar unit;*
5. *The supply of a Storage Reservoir of 1.5 million US Gallons;*

6. Appurtenances (lines and valves)."

[30] Counsel for the claimant submits that the only relevant power of WCA is to enter into agreements to purchase potable water for distribution by the Corporation. Counsel submits that the power does not enable WCA to solicit bids for the construction of a plant, buyout of an existing plant and all other stipulations mention above and found in the Invitation to Tender.

[31] I do not accept that WCA is so limited as suggested by counsel given not only the objectives of the Corporation, but also its power to do all things necessary for, or ancillary or incidental to, the carrying out of its objects. It is clear that WCA is charged to manage the demand for potable water, maintain, repair and replace waterworks as well as upgrade and extend waterworks and that in my view naturally encompasses the objectives of the Project.

[32] Additionally section 4 confers a discretionary power which must be exercised in accordance with the objects of the WCA. It must be that the decision to tender the Project with its stipulations, is in accordance with the objects of the Act. Was the decision of WCA to solicit bids for the tender of the WSA, an activity in pursuit of the object to manage and operate a piped water system in such a manner that the public has a supply of potable water that is reliable, efficient and economic? It is the court's view that it must be.

[33] It is in keeping with the objects of WCA that the decision was made to upgrade the current system of water supply in Anguilla. It is also in keeping with the powers to outsource the supply of water to the Corporation. It is in the best interest of managing the consumption demand to ensure that the intended supplier has upgraded plant and equipment in place with the view to an increased continuous and efficient supply of potable water. It is an important power to ensure the reliable supply of water to Anguilla, a place known to have long dry spells. There is in my view a rational nexus between the Invitation to Tender and the intention, object or purpose of the Water Corporation of Anguilla Act

[34] I am guided by the words of Lord Selbourne in Attorney General v Great Eastern Rlwy Co. cited in the Quorum Island case above;

> "*It appears to me to be important that the doctrine of ultra vires… should be maintained. But I agree…that this doctrine ought not be reasonably, and not unreasonably, understood*

and applied, and that whatever may fairly be regarded as incidental to , or consequential upon, those things which the Legislature has authorised, ought not (unless expressly prohibited) to be held, by judicial construction, to be ultra vires."

Unfairness

[35] CWT submits that it was not treated fairly as an interested bidder by WCA. Counsel relies on principles of fairness set out in De **Smith's Judicial Review**, Sweet & Maxwell, 6th ed; Paragraph 7-009;

"whenever a public function is being performed there is an inference, in the absence of an express requirement to the contrary, that the function is to be performed fairly."

[36] Mr. Bento in support of the claim, alleges several instances of unfairness in the procurement process.

(1) That there was material non-disclosure in the tender notice as an interested bidder was required to contact the escrow agent themselves to obtain a copy of the proposed escrow agreement and that when received there were no disclosed terms as to how the deposit would be treated. In submissions Counsel states that once the escrow agreement was provided, it was silent with respect to the manner in which the deposit would be treated.

[37] The documents exhibited by Mr. Bento at A7 of his affidavit in support of the claim clearly indicate that companies interested in tendering for the WSA should contact the Escrow Agreement Agent for further instructions. The name, address, website and phone number of the Escrow Agent are provided. Having regard to paragraph 5 of the Escrow Agreement exhibited by Mr. Richardson in his affidavit in reply which clearly demonstrates the manner in which the deposit was to be treated by successful and unsuccessful bidders alike, I am of the view that these allegations are unfounded.

(2) That WCA acted in bad faith in that it issued the procurement notice on the 26th January 2016 giving an interested bidder 4 weeks to earmark US$2,000,000, liaise with the escrow agent and enter into an agreement that mandated funds be paid into the National Bank of Anguilla.

[38] Bad faith implies a lack of an honest or genuine attempt to undertake a task and involves personal attack on the honesty of the decision maker. I am unable to discern any evidence that supports this allegation. This was a requirement of the Invitation to Tender published on the 26th January 2018. The documents outlined the intended timelines of the Project and what was intended and what was to be included in the Project. The terms and conditions of the Invitation to Tender were the same for all potential bidders.

(3) Mr. Bento asserts that the requirement of a US$2,000,000 deposit was made without considering the significant disadvantage to CWT. He states as follows;

"The claimant had already by the time of the notice for procurement invested US$1.5 million into the plant in Anguilla and the requirement to pay a further US$2 million (which would effectively be used to buyout the claimant's plant) was unreasonable and grossly unfair to the claimant. The claimant was effectively being asked to put up US$3.5 million before it could be deemed a qualified bidder by the defendant."

[39] Counsel for CWT submits that the principles of fairness and transparency are well known and established as it relates to procurement for public contracts. Referring to the case of MLS (Overseas) Ltd v Secretary of State for Defence [2017] EWCH 3389 Counsel quotes;

"..the court explained what the legal principle of transparency meant in the context of invitations to tender for public contracts: the award criteria must be formulated in a way as to allow all RWIND tenderers to interpret them in the same way. That requirement set a legal standard: the question was not whether it had been proved that all actual or potential tenderers had in fact interpreted the criteria in the same way, but whether the court considered that the criteria were sufficiently clear to permit of uniform interpretation by all RWIND tenderers."

[40] Counsel for CWT submits that this makes clear that at the minimum a prospective bidder must have access to the evaluation criteria in the tender documents. In the MLS (Overseas) Ltd case referred to, it is noted that the procurement process was complete and the issue was whether seeking further clarification from a MLS without seeking such clarification of all other tenderers amounted to unequal treatment in favour of MLS. I did not consider it to be of much assistance in this matter.

[41] Prequalification and a tender for a contract should not be confused. The two are not the same and the difference between the two is that prequalification is not a form of tendering. Prequalification when used, precedes the tendering for the actual contract. Prequalification is used to identify contractors who would be allowed to tender for certain contracts. Therefore an advertisement for prequalification does not amount to an advertisement of a tender for a contract because all the former does is allow those interested to express their desire to be eligible to tender. CWT did not have access to the Tender Documents because it did not meet the criteria set down as prequalification in the Invitation to Tender.

[42] The terms and conditions of the Invitation to Tender were the same for all potential bidders. The stipulation sought to minimise the risk of delays to the project and the implications that would arise from lack of finances. This criterion applied to all potential contractors and I cannot see how it can therefore be said to be discriminatory. There is a rational basis for it. It is transparent because every potential bidder who was notified of the requirement had to comply with it. It manifestly relates to economic and technical conditions for the WSA.eg the buyout of the existing plant.

[43] Without any authority for the proposition seemingly asserted by CWT that the fact that it invested US$1.5 million in the plant was a reason that should be considered by the WCA in setting the sum of US$2,000,000, it would have been an infringement of the very principle of equal treatment being posited by counsel

[44] In conclusion and in light of the foregoing, I do not agree that the claimant has established that WCA acted unfairly or in bad faith. I also do not accept that CWT has satisfied the court it should make any order against WCA on the ground of ultra vires and illegality as claimed. The judicial review proceedings and the remedies sought therein are therefore dismissed. Costs to the defendant are to be agreed within 14 days failing which they will be assessed upon application to the court.

[45] The court hereby orders;

(i) that the Fixed Date Claim herein is dismissed.

(ii) that the claimant pay the defendant costs to be agreed or assessed.

Cheryl Mathurin
High Court Judge

BY THE COURT

Registrar