

Sogreah Consultants SAS v The Wastewater Management Authority & ORS

2006 SCJ 208

CHAMBERS

IN THE SUPREME COURT OF MAURITIUS

In the matter of:

Sogreah Consultants SAS

Applicant

v

The Wastewater Management Authority & Ors

Respondents

In presence of:

The Hon. Attorney-General

Co-Respondent

JUDGMENT

The Wastewater Management Authority is, by virtue of the Wastewater Management Act, vested with the statutory responsibility for the wastewater sector in Mauritius. It is thus responsible for the management and control of wastewater works and the implementation of projects.

In March 2004, the respondent No. 1 invited proposals for a contract for consultancy services in connection with the 'Plaines Wilhems Sewerage

project'. The applicant submitted an 'offer' in June 2004. Respondent No. 3 and respondent No. 4, acting together as a joint venture, also submitted an offer. It is being contended by the applicant that:

(1) it has complied with all the conditions prescribed by respondent No. 1 and it has made the best offer;

(2) it has scored the highest score by a wide margin in all the four evaluation exercises which were carried out between September 2004 and February 2005;

(3) respondent No. 3 and respondent No. 4 did not obtain the required marks at the first evaluation and were not even considered for the subsequent evaluations;

(4) respondent No. 3 and respondent No. 4 have not complied with all the requirements of the tender and have made a worse score than the applicant;

(5) the applicant has been unfairly eliminated and ousted by the respondent No. 1 who, for no valid reason and acting against the established principles for the allocation of tender, has set aside the tender of the applicant in favour of a less deserving tenderer; and

(6) respondent No. 1 and respondent No. 2 are not securing to the State and the public the best value in terms of price and quality, having regard to the specifications of the tender.

The applicant is thus praying for the issue of an interlocutory injunction to restrain respondent No. 1 and respondent No. 2 from proceeding with the allocation or award of the contract.

The averments of the applicant are being strongly contested by the

respondents who have maintained that a proper evaluation exercise had been carried out by the Independent High Powered Evaluation Committee in accordance with the applicable instructions, terms and conditions.

Clause 1.5.2 of the 'Instructions to Tenderers' mentions that persons, companies or firms shall not be eligible for the award of the contract where '(g) they have any direct or indirect association with Montgomery Watson Harza and/or Gibb (Mtius) Ltd'. The reason for including such a condition was to avoid conflict of interest arising from involvement and services rendered by key personnel in a previous connected contract (Contract WW67X). It was the contention of the respondents that three engineers proposed by the applicant and who belonged to their key personnel were and are still on the payroll or establishment of Gibb (Mtius) Ltd and were thus disqualified. Consequently, on the basis of legal advice, the 'Committee' concluded that 'the three key personnel fall under the category of individual/freelance experts and as such were not eligible to work on the project'. It has also been submitted by the respondents that the representative of the applicant has acted in breach of the Deposit of Powers of Attorney Act, the applicant is guilty of laches in view of the delay in lodging its main action and has failed to come with clean hands by concealing relevant and material facts.

I hardly need to stress that I need not at this juncture make any final determination with regard to the merits of the issues raised and this on the basis of the bulky affidavit evidence and documents which have been seriously questioned. It clearly emerges from an analysis of the evidence that the applicant has been able to put forward a good arguable claim and has been able to establish that there is a serious question to be tried in respect of its disqualification and ineligibility. The legal advice on which the Committee acted was substantially to the effect that any individual/freelance expert who had previously worked on the Contract WW67X will not be eligible to provide his/her services on Contract WW79X (the present contract). It is far from being clear on what criteria, if any, did the Committee base itself in order to determine that the applicant's engineers fell under the category of individual/freelance experts who had to be disqualified. It is apposite to note, in that respect, that a person who is an 'Expert/Supporting Staff or Expert/Staff Team Specialist' would be eligible to provide services on the present contract even though he had worked on the previous contract subject to the conditions that '(1) he shall be in the sole employment of the tenderer for the period he will be deployed under the Contract WW79X. (2) he provides details regarding his employment at the time he will provide his services under the WW79X Contract. The applicant was ousted from the contract on the ground that the 3 key personnel were considered to be individual/freelance experts.

The applicant has established that there is a serious issue to be tried in the absence of well-defined or established criteria upon which respondent No. 1 was shown to have acted before reaching the conclusion that the 3 persons were individual/freelance experts who ought to be disqualified.

There are additional grounds showing that there is a serious question to be tried. It has been averred on behalf of respondent No. 1 that the applicant has seriously breached section 2.2. of the Request for Proposals under the title of 'Covenant of Integrity'. Some internet extracts had been annexed in an attempt to show that the applicant may have been involved in some bribery scandals. The applicant has a good argument that respondent No. 1's board may have been acting on wrong premises in that regard since there would be a breach of section 2.2 of the 'Covenant of Integrity' only where a director, employee or agent 'has been convicted in any Court of any offence involving a Prohibited Practice in connection with any tendering procedure'. This does not appear to be the case here.

The High Powered Committee also found that 2 of the tenderers had failed to meet with the requirement to submit a written agreement with the sub-contractor where the percentage of sub-contracting is over 10% of the tender price. Respondent No. 3 was one of the tenderers. Further, respondent No. 1 has failed to account for the delay in the evaluation process although the offers had been made as far back as June 2004. Although it has been denied that there were 4 evaluation reports which were decidedly in favour of the applicant as averred by the latter, we have been left in the dark as to what happened during the long lapse of time from June 2004 until 14 April 2005 when the High Powered Committee was finally seized with the matter and had its first meeting in order to evaluate the bids.

Whatever may be the strength of the applicant's case and their prospect of success in their Judicial Review case, the evidence, however, plainly shows a strong countervailing public interest which weighs heavily against the granting of the interlocutory order.

Where a public authority is involved, 'one must look at the balance of convenience more widely, and take into account the interests of the public in general to whom these duties are owed' (Smith v. Inner London Education Authority [1978 All ER 411]) and Sierbien v. Westminster City Council [1987 86 LGR 431]. The extent to which the disadvantages of

each party would be incapable of being compensated in damages, in the event of success in the main action, is always a significant factor in assessing where the balance of convenience lies. There is no sufficiently strong indication of any potential prejudice here, otherwise than of an essentially pecuniary nature, which can result from the loss of the contract by the applicant.

Independently of this fact, the question as to the adequacy of damages as an adequate alternative remedy would not be highly relevant in the present case which involves the public interest and where respondent No. 1 is a public body performing public duties. (R. v. Secretary of State for Transport, exp. Factortame Ltd. (No. 2) [1991 1 A.C. 603, 672-3]). The following facts which are not in dispute set out the compelling public interest against the granting of the order which will have for effect to jeopardise the implementation of a major project of significant public importance:

(1) The contract is for the implementation of the Plaines Wilhems Sewerage Project which concerns the transport, treatment and disposal of wastewater affecting a substantial percentage of the population.

(2) The first component of the project, which comprises the trunk sewer is ongoing and is scheduled for completion by February 2008.

(3) The Consultancy Services for the present contract are tributary to the trunk sewer.

(4) Any further delay in the award of the contract may adversely affect the continuation of the programme and other contracts for which funds have already been secured from funding agencies at concessionary rates.

(5) The project forms part of the National Sewerage Programme, whose objectives are:

(a) to halt and reverse the trend of wastewater pollution on the island and its coastal zones; and

(b) to improve the health and sanitation conditions of the population.

(6) Any further delay is likely to be disruptive and result in significant financial loss. No undertaking as to damages has been offered.

It has thus been established that the balance of convenience overwhelmingly lies in favour of the project being continued to its prompt completion in the public interest. I find that it will be neither just nor convenient to grant the injunctive relief in the circumstances and the grant of an injunction at this stage would entail a greater risk of injustice than its refusal.

The application is accordingly set aside. With costs.

I certify as to Counsel.

A. Caunhye

21 August 2006 Judge

For Applicant : Mr Attorney F. Hajee Abdoola

Mr. Y. Aboobaker, S.C.

For Respondent No. 1: Mr. Attorney P. Rangasamy

Mr. R. Peeroo, of Counsel

For Respondent No. 2 Ms S.D. Sonah, Principal State Attorney

& Co-Respondent: Mr. I. Maghooa, Ag. Asst Parliamentary Counsel

For Respondent Nos. 3 & 4: Mr. Attorney F. Hardy

Mrs. A. Juddoo-Proag, of Counsel