

BETWEEN: IMPI Limited
Appellant

AND: Central Tender Board
First Respondent

AND: Minister of Internal Affairs
Second Respondent

Coram: *Hon. Chief Justice Vincent Lunabek
Hon. Justice John William von Doussa
Hon. Justice John Hansen
Hon. Justice Dudley Aru
Hon. Justice Gus Andrée Wiltens
Hon. Justice Viran Molisa Trief*

In attendance: *P. Griffiths and N. Ritsinias for the Appellant
A. Bani for the Respondents*

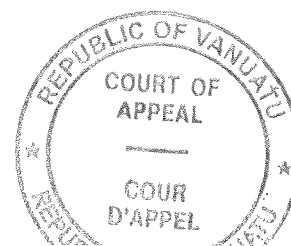
Date of Hearing: 12 November 2019

Date of Judgment: 15 November 2019

JUDGMENT

A. Introduction

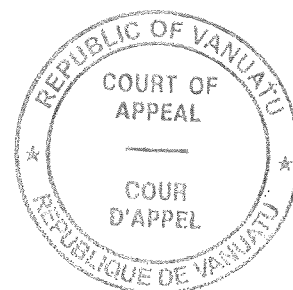
1. In December 2018, the appellant submitted a tender for the supply, delivery and installation of solar panels in 18 Area Councils across the country. A third party was the successful tenderer and entered into a contract with the Government in February 2019. Despite being served with the appellant's claim for judicial review, that third party took no part in that proceeding nor in this appeal. The appellant conceded that it was never intended by its judicial review claim, nor in this appeal, to have that contract set aside.



2. However the appellant sought to pursue the matters as there is a public interest element in the appeal which underscores the importance and need for the Central Tenders Board ('CTB') and the State to strictly comply with the legislation and regulations governing government contracts and tenders.

B. Background

3. The Ministry of Internal Affairs (the 'Ministry') first advertised this tender in mid-2018. For reasons immaterial to this appeal, the tender did not go ahead. The Ministry next sought to advertise the tender on 30 November 2018, with a tenders closing date of 7 December 2018. The maximum value of the tender was VT39,000,000.
4. However by mistake the advertisement did not appear in the Daily Post newspaper until 6 December 2018. By the time the appellant saw that advertisement, there were less than 12 hours before tenders closed at 11 am on 7 December 2018. It submitted its rushed and ill-prepared tender before that closing date.
5. Also on 6 December 2018, the appellant emailed Ministry and CTB officers asking if someone could explain why the tender was closing the next day but had a tender opening date of 30 November 2018. Also why it was not advertised on 30 November as permitting only one day to submit for a tender of this size was not fair. No one responded to this email until 12 December 2018, after tenders submission had closed.
6. PCS who was a previous tenderer had closely followed up with the Ministry when the tender would be next advertised. As a result it was told that the advertisement would issue on 29 November and close on 6 December 2018. It submitted its tender on 4 December 2018 before the tender was publicly notified.
7. On 8 December 2018, the Daily Post published another advertisement extending the time for tender submissions to 11 December 2018. Unfortunately the appellant did not see that advertisement. Nor did any officer from the Ministry or the CTB advise the appellant of the extension of time despite its communications to them.
8. On 10 December 2018, Pacific Electrical Refrigeration & Air Conditioning Ltd ('Pacific Electrical') submitted its tender and eTech Vanuatu Limited ('eTech') did so on the following day.
9. On 13 December 2018, members of the CTB opened all the tenders submitted.
10. On 17 December 2018, the Tender Evaluation Committee recommended that the tender be awarded to eTech. The CTB recommended such award to the Council of Ministers on 20 December 2018.



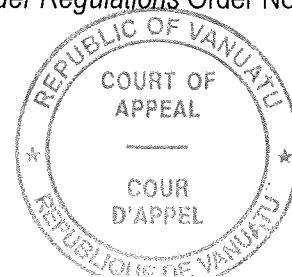
11. On 24 January 2019, the Council of Ministers endorsed the CTB and Evaluation Committee's recommendation.
12. On 30 January 2019, eTech and the Minister entered into the contract for the tender. On 31 January 2019, the Government paid eTech upfront the full value of that contract, VT34,650,0000.
13. On 2 May 2019, the appellant filed its claim for judicial review challenging the respondents' decisions and award of tender to eTech for not acting within procedures that ensure open and competitive bidding and a transparent and competitive process for deciding the tender award.

C. The Decision

14. The primary Judge stated that the issue was whether or not the respondents' decision to award the tender to eTech was unlawful. He found that the tender advertised on 6 December 2018 was extended to 11 December 2018, and the fact that Pacific Electrical and eTech had submitted bids showed that the tender was open and competitive.
15. The appellant had complained that the process set out in cls 1.1.9 and 1.6.3 of the General Conditions of Tender ('GCT/RFT') for extending the tender had not been complied with. The GCT/RFT is in section 1 of the Request for Tender documents ('RFT') for the tender. The primary Judge referred instead to the *Government Contracts and Tenders Act* [CAP. 245] (the 'Act') and held that the tender document was not amended in any substantial part as the only thing that was changed was the deadline for submission of tenders.
16. The appellant had also complained that following the approval of the award of the tender, it had not been notified of the award decision (cl. 1.15.2, GCT/RFT) and was not given a debriefing as to the reasons why its bid was not successful (cl. 1.17.1, GCT/RFT). The respondents admitted that they had not notified the appellant of the award decision. The primary Judge held that this was a minor breach of the Act such that s. 13 of that Act could not be used to render the tender award to eTech unlawful. The primary Judge found that the appellant had been adequately debriefed albeit after the appellant filed its judicial review claim.
17. Finally, the primary Judge held that the appellant's arguments about unreasonableness were of little or no relevance.

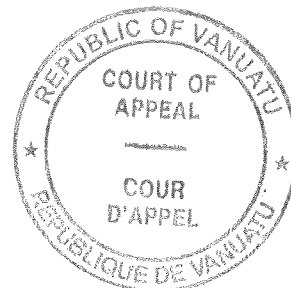
D. Appeal grounds

18. The appellant submitted that the respondents had acted beyond their power in failing to strictly follow the tender procedures under the Act, the *Tender Regulations* Order No. 40



of 1999 (the 'Regulations') and the RFT. The alleged failings included extending the deadline for submission of tenders to 11 December 2018 without following the procedure set out in cls 1.1.9 and 1.6.3 of the GCT/RFT; accepting PCS Limited's tender on 4 December 2018 before the tender was even advertised; accepting Pacific Electrical and eTech's tenders after 7 December 2018; that there was no notification to it as a participating tenderer of the tender award decision; the entering into contract with eTech when it had submitted its tender after the initial closing date; and failing to respond to the appellant's queries by email dated 6 December 2018 until after tender submissions closed on 11 December 2018. It submitted that none of these breaches were minor.

19. The appellant also submitted that the respondents' actions in dealing with the tender process was tainted with unreasonableness and the primary Judge erred in holding that this ground was irrelevant. It submitted that while there were overlaps in the facts for both grounds for review, that it was a valid ground. The appellant referred to this Court's judgment in *Apisai v Simon* [2002] VUCA 42 and submitted that similarly, here the entire tender process was a 'procedural mess' such as to render the decision to award the tender to eTech invalid.
20. The appellant invited the Court to find that the tender was conducted in a manner that was not transparent, not open or competitive and to grant the appeal.
21. The respondents submitted that the fact that the tender was publicly advertised showed that it was an open tender, and that it had attracted more than one tender submission meant that the tender process was competitive.
22. The respondents disputed that extending the deadline for the submission of tenders was an amendment to the RFT. Accordingly they submitted that the RFT had not been amended and thus they were not required to follow the procedure in cl. 1.6.3 of the GCT/RFT. The respondents submitted that even though they had not informed the appellant of its intention to re-advertise (the extended deadline for tender submissions), that the tender was readvertised publicly.
23. The respondents accepted that they had not notified the appellant within 10 days of the tender award decision pursuant to cl. 1.15.2 of the GCT/RFT but submitted that this was a minor breach which could not be used to void the tender award to eTech.
24. The respondents submitted that they had not acted beyond their statutory power. They submitted that the only failure to act within tender procedures was in not debriefing the appellant within 10 days as required by cl. 1.15.2 of the GCT/RFT. In their submission, they had remedied that by inviting the appellant for a debriefing on 8 March 2019 which was refused, and then providing written debriefings on 20 May and 10 June 2019.



25. As to unreasonableness, the respondents submitted that their actions were not unreasonable and not made in bad faith.

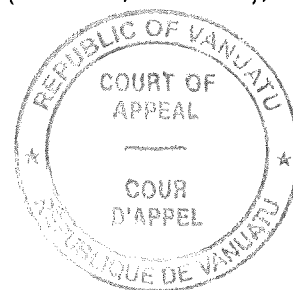
26. The respondents submitted that the tender was open, transparent and competitive in accordance with the Act and Regulations and accordingly, the appeal must be dismissed.

E. Discussion

27. At the outset, we record that the appellant conceded that it was never intended by its judicial review claim, nor by this appeal, to have eTech's contract set aside. We would add that where a contract has been entered into following a tender process, it is ordinarily extremely difficult for a Court to wind back that contract where work has been undertaken or monies paid over. The appellant sought to pursue the matters as there is a public interest element arising in relation to the importance of and need for the CTB and the State to strictly comply with the legislation and regulations governing government contracts and tenders.

28. The rules and procedures for the subject tender required that:

- The Minister use a competitive and transparent process when deciding who to award the contract to (para. 3(f), Act);
- The Minister, Director General, or other person authorised by the Minister or Director General, comply with the tendering process set out in the Act and Regulations (s. 8, Act);
- Tenders must be called for all Government Contracts (subreg. 3(1), Regulations);
- All tenders must be called by open and competitive bidding except where another process is approved by the CTB (subreg. 3(2), Regulations);
- Advertisement of the tender (subreg. 4(2), Regulations);
- The Purchaser/Government could, at its discretion, extend the deadline for the submission of tenders by amending the Tender Document in accordance with cl. 1.6.3 (cl. 1.1.9, GCT/RFT);
- If for any reason the RFT has to be amended, the Purchaser/Government will modify it by issuing an Addendum in writing, which should be acknowledged in writing by the Tenderer (such Addendum will form part of the RFT and could, if required, cause an extension of the RFT submission closing date)(cl. 1.6.3, GCT/RFT);
- Following the approval of the award, the award decision shall be notified to all participating tenderers and no contract may be entered into before 10 days have elapsed from the date of such notification (cl. 1.15.2, GCT/RFT); and



- Within 10 days of receipt of a written request by any unsuccessful tenderer, but not before a contract is signed with the successful tenderer, the Purchaser/Government shall communicate the reasons why its tender was not successful (cl. 1.17.1, GCT/RFT).

29. Section 1 of the Act provides:

*The purpose of this Act is to establish the rules and procedures that **must** be followed with Government contracts and tenders.*

(our emphasis)

30. As set out in its s. 1, the purpose of the Act is to establish the rules and procedures that must be followed with Government contracts and tenders. The Regulations are made pursuant to the Act and together with the Act, establish the rules and procedures that must be followed.

31. The word "must" is used in s. 1, not "may". This underscores that the rules and procedures set out in the Act, Regulations and RFT for tenders are mandatory and must be strictly followed.

32. By mistake, the advertisement of the tender did not appear in the Daily Post until 6 December 2018. The advertised tenders submission date was 7 December 2018. Subsequently, the Ministry caused a further advertisement to appear in the Daily Post on 8 December extending the tenders submission date to 11 December 2018.

33. Clauses 1.1.9 and 1.6.3 of the GCT/RFT provide:

1.1.9 *The Purchaser **may, at its discretion**, extend the deadline for the submission of Tenders by amending the Tender Document in accordance with Clause 1.6.3, in which case all rights and obligations of the Purchaser and Tenderers previously subject to the deadline shall thereafter be subject to the deadline as extended.*

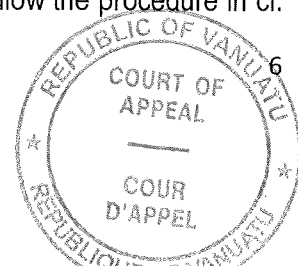
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1.6.3 *If for any reason the RFT has to be amended, the Purchaser **will modify it by issuing an Addendum in writing, which should be acknowledged in writing by the Tenderer**. The Tenderer shall note that **such an Addendum will form part of the RFT and may, if required, cause an extension of the RFT submission closing date.***

(our emphasis)

34. A tender must be advertised pursuant to subreg. 4(2) of the Regulations. Subregulation 4(3)(f) of the Regulations provides that if any person inquires about details of the goods to be tendered, he must be given information including, relevantly, the closing date for submission of tenders. The closing date for the subject tender was set out in section 2 of the RFT, the Special Conditions of Tendering ("SCT/RFT"). The third page of the SCT/RFT set out the Tenders Advertised date as 30 November 2018 and the Tenders Closing date as 7 December 2018.

35. The respondents submitted that extending the deadline for the submission of tenders was not an amendment to the RFT and they were not required to follow the procedure in cl.



1.6.3 of the GCT/RFT. That submission is erroneous and contrary to the clear wording of cls 1.1.9 and 1.6.3 of the GCT/RFT/RFT. Further, the respondents submitted that even though they had not informed the appellant of their intention to re-advertise (the extended deadline for tender submissions), that the tender was readvertised publicly. This does not advance the respondents' case in any way and is equally erroneous.

36. In accordance with cl. 1.1.9 of the GCT/RFT, the Government could at its discretion extend the deadline for the submission of tenders by amending the Tender Document in accordance with cl. 1.6.3. The latter clause provided that where the RFT had to be amended, the Government would modify it by issuing an Addendum in writing, which should be acknowledged in writing by the Tenderer. The Requirement that the Addendum be acknowledged implies that notice of the Addendum must be given by the Government to the Tenderer. That Addendum would form part of the RFT and could, if required, cause an extension of the RFT submission closing date. The respondents failed to follow the mandatory process set out in cls 1.1.9 and 1.6.3 of the GCT/RFT.

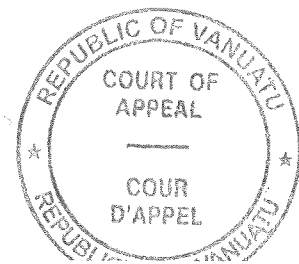
37. It follows that the ensuing events complained of were also failures to comply with the tender rules and procedures:

- Accepting PCS Limited's tender on 4 December 2018 before the tender was even advertised. Further, no person should have even been provided with the RFT and any other information related to the tender until after the tender had been advertised;
- Failing to advise the appellant of the intention to and advertisement on 8 December 2018 of a new submission date, even despite its communications to Ministry and CTB officers;
- Accepting Pacific Electrical and eTech's tenders after 7 December 2018; and
- Entering into contract with eTech when it had submitted its tender after the closing date for the tender.

38. Clause 1.15.2 of the GCT/RFT provides:

1.15.2 Following the approval of the award, the award decision shall be notified to all participating tenderers and no contract may be entered before 10 days have elapsed from the date of such notification.

39. The respondents accepted that they had not notified the appellant within 10 days of the tender award decision pursuant to cl. 1.15.2 of the GCT/RFT but that this was a minor breach which could not be used to void the tender award to eTech. We have noted that it is ordinarily extremely difficult for a Court to wind back a contract that has been entered into following a tender process. Accordingly it is usual for tender rules to contain a 'cooling-off period' following a tender award so that any participating tenderer may raise any issues that it has with a tender process which can be addressed prior to the entering of any contract. Importantly, this also safeguards the Government from entering into any contract where there have been errors in the process and to ensure it obtains the best



possible outcome from that tender process. In the instant case, the respondents also failed to comply with cl. 1.15.2 of the GCT/RFT. This was not a minor breach.

40. Clause 1.17.1 of the GCT/RFT provides:

1.17.1 Within 10 days of receipt of a written request by an unsuccessful Tenderer, but not before a contract is signed with the successful tenderer, the Purchaser shall communicate the reasons why its Tender was not successful.

41. The respondents submitted that their only failure to act within tender procedures was in not debriefing the appellant within 10 days as required by cl. 1.17.1 of the GCT/RFT. Accordingly, the respondents accepted that they had also failed to comply with the mandatory requirement in cl. 1.17.1 of the GCT/RFT.

42. The various failures to comply with the applicable tender rules and procedures are instances of the respondents acting beyond their power. They needed to strictly follow those rules and procedures. They did not. The failures are serious.

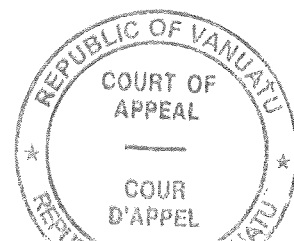
43. In the circumstances, we concur with the appellant's submissions that unreasonableness was a valid ground for its claim for judicial review. It was open to the appellant to raise unreasonableness in addition to the ground that the respondents acted beyond their power. The primary Judge erred in holding that this ground was irrelevant. Given our findings on the ground of acting beyond power, we need not make any findings as to the unreasonableness ground.

44. In the course of submissions, our attention was drawn to the qualification criteria for tenderers. The SCT/RFT required a minimum capital credit facility of VT39,000,000. Against that requirement it seems odd that upon approval of the tender, an immediate payment of the tender price was made to eTech against a guarantee. On the documents before this Court, we have been unable to find any term in the RFT making provision for an advance payment. Indeed section 6 of the RFT, the Special Conditions of Contract ('SCC/RFT') tendered by both the appellant and respondents are silent as to the terms of payment (the relevant fields have been left blank). To ensure fair and transparent process, the SCC/RFT should clearly specify the terms for payment and whether or not there is to be a payment in advance.

45. Section 13 of the Act provides:

13. Unless the breach is of a minor, trivial or technical nature, a contract entered into in breach of the tender provisions of this Act, or regulations made under this Act, will not be binding on the State or the Government.

46. The rules and procedures set out in the Act, Regulations and RFT for tenders must be strictly followed. This is confirmed by s. 13 of the Act which provides that a contract entered into in breach of the tender provisions of the Act and regulations will **not** be binding on the State or the Government, unless the breach is of a minor, trivial or technical



nature. In any tender process, the Government wields more power than a tenderer. This provision is expressly one-sided in favour of the Government to underscore that the tender provisions of the Act and regulations must be complied with. Where the CTB, the State or the Government fail to do so, they can expect claims for judicial review.

47. The express purpose of the Act is to establish the rules and procedures that must be followed with Government contracts and tenders. The Act and Regulations require a competitive and transparent process for deciding who to award contracts to, and that all tenders be called by open and competitive bidding except where another process is approved by the CTB. In the subject tender process, the mandatory tender rules and procedures discussed in this judgment were not followed. The appellant conceded that it was never intended in the Court below or by this appeal to set aside the contract with eTech. That was correct and this Court's judgment has no impact on that contract. However, the CTB and Government need to strictly follow the tender rules and procedures established by the Act, Regulations and RFT or this Court may have cause in future appeals to set aside contracts entered into in breach of the mandatory requirements of the law.

F. Result

48. The appeal is allowed to the extent that the following declaration is made:

The tender rules and procedures set out in the *Government Contracts and Tenders Act*, Tender Regulations and Request for Tender documents are mandatory and must be strictly followed. In the respects identified in this judgment this did not happen in this case.

49. For the avoidance of doubt, this judgment has no impact on the contract entered into by the Government and eTech arising out of the tender process subject of this appeal.

50. For the avoidance of doubt, this judgment does not found any cause of action for the appellant for any subsequent claims or proceedings.

51. Each party will bear their own costs.

DATED at Port Vila this 15th day of November 2019
BY THE COURT

.....
Hon. Chief Justice Vincent Lunabek

