IN THE COURT OF APPEAL OF BELIZE, A.D. 2022

CIVIL APPEAL NO. 9 OF 2020

RJB CONSTRUCTION COMPANY LIMITED APPELLANT

AND

MINISTRY OF WORKS AND TRANSPORT FIRST RESPONDENT
ATTORNEY GENERAL SECOND RESPONDENT

BEFORE

The Hon. Madam Justice Woodstock-Riley	Justice of Appeal
The Hon. Madam Justice Minott-Phillips	Justice of Appeal
The Hon. Mr. Justice Foster	Justice of Appeal

D Bradley for the appellant.
S M Tucker, Assistant Solicitor General and A Gomez for the respondents.

25 March and 30 December 2022

JUDGMENT

WOODSTOCK RILEY, JA

Introduction

[1] Before the court is an appeal of the Supreme Court's judgment in ***Claim No. 355 of 2018*** wherein the court dismissed the claim by the Appellant, RJB Construction Company Limited (RJB), upholding the decision of the First Respondent, the Ministry of Works and

Transport (the Ministry), on a tender contract which the Appellant, submitting the lowest bid, contends was wrongfully awarded to another company.

[2] The Appellant asks that this Honourable Court set aside the decision of the lower court and grant the following relief: '*An order allowing the appeal, setting aside the decision and order of the trial judge …and give judgment in favour of the Appellant with the reliefs set out in the claim form , including an order for damages to be assessed.'*

[3] The relief set out in the claim form was as follows:-

1. *A declaration that the decision of the First Defendant contained in a letter dated 8 February, 2018 not to award a contract to the Claimant as a consequence of the Claimant's bid for Section II (Rehabilitation of the George Price Highway from Roaring Creek to Iguana Creek Junction) for the George Price Rehabilitation Project, and the reasons given by the First Defendant for that decision contained in a further letter dated 13 March, 2018 are unreasonable, irrational, discriminatory, ultra vires, based on irrelevant considerations or based on a failure to consider relevant considerations, and in breach of the Claimant's legitimate expectations;*

2. *An order for damages, including for loss of profit, and for consequential relief;*

3. *Interest on the award of damages;*

4. *Such further or other relief as this Honourable Court may deem just; and*

5. *Costs*

[4] The basis of this appeal is that the learned trial judge erred in her considerations founding her decision to dismiss the Appellant's claim. The aforementioned contention has been bifurcated and submitted as six grounds of appeal, namely:

(i) The Learned Trial Judge erred in law by referring to and relying on the weighting/scoring system used by the First Respondent when making her decision;

(ii) The Learned Trial Judge erred in law in accepting, as submitted by the First Respondent, that there was an evaluation step in the tendering procedure, and thereby erroneously followed and acted upon the weighting/score system;

(iii) The Learned Trial Judge erred in law in making a finding that the Appellant's bid was disqualified, and the Appellant says that this finding was against the weight of the evidence;

(iv) The decision of the Learned Trial Judge was against the weight of the evidence;

(v) The Learned Trial Judge erred in law in failing to properly assess the evidence of the expert witness, Douglas Walker; and

(vi) The Learned Trial Judge erred in law in refusing the relief sought by the Appellant, which relief was just and proper in the circumstances having regard to all the evidence.

Background

[5] The First Respondent, the Ministry, on the 17th day of March 2017, published an invitation to bid for the second section of the George Price Highway Rehabilitation Project ("the Project") partly funded by the Inter-American Development Bank (IDB). The Instructions to Bidders (ITB) indicated that provided the bidder is eligible in accordance with clause 4, qualified in accordance with clause 5, has a bid which has been determined substantially responsive to the Bidding document and which is the lowest evaluated cost, that bidder is to be awarded the contract. The lowest qualified bidder should be selected. The bids were opened on the 23rd June 2017 in a meeting in the presence of the bidders. The Appellant's bid was the lowest. The assessment of the bids commenced on 28th day of June 2017 and concluded on the 25th day of July 2017.

[6] The Committee doing the evaluation devised a point system to determine which bid was the most responsive to the criteria. This weighting system was not part of the evaluation methodology set out in the bidding document. The Evaluation Report submitted to the IDB and signed by the three members of the Committee showed it stated '*RJB was not considered substantially responsive to the bidding documents because their work experience was not of a similar nature and complexity of the proposed works and the proposed staff did not have the experience and qualification required in the bidding document'.*

[7] Though the lowest submitted, RJB was informed by letter dated 8th February, 2018, that its bid was not accepted for the Project. Accordingly, RJB by letter dated 12th February 2018 requested the reason for its disqualification. By letter dated 13th, March 2018, the Ministry advised that RJB had been disqualified for not meeting the *"minimum Technical Criteria requirements."* These were identified as **ITB 5.3 (c)** experience in works of a similar nature and size for each of the last (5) five years; **ITB 5.5 (a)** an average annual billing of construction work over the period specified; **ITB 5.5 (b)** experience as prime contractor in the construction of at least the number of works of a nature and complexity equivalent to the works over the period specified in the BDS (to comply with this requirement, works cited should be at least seventy (70) percent complete) and **ITB 5.5 (c)** show that it can ensure the timely availability of the essential equipment listed in the Bidding Data Sheet (BDS).

[8] RJB filed a claim for an administrative order pursuant to ***Part 56 of the Supreme Court (Civil Procedure) Rules***. Her Ladyship Madame Justice Sonya Young upon hearing the matter determined that the claim be dismissed.

The Decision

[9] Her Ladyship found that the issues to be determined were (i) whether there was a failure by the Committee to follow the evaluation procedures outlined in the bidding documents; (ii) if there was a failure by the Committee to follow the evaluation procedure, whether this breached the principles of transparency and fairness in procurement: Whether the decision not to award the Claimant the contract for the Project was unreasonable, irrational, discriminatory,

ultra vires and based on irrelevant considerations or based on a failure to consider relevant considerations; and (iii) whether the Claimant is entitled to damages and if so the quantum.

[10] Succinctly, the court found in response to the aforementioned issues that although there was deviation from the evaluation procedure with the introduction of the weighting system to the process, it was imperative to consider whether the principles of transparency and fairness were breached by the Respondent so as to make the decision unreasonable, thereby invalidating it in its entirety.

> At paragraph 111 of the judgment the court noted that whilst "*no good purpose will be served by scrutinizing the reasoning behind the scores*" the court would, "*scrutinize the reasons given for the Claimant's failure to be awarded the contract and see whether that decision remains sounds although the process for reaching it was flawed in several ways*." (paragraph 113). In so doing, the court determined in response to the second issue that with the criteria as stated in the BDS in mind, and the evidence of the expert and the Committee, that it "*cannot say that RJB has demonstrated that it was qualified for the award of this contract.*" (paragraph 135)

[11] This was founded on the court's belief that the evidence adduced concerning meeting the requirement of works of similar nature and complexity demonstrated that RJB did not meet that criterion irrespective of using the scoring or mandatory system. Thus, the decision was deemed to be "*neither unreasonable nor irrational*". The court therefore determined on the third issue that the Claimant was not entitled to the relief sought. However, the Judge further held that because of the nature of the matter and the error which the Court found was made by the Committee she had *'serious difficulty awarding costs to the successful party'* and made no order as to costs.

The Submissions of the Appellants

[12] The crux of the Appellant's claim is that had the tender process been fairly conducted, that is in accordance with the bidding documents, RJB would have been successful in their bid

as the lowest bidder. The Appellant claims that the two criteria for the award of the contract which are clearly set out in the bidding documents are namely "substantially responsive" and "lowest evaluated costs." They further aver that the Evaluation Committee erred when they equated "substantially responsive" to "best qualified" or "most qualified" and then introduced a subjective element in the weighting/scoring system. Even so, they submit that their bid should have been successful as the criteria which was flagged as the reasons for the bid's failure were erroneously computed by the Committee as they did demonstrate experience in work of a similar nature and complexity and had satisfied the other requirements as listed.

The Submissions of the Respondents

[13] The Respondents justify the merit of their decision by submitting that the criteria which the bidders were to meet remained the same throughout the process. These criteria are submitted to be the objective qualifying requirements contained in Clauses 5.3 and 5.5 of the ITB, which are made subject to the BDS. The Respondents proffer in their submissions that clause 32.1 ITB is clear that the Contracting Agency shall award the contract to the bidder whose bid has been determined to be substantially responsive to the Bidding documents and represents the lowest evaluated cost, provided that such bidder has been determined to be (a) eligible in accordance with the provisions of ITB Clause 4 and (b) be qualified in accordance with the provisions of ITB Clause 5.

[14] The scoring system was introduced to the assessment, according to the evidence given by the Committee, "*for the technical experience component because of the compound nature of some of the questions.*" The Committee maintained that the scoring system "*did not change the criteria for evaluation*." The Respondents aver that through this procedure the Appellant did not meet the standard. They further contend that the lowest evaluated cost is not the lowest price submitted but is also to be determined by the bidder "*most capable to effectively carry out the contract*" and this "*determination of capability is how well the bidder meets all the requirements as stated in the bidding document*" and it is on this basis that the contract was not awarded to the Appellant. The Respondent went further to say that even when the grading scheme was not applied, the Claimant's bid was still unresponsive to the bidding documents.

The judge noted that the Respondent's witness, the Project Manager, Derrick Calles, acknowledged that the bid was substantially responsive but when evaluated it did not meet the minimum criteria.

Issues

[15] The main issue before this court is whether the learned trial judge was correct to dismiss the Appellant's claim. The following sub-issues will be discussed:

(i) Whether any error or miscarriage in the process is sufficient to invalidate the tender, and

(ii) Whether RJB was qualified for the award and if not, whether this was on account of a miscarriage of the evaluation procedure;

Law and Analysis

(i) Whether any such error or miscarriage in process is sufficient to invalidate the tender

[16] Upon consideration of both parties' submissions and the evidence submitted in the support thereof, there are two distinct interpretations of the procedure by which the bidder is to be elected. The Appellant submits that the learned trial judge wrongfully accepted the contention from the First Respondent that there is to be a detailed evaluative process, based on the weighing/scoring system. They contend that this detailed evaluative process is not mentioned in any part of the bidding documents and should not have formed part of the Evaluation Committee.

[17] The Respondent submits that there must be detailed evaluation of the issue of eligibility in accordance with ITB Clause 4 and qualified in accordance with the provisions of ITB Clause 5. This in effect is a two-pronged consideration with which the trial judge agrees at paragraph

68 of the judgment, stating that, "*It appears to this Court that by itemizing the requirements in this way, the ITB gives further proof that while a bid may be substantially responsive to the bidding document, a bidder may not be qualified for the award of the Contract in accordance with clause 5 of the ITB. This qualification has absolutely nothing to do with the responsiveness of the bid pursuant to clause 27 of the ITB."* At paragraph 71, the judge goes further to state following a detailed discussion of the interpretation of the respective clauses, that "*there is another step in the equation, that is, the evaluation of the qualification of the bidder*." And later at paragraph 73 "*this is an assessment which is separate from any assessment of the bid and could even be done prior to the submission of the bids*." There are distinguishable steps in qualification of bidder and evaluation of the bid. Therefore the lowest substantially responsive bid cannot be awarded if the qualifications of the bidder are not met.

[18] It is the manner in which the qualifications were assessed which creates the issue. Clause 2.17 of the IDB Policies states that "*the bidding documents shall specify any factors in addition to price, which will be taken into account in evaluating bids, and how such factors will be quantified or otherwise evaluated*." As we have determined the qualification of the bidder is an integral step of the bidding process, it is implicit that the means by which qualifications are evaluated should have been communicated to bidders. The criteria defined in the bidding documents as outlined were stated to be mandatory and I agree with the learned judge that a weighted system in the form of a numerical grades is different to a mandatory system. The effect of the deviation is that where a bidder who satisfies the criteria would have automatically moved on to the next stage in the evaluation, they would be met with a different standard.

[19] The court correctly concluded that the Committee did not follow the evaluation procedure outlined in any bidding document. This comprises the first part of a two-pronged consideration as the fact of process alone does not render the decision fatal. The trial judge found that the relevant question remained whether the decision breached the principles of fairness and transparency and whether this rendered it unreasonable, irrational and ultra vires. In this exercise, the court considered an assemblage of authority as to what would constitute fairness and transparency in such circumstances.

[20] The decision of ***Pratt Contractor's Ltd v Transit New Zealand*** [2003] UKPC 83 referred to by the Appellant was useful. The Council therein recognizes at paragraph 47 that "*In their Lordships' opinion, the duty of good faith and fair dealing as applied to that particular function required that the evaluation ought to express the views honestly held by the members of the TET. The duty to act fairly meant that all the tenderers had to be treated equally. One tenderer could not be given a higher mark than another if their attributes were the same.*" Although the Committee may not have breached the standard in this regard, in accordance with the referenced **Fairness and Transparency in Purchasing Decisions Probity in Australian Government Purchasing Decisions Better Practice Guide 2007**, there was no consistency in the development and application of the evaluation criteria, also taking into consideration that the scoring system was not used for all the criteria. As this standard requires the evaluation of criteria and procurement procedures to be agreed and documented in advance, in so lacking, the Respondents breached both the principles of fairness and transparency.

[21] As aforementioned, the Appellant contended that once Her Ladyship made the finding that the use of the weighting/scoring system was flawed she should have gone on to consider the natural consequence of this to the overall procedure and on this basis the judge should have invalidated the entire tendering process. The court did go on to consider the natural consequence of the breaches. However, the court is called to adopt a certain supervisory jurisdiction in such circumstances, as advised in ***Bechtel Ltd v High Speed Two (HS2) Ltd*** which concerns public procurement and the standard of error which merits invalidating a decision.

> **"[19]** The court will only interfere in an evaluation if there has been 'manifest error', and when assessing that, evaluators are entitled to act within what is called a 'margin of discretion'. The court does not routinely substitute its own view in terms of score for an item, against that of the evaluator who awarded the score to that item, to compare if the two scores align. That would not be the correct legal approach. As Coulson J (as he then was) stated in *Woods Building Services v Milton Keynes Council (No 1 and No 2)* [2015] EWHC 2011 (TCC), (2015) 161 ConLR 101, [2015] LGR 715 (at [12]):

> '[12] The first (and still best-known) case in which a judge worked through a **tender** evaluation process to see whether or not manifest errors had been made was *Letting International Ltd v London Borough of Newham* [2008] EWHC 1583 (QB), (2008) 119 ConLR 89. There, Silber J followed the approach of Morgan J in *Lion Apparel* as to the law, and went on to say:
>
> > [115] I agree with Mr Anderson that it is not my task merely to embark on a remarking exercise and to substitute my own view but to ascertain if there is a manifest error, which is not established merely because on mature reflection a different mark might have been awarded. Fourth the issue for me is to determine if the combination of manifest errors made by Newham in marking the **tenders would have led to a different result.** ' (Emphasis added.)

[21] The approach of the courts to procurement challenges is one of exercising 'supervisory jurisdiction', a phrase used by Stuart-Smith J (as he then was) at [58] [59] in *Lancashire Care NHS Foundation Trust v Lancashire CC* [2018] EWHC 1589 (TCC), [2018] BLR 532 and also found in a number of earlier authorities of note, including the Court of First Instance in *Strabag Benelux NV v EU Council* (Case T-183/00) EU:T:2003:36, [2003] ECR II-138 and the Supreme Court in *Healthcare at Home Ltd v Common Services Agency* [2014] UKSC 49, [2014] 4 All ER 210, [2015] 1 CMLR 395.

[22] This approach to judicial supervision of procurement competitions is in parallel with the approach of the Administrative Court to public law challenges generally. The courts will respect the decision making of the evaluators and those involved in assessing the different bids. It will also approach the matter of whether a **tender** is abnormally low in the same way, paying attention to the margin of appreciation afforded to the contracting authority, which is the decision maker. I observed the following in *SRCL Ltd v NHS Commissioning Board* [2018] EWHC 1985 (TCC), [2019] PTSR 383, [2018] All ER (D) 190 (Jul) (at [197]):

> 'I also consider that the court's function in a challenge such as this one is not to substitute its own view for that

> of the contracting authority … The correct approach, which I consider to be entirely consistent with the approach of the courts to procurement challenges generally and the principles summarised in *Woods Building Services v Milton Keynes Council* [2015] LGR 715, is only to interfere in cases where the contracting authority has been manifestly erroneous. The courts, in so many cases over the years in this field, have made it clear that their function is not to reconsider and remark every evaluation of each **tender** in which a challenge is brought. In matters of judgment, the contracting authority has a margin of appreciation. In matters of evaluation, only manifestly erroneous conclusions or scores will be reconsidered. This approach has its parallel in other public law fields, for example decisions of ministers'."

[22] Trial Judge's reasoning, taking into account the evidence proffered by the Respondent, was that a different result would not have occurred had the committee not used the scoring. Therefore, absent any error, there would not have been a different result, consistent with the approach of Morgan J in the aforementioned *Lion Apparel*. The Committee who was charged with evaluating the bids still would have believed in their experience that RJB did not meet the threshold of the experience mandated for the Project.

[23] The CCJ decision of ***Guyana Geology and Mines Commission v BK International Inc. and another***; ***Baboolall v BK International Inc. and Another [2022] 2 LRC 491*** is further instructive on the proper considerations to be made by a court where assessing procurement of contracts where a public authority is concerned. While it can be distinguished factually, as cases of this nature are particularly context-sensitive considering the wealth of involved documents and the disparity between same, the dicta of the judges is important in the proper approach in the exercise of such judicial oversight.

[24] At paras 93 and 94, Wit JCCJ states that,

93. … "such *[administrative review] entails an examination of both process and content. The process by which the impugned decision was made, or action was taken, as well as the content and impact of the decision or action. To determine vires or legality, such a review may necessarily also incorporate, at least, a preliminary aims-means assessment. That is, an evaluation of whether the aim of the decision or action was for a legitimate and lawful purpose, and whether the means used to achieve it was justifiable, necessary and proportionate.*" [emphasis mine]

94. "*To be clear this approach is not novel. Traditional approaches to judicial review in public administrative law have always included, in certain contexts, scrutiny of both process and content. For example, Wednesbury unreasonableness is directed towards the content of decisions and not just the process. However, the inquiry by the courts is a secondary review, as to whether the decision maker on the material before them could reasonably have come to the challenged decision. That is, courts apply the principle of rationality as a secondary assessment of the vires of the actions or decisions under review. Once the action or decision is within the range of possible decisions that are deemed reasonable, and not such as to outrageously defy logic or relevant acceptable standards, courts will generally decline to intervene.*

[25] Although that case does not involve a claim for administrative review, the method by which public decisions are considered, that is process and content is instructive. Fairness and transparency are important in public processes particularly where the allocation of public funds is concerned. The court is tasked with ensuring that there is no manifest error in the process used that invalidates it. However, when determining the ultimate question of whether the decision was irrational, the court is equally entitled to evaluate the cogency of the public body's decision. Thus, the error made by the Committee in the process was not solely determinative in the issue of whether the tender should be invalidated, but of paramount importance is

whether RJB was actually disqualified from the bid and whether this was because of the miscarriage of the procedure.

(ii) Whether RJB was disqualified from the award and if so, whether this was on account of a miscarriage of the evaluation procedure

[26] By letter, RJB were informed that their disqualification was on the basis of not satisfying the criteria **ITB 5.3 (c) -** experience in works of a similar nature and size for each of the last (5) five years; **ITB 5.5 (a) -** an average annual billing of construction work over the period specified; **ITB 5.5 (b) -** experience as prime contractor in the Construction of at least the number of works of a nature and complexity equivalent to the works over the period specified in the BDS and **5.5 (c) -** the timely availability of the essential equipment listed in the BDS. It was accepted by the Respondents' witness that the inclusion of **5.5(c)** was incorrect. In the committee's letter to IDB and in evidence before the Court it was apparent that the crux of the disqualification was the issue of experience on works of a similar nature.

[27] The threshold of the standard has been subject to dispute with **Clause 5.3 (c) of the ITB** stating *"experience in works of **a similar nature and size**"*, **5.5 (b)** *"experience as prime contractor in the construction of at least the number of works of **a nature and complexity** equivalent to the works over the period specific in the BDS"* and the BDS states *"experience of works of a **similar nature**."* The Trial Judge noted at paragraph 119 that she agreed with Counsel for the Claimant that the BDS could amend the ITB. She also noted the further *'discrepancy'* that the forms of contractor's bid states *'experience in works of a similar nature and size'.* The Trial Judge found at paragraph 121 that '*the bidder was really only required to submit information on projects of a **similar nature** for the last five years with activity in the last six months of each year. The bidder was also supposed to demonstrate that as a prime contractor it had experience in two works of an equivalent **nature and complexity** over a five-year period'.*

[28] The Appellant avers that they had the requisite experience and the Respondent denies that they did. This is important as this is the main point on which the Appellant's bid was deemed to have failed. The Respondent claims that this requirement would not have been met irrespective of whether the weighting system or the mandatory system was used. At paragraph 127, the trial judge assessing the evidence given by the Appellant, states that "*RJB has a much more reduced scope than the proposed project, had no works of a similar nature and complexity as the prime contractor. RJB's construction manager has no experience of similar nature indicated.*" The scoring system used was clearly erroneous, if the criteria was whether the bidder had satisfied a particular criterion, and the answer is yes or no, the scoring system improperly introduces degrees of satisfying the requirement rather than the fact that it was satisfied.

[29] On this point, the appropriate means of assessing RJB's disqualification should objectively be that it either had the experience or it did not. I agree with the submission "*substantially responsive*" is not "*best qualified*".

[30] The judge correctly states at paragraph 131 that, "*it is not for the Court to attempt to insert its own decision for that of the Committee*" but then goes on, contrary to the evidence of the court expert witness, supplanting opinion of what constituted works of a similar nature. The Trial Judge while indicating she would not insert her own decision for that of the Committee does go on to extensively give her opinion '*the court is not convinced that the experience required for work of an equivalent nature and complexity to the Project would simply be experience in conventional road construction … it worries me even to imagine that the same skill and expertise required to build a village road would be considered sufficient to build a highway … to my mind works of an equivalent nature would be works where a comparison or assessment would reveal the same fundamental quality or essential character … of equivalent complexity would be works of a similar complication of process. So experience in the chip and seal or a similar method on terrain such as exists along that section of the George Price Highway in Belize.'*

[31] Those remarks seem beyond the remit of the Judge. It was not for the court to embark on its opinion of expertise. Was RBJ legitimately disqualified? The Appellant and the expert witness found it had the experience required. The expert found that seven of the first eight projects submitted by RBJ satisfied the requirements of works of a similar nature and that those seven projects shared the equivalent complexity or were more complex than the project. The Trial Judge discounted the evidence of the expert witness. The evaluators and the Trial Judge determined that they did not consider that RJB had demonstrated that it was qualified in fact the Trial Judge noted '*its bid should have been rejected outright'.*

[32] On that alone I would have concern that the subjectivity affected the decision. However, substantively the Trial Judge pointed out RBJ did not meet one requirement as the subcontractor's project did not meet the 50% requirement because it was only allowed to participate to a maximum of 30%. Further that no evidence was offered of works within the last six months of each of the last five years. The objective factors would be the support for the decision. Ultimately, on an objective exercise of whether RJB qualified or not, I am satisfied in this regard that the judge correctly assessed those criteria and found no evidence to contravene her findings.

[33] The Appellant contends that after condemning the evaluation procedure by the Committee the court should not have placed reliance on the weighting system and did not place proper weight on the relevant considerations.

[34] The important determinative issue was whether the Appellant met the mandatory qualifying requirements outlined in the bidding documents, since a bidder cannot be awarded the contract if he fails to qualify. The breaches in the process did not invalidate the decision as RJB ultimately objectively did not meet the criteria. While the process in this decision was troubling as clearly articulated by the Judge her determination that RBJ did not meet the qualifications is not one I could confidently say should be overturned.

[35] In the circumstances I would dismiss the appeal. In keeping with the determination of the Trial Judge there will be no order for costs.

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WOODSTOCK RILEY, JA

MINOTT-PHILLIPS, JA

[36] I have read the judgment of my sister, Woodstock Riley, JA, in this matter and concur with her decision and proposed order.

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MINOTT-PHILLIPS, JA

FOSTER, JA

[37] I have read the judgment of my sister, Woodstock Riley, JA, in this matter and concur with her decision and proposed order.

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FOSTER, JA