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IN THE SUPREME COURT OF TONGA
CIVIL JURISDICTION
NUKU'ALOFA REGISTRY

CV 52 of 2020

BETWEEN:

ROTOMOULD (PACIFIC) LIMITED

Plaintiff

-and-

**MINISTRY OF METEOROLOGY, ENERGY, INFORMATION,
DISASTER MANAGEMENT, ENVIRONMENT, CLIMATE CHANGE
AND COMMUNICATIONS ("MEIDECC")**

Defendant

-and-

RAJNESH NARAYAN REDDY
t/as M&J Water Tank Company

Interested third-party

Application for leave to apply for judicial review

RULING

Before: LORD CHIEF JUSTICE WHITTEN QC
To: Mr W.C. Edwards SC for the Plaintiff
Ms Akau'ola for the Defendant
Mrs Ebrahim for the interested third party
Date of application: 19 November 2020
Date of hearing: 9 December 2020
Date of ruling: 24 December 2020

Introduction

1. The plaintiff ("Rotomould") seeks leave, pursuant to order 39 of the Supreme Court Rules, to apply for judicial review of a decision by the defendant ("MEIDECC") on 14 September 2020, after a tender process for the supply 1500 water tanks, to award the contract to the interested third-party ("M&J").¹

¹ Whose joinder is necessary: *Woolworths New Zealand Ltd v Alcohol Regulatory and Licensing Authority* [2020] NZHC 971 referring to *Minister of Education v Deluxe Motor Services (1972) Ltd* [1990] 1 NZLR 27 (CA) at 34.

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2. The grounds for the application may be summarised as follows:
 - (a) MEIDECC made the decision in its role as a public body which affected the rights of Rotomould;
 - (b) the decision was contrary to, and ultra vires, the terms, conditions and requirements of the standard bidding documents;
 - (c) MEIDECC failed to take into account the relevant fact that M&J is not certified in accordance with the certification requirements specified in the standard bidding documents;
 - (d) the officer of MEIDECC responsible for deciding the technical requirements of the bids acted in bad faith by refusing to take into consideration evidence supplied by Rotomould that M&J was not properly certified; and
 - (e) MEIDECC took into account irrelevant considerations by denying Rotomould's bid on technical grounds which were not part of the bid requirements and which lacked substance or foundation and thereby displayed a lack of impartiality and bad faith.

Background

3. The application is supported by the affidavit of John Raas Fonua, sworn 19 November 2020. Mr Fonua is the branch manager of Rotomould. In summary, he deposed that:
 - (a) On 14 September 2020, the Chief Executive Officer of MEIDECC informed Rotomould that its bid had been unsuccessful and that the successful company, subject to negotiation outcomes, was M&J. The total price of the successful bid was TOP\$2.7 million. The CEO noted that pursuant to the *Public Procurement Regulations 2015*, Rotomould could complain to the Head of the Contracting Entity within 10 days of the date of the letter.
 - (b) On 15 September 2020, Mr Fonua lodged a complaint against the decision. Rotomould sought a review of the outcome of the tender as it believed that the analysis of its bid had not been conducted fairly. He referred to the following requirements or specifications in the standard bidding documentation:

- (i) Page 18, Requirements, provided: *"The Contractor/Manufacturer shall provide a vertical, high-density polyethylene tanks and accessories in accordance with AES/NZ standards"* and (in the fourth paragraph), *"AS/NZS 4766 – You should only purchase polyethylene tanks from manufacturers independently certified to this standard."* Mr Fonua stated that Rotomould's tanks were *"the only tanks in Tonga that are officially certified for the AS/NZS 4766 standards"*. He attached screenshots from the JAS-ANZ (Joint Accreditation System of Australia and New Zealand) website which showed that M&J was not accredited under AS/NZS 4766. M&J was only accredited for ISO 9001:2015 management system which, Mr Fonua said, only looked at the business processes followed by an organisation and had nothing to do with certifying the quality of tanks. He also attached an explanation of the differences between AS/NZS 4766 and ISO 9001. He stated that having certified raw material is only one aspect of the certification process for AS/NZS 4766 and that there are a range of requirements to be met before a tank is certified to that standard.
- (ii) Page 9, number 17, first paragraph, provided: *"Prior to recommending an award of contract the Contracting Entity may decide to post qualify the lowest evaluated substantially responsive Bidder to verify the Bidder's documentation and facilities"*. He asked: *"What post qualification processes have been carried out to verify Bidder's documentation and facilities? We have not been contacted for this"*.
- (iii) Mr Fonua asked how M&J's bid had been deemed "substantially responsive" if they did not meet the basic requirement of having tanks certified to AS/NZS 4766.
- (iv) He also questioned the qualifications of the Evaluation Committee in terms of assessing the technical specifications of the bid. He asked whether anyone on the panel was a qualified engineer, able to objectively assess the technical aspects of the tanks, instead of relying on hearsay.

- (v) He concluded by noting that both Rotomould and M&J had quoted the same price for the project. The only difference, he said, was that Rotomould would provide a tank that is independently certified for its quality and which meets all the technical requirements.
- (c) On 16 September 2020, the CEO of MEIDECC responded, relevantly, as follows:
- (i) M&J met both AES/NZ S 4766 and ISO 9001:2015 standards;
 - (ii) supporting documents were provided in M&J's bidding documents which were submitted to the Ministry and assessed during the bid evaluation. I note at this juncture that during submissions, Mr Edwards said that the MEIDECC representatives did not produce any such documents during their meetings with Rotomould;
 - (iii) further, M&J is currently partnering/trading with Matrix Polymers New Zealand Pty Ltd ("Matrix") which was granted a Certificate of Conformity to AS/NZ 4766 by SAI Global (the Australian standards information and compliance organisation);
 - (iv) Matrix had confirmed that the manufacturing of its high quality water potable tanks complied with AS/NZ 4766;
 - (v) Rotomould did not meet all the requirements (specifications) of the bidding documents. It's bid was therefore non-responsive and not required to undergo the post qualification process;
 - (vi) the Bid Evaluation Committee consisted of highly qualified and technical experts with the required skills, knowledge and experience relevant to procurement requirements, including a qualified engineer;
 - (vii) even though Rotomould and M&J quoted the same price, M&J met all the technical requirements/specifications of the bidding documents whereas Rotomould did not.

The CEO concluded by offering to meet with Mr Fonua “to discuss solutions and a way forward”.

- (d) On 24 September 2020, Mr Fonua replied to the CEO. He enclosed correspondence that, he said, clearly refuted that M&J and Matrix were partners in the manufacture of water tanks and that Matrix was a supplier of raw materials only. That letter was from the General Manager of Matrix to Jyotsna Chand of Rotomould dated 24 September 2020. It was marked “private and confidential”. The General Manager responded to three questions posed by Mr Chand. The precipitating correspondence from Rotomould, which presumably posed the questions, was not enclosed.
- (i) The first question was whether Matrix had a partnership arrangement with M&J. The General Manager answered:

“Matrix Polymers have been a long-standing supplier of rotational moulding polyethylene to (M&J) in Tonga. We supply them many times a year from our manufacturing facility in New Zealand. We would always refer to our customer relationship as a partnership however there is no formal partnership arrangement in place”.

- (ii) The second question was as to the nature of Matrix’s business, and whether it was a rotational moulder or raw material supplier. The General Manager answered:

“Matrix Polymers is a specialist manufacturer and supplier of raw materials to the rotational moulding industry. We supplied rotational moulders for over 25 years.”

- (iii) The third question was whether Matrix had authorised M&J to use, or whether Matrix had transferred, its AS/NZ 4766 certification for the purposes of M&J’s tender. The General Manager answered:

“Matrix Polymers take pride in selling raw materials to the water tank industry that are certified AS/NZ 4766 compliant. We supply proof of certification to all of our water tank industry customers by way of a 3rd party audited certificate (SAI Global in our case). We also supply Certificates of Analysis...for all of our material if requested by our customers. Using AS/NZ 4766 certified materials

is one part of a tank manufacturer being accredited for AS/NZ 4766 for their water tanks."

- (e) The allegation by M&J that it was in partnership with Matrix and therefore that it met the standard requirements for the manufacture of water tanks was incorrect. The AS/NZS 4766 standard "applied only to raw materials and not to water tanks".² Therefore, M&J did not meet the standard requirements for the manufacture of water tanks.
- (f) In relation to MEIDECC's response about Rotomould's bid failing to meet the bidding requirements, Mr Fonua said that he produced (presumably to MEIDECC) evidence "about the dimension drawings and hoop stress" to show that those requirements were irrelevant to the manufacture of tanks and not part of the standard requirements.
- (g) Mr Fonua attended meetings with MEIDECC representatives in relation to Rotomould's complaints. He provided evidence that MEIDECC had failed to correctly assess the bidding documents and thereby erred in granting the contract for the supply of the water tanks to M&J. He said that Rotomould's complaints were not answered.
- (h) On 28 September 2020, Mr Edwards SC, on behalf of Rotomould, wrote to the CEO of MEIDECC. He referred to a meeting at MEIDECC's office on 23 September 2020 with members of the assessment committee. Mr Edwards wrote:

"There were two matters which you had advised that the committee took into account in awarding the supply contracts to (M&J). The first point relates to the advice by members of the committee and through your letter dated 18 September 2020 that (M&J) have satisfied the certification of AS/NZS 4766 requirement because M&J is in partnership with Matrix. This independent certification point is incorrect for the following reasons:

- 1. Matrix Polymer is not in partnership with M&J in the manufacture of water tanks here or elsewhere.*
- 2. Matrix Polymer is not a manufacturer of water tanks but the supplier of raw materials.*

² Paragraph 8. That statement did not seem consistent with Mr Fonua's earlier descriptions of the standard applying to the manufacture of water tanks. During the hearing, Mr Edwards was unable to clarify the seeming discrepancy.

3. *That the AS/NZS 4766 standards apply only to Matrix Polymer's raw materials but not to the manufacture of water tanks.*
4. *The AS/NZS 4766 standard for raw materials is not transferable to the manufacture of water tanks in Tonga.*

In our view there has been a deliberate misrepresentation made to the committee on the question of certification of standards to mislead the committee. Please note:

- a. *Under the standard bidding documents from the office page 6 item 2, it states –*

"Bidders should be aware that a bidder who engages in corrupt, collusive, fraudulent, coercive practices will have their proposals rejected and may further be subjected to prosecutions under the laws of Tonga."
- b. *This provision under your bidding document appears to have been breached and you are duty bound to take appropriate action to rectify the situation. There appears to be an attempt made in the provision of the false or wrong information as to partnership as an attempt to persuade the committee to award the contract to the successful bidder.*
- c. *This provision in the bidding document is a serious requirement and one which in our view should be pursued to its logical conclusions.*
- d. *The attempt by Uaisele to discredit Rotomould's tanks as inferior and substandard immediately raises the question of impartiality. In the discussion we had, it appeared to the writer that Uaisele was determined to eliminate Rotomould as a bidder. The points raised by Uaisele were answered by John Fonua at the time and his answers were later reaffirmed in the email correspondences to your office.*

In our respectful view, this is a bad case where there is fraudulent misrepresentation to influence the decision of the committee and award the contract to (M&J).

We invite you to declare the decision of the assessment committee invalid and award the contract direct to Rotomould.

Such action by you would necessarily avoid expensive and protracted litigation with costs payable by the unsuccessful party...."

- (i) On 14 October 2020, Mr Edwards again wrote to the CEO of MEIDECC noting that there had been meetings and discussions but that "no final decision has been given as to whether our client's complaint has been rejected or upheld. Further, we would like to know whether you have confirmed the award of the contract to (M&J)." Mr Edwards asked for the CEO's urgent advice.
- (j) Rotomould has not received a reply from MEIDECC.

- (k) Rotomould had noticed that MEIDECC had started to receive and distribute water tanks from M&J.³
- (l) Finally, Mr Fonua deposed that the proposed Statement of Claim next to his affidavit was true and correct to the best of his knowledge and understanding.

Proposed Statement of Claim

- 4. The proposed Statement of Claim sets out the grounds for the application and the background recited above.
- 5. At paragraph 15, further details are pleaded as to the meeting between the parties on 23 September 2020. The particulars detail explanations allegedly given by the MEIDECC representatives for why Rotomould's bid was non-compliant, such as:
 - (a) Rotomould was informed that it had failed to provide the "dimensioned tank drawings (shop drawings)" as required by the bid documents. Rotomould says that allegation was incorrect as the requisite drawings for its tanks were included at page 43 of its bid submission.
 - (b) Rotomould was informed that it had failed to provide the "Hoop Stress" calculations that MEIDECC had sought. The particulars state that on 2 September 2020, Rotomould officers advised MEIDECC that the "Hoop Stress" calculation was outdated and no longer used under AS/NZS 4766 certification and requested whether MEIDECC would accept the "FEA analysis", which was acknowledged by MEIDECC at the meeting.
 - (c) Rotomould was advised that MEIDECC did not accept the "drop test" for the water tanks because it used to be carried out in Fiji. However, the "drop testing" had been set up and used in Tonga.

³ Since on or about 20 October 2020, according to paragraph 19 of the proposed Statement of Claim.

- (d) Rotomould and the MEIDECC officers discussed the certificate issue. Rotomould advised that it would provide further information concerning the certification matter.
6. At paragraph 16, it is alleged that later on 23 September 2020, Rotomould emailed MEIDECC information from two independent experts that certified raw material does not mean a water tank is certified, that certification to AS/NZS 4766 level requires more than certified material and that certification of Matrix Polymers is not transferable to M&J.
 7. Paragraphs 20 to 25 are headed "FIRST CAUSE OF ACTION - ULTRA VIRES ACT IN EXCESS OF POWER". Thereunder, Rotomould sets out the legal terms of its complaints which are essentially the grounds for this application. Further, that MEIDECC acted unreasonably in awarding the contract to M&J.
 8. Finally, at paragraph 25, Rotomould pleads that it had a legitimate expectation that the tender process and bid selection would be carried out in accordance with its rules and requirements, whereas MEIDECC failed to carry out the bid selection in accordance with its own criteria when awarding the tender to M&J.
 9. By its prayer for relief, Rotomould seeks:
 - (a) a declaration that the decision is unlawful, null and void;
 - (b) an interim injunction prohibiting MEIDECC and M&J from performing the contract;
 - (c) alternatively, an order for damages.

Consideration

10. Order 39 of the Supreme Court Rules applies, relevantly, to any action for judicial review against a public body in which the relief claimed includes a declaration or injunction. Rule 2 prohibits any application for judicial review without the leave of the Court. An application for leave is to be made promptly, and in any event, within three months from the date when grounds for the application first arose unless the Court considers that there is good reason for extending that period.

Pursuant to rule 3, the Court may grant the application without a hearing, but shall not refuse it without hearing the applicant. The Court shall not grant leave unless satisfied that the applicant has a sufficient interest in the matter to which the application relates.

11. Judicial review allows the court to exercise a supervisory role over, inter alia, public bodies and tribunals, to ensure that public powers are exercised lawfully: *Touliki Trading Ltd v Fakafanua* [1995] Tonga LR 8. The grounds upon which administrative action is subject to judicial review have been conveniently classified as 'illegality', 'irrationality' and 'procedural impropriety': *Pekipaki v Fifita* [2018] TOCA 19 at [29].⁴ Material mistake as to an established fact is an accepted ground of review. The decision-maker, in making its evaluation and drawing its conclusions, must proceed upon a correct interpretation of relevant law and must have taken account of relevant considerations and ignored irrelevant considerations. To fail in any of these respects is an error of law. Where, for instance, the information the decision-maker acted upon was clearly incorrect, or where there is a 'misunderstanding or ignorance' of an established and relevant fact, the decision may be susceptible to being set aside when those conclusions are so clearly insupportable as to amount to an error of law: *Tafa v Viau* [2006] Tonga LR 125 at [62], *Kautoke v Public Service Commission* [2019] TOCA 9 at [43], [44].
12. Sufficient interest is the first and foremost consideration in relation to an application for leave to apply for judicial review. It is a broad and flexible concept.
13. The Court must be satisfied that there is an arguable case for review. The burden upon the applicant in that regard is not onerous. No in-depth analysis by the Court is required. If, on a quick perusal of the material then available, the Court thinks that it discloses what might on further consideration turn out to be an arguable case in favour of granting to the applicant the relief claimed, it ought, in the

⁴ Referring to Lord Diplock in *Council of Civil Service Unions v The Minister for the Civil Service* [1985] AC 374, 410.

exercise of a judicial discretion, grant leave to apply for that relief: *Public Service Commission v Public Service Tribunal* [2019] TOSC 53.⁵

14. However, the Court will not grant leave where the case is frivolous, vexatious or hopeless. The purpose of the requirement that leave be obtained is to ensure that an applicant may only proceed to a substantive hearing if the Court is satisfied that there is a case fit for further investigation on a full *inter partes* hearing: *Public Service Association (PSA) v Government of Tonga* [2016] TOSC 34 at [10].⁶
15. Allied to the threshold issue of standing, this application raises an even more fundamental issue as to whether decisions by public authorities in relation to competitive tendering processes are justiciable or amenable to judicial review.

Is the decision justiciable?

16. The application for leave stated that the plaintiff required a hearing.⁷ Subsequently, Mr Edwards filed submissions which included that the request for a hearing was a mistake. He noted Order 39 rule 3(1). Notwithstanding, I directed that the matter be listed for hearing, not pursuant to Rotomould's erroneous request, but because of the above question of justiciability.
17. During the hearing, in answer to the question posed, Mr Edwards submitted that MEIDCEC's decision on the tender is justiciable because it was a decision of a government ministry entrusted with responsibility for decisions which affect the public. However, Mr Edwards stated that he was not aware of any previous decision in the Kingdom on an application for judicial review, by an unsuccessful bidder, of a decision by a Government department in relation to a competitive tendering process. My research on published decisions has also revealed none on point.
18. In principle, all exercises of public power are reviewable, whether the relevant power is derived from statute, prerogative or any other source. However, the

⁵ Citing *Flyniu Airlines Ltd v Faletau* [2006] Tonga LR 1 and *Public Service Association (PSA) v Government of Tonga* [2016] TOSC 34 at [9] referring to *Moala v Public Service Commission* [2012] TOCA 14 and *Inland Revenue Commissioner v National Federation of Self-Employed and Small Businesses Limited* [1981] 2 All ER 93, 106.

⁶ Referring to the White Book, 1991 Edition at 53/1-14/8; *Davey v Aylesbury Vale District Council* [2008] 2 All ER 178.

⁷ [12]

courts acknowledge limits, which are reflected primarily in the notions that the case must involve the exercise of a public power, that even if the court has jurisdiction, the exercise of power must be one that is appropriate for review and that relief is, in any event, discretionary: *Public Service Association (PSA) v Government of Tonga* [2016] TOSC 34 at [23].⁸

19. The English and Australian courts recognise the need for deference based on a consideration of the status of the decision maker and the nature of the power being exercised.⁹ In *Council of Civil Service Unions* [1985] AC 374, Lord Diplock opined that to qualify as a subject for judicial review, the decision must have consequences which affect some person other than the decision maker, although it may affect him too, and it must affect such other person either:¹⁰

“(a) by altering rights or obligations of that person which are enforceable by or against him in private law; or

(b) by depriving him of some benefit or advantage which either:

(i) he has in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational ground for withdrawing it on which he has been given an opportunity to comment; or

(ii) he has received assurance from the decision-maker will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn.”

United Kingdom

20. In the United Kingdom, not all decisions of public bodies are (or should be) governed by distinct principles of public law. For instance, when a public authority enters into a contract, the same principles of private law apply as those which govern similar transactions between private corporations, though if in making a contract, a public body acts in an arbitrary or unreasonable manner, or exceeds its statutory powers, its decision may be subject to judicial review. The enforcement of contracts entered into by public authorities is a matter of private law, although the question of whether the authority has power to enter into an

⁸ Referring to Elias CJ and Arnold J in *Ririnui v Landcorp Farming Limited and others* [2016] NZSC 62 at [1].

⁹ Cited by Paulsen LCJ in *PSA v Government of Tonga*, *ibid*, at [25].

¹⁰ Pages 408-409.

agreement, and its reasons for doing so, may be a matter of public law.¹¹ Similarly, where a local authority exercises statutory powers or duties by contracting out service delivery, and in so doing, contravenes a principle of judicial review (for example, by taking into account an irrelevant consideration) this will usually be a matter of public law.¹²

21. A statutory body may be amenable to judicial review by reason either of the source from which it derives its power¹³ or because it discharges public duties or performs public functions. However, not every act of such a body is of a type which is suitable for judicial review. It is also necessary to consider the closely linked question of the nature of the decision of which complaint is made.¹⁴ The crucial consideration will be whether there is a sufficient public law element to a particular decision. That will involve consideration both of the nature of the decision and the source of the power.¹⁵ It will also be relevant to consider whether the grounds of challenge raise a public law issue.¹⁶ 'The boundary between public law and private law is not capable of precise definition, and whether a decision has a sufficient public law element to justify the intervention of the Administrative Court by judicial review is often as much a matter of feel, as deciding whether any particular criteria are met'.¹⁷
22. The process by which a public body determines how to award a contract following a tendering exercise will not ordinarily be subject to judicial review. However, judicial review will be available if there is a specific statutory requirement that the tendering exercise be carried out in a particular way, or where there has been

¹¹ *Tesco Stores v Secretary of State for the Environment* [1995] 2 All ER 636.

¹² "Judicial Review of Administrative Action" by de Smith, Woolf and Jowell, Sweet & Maxwell, 5th edition, [3-020, 21, 30] referring to *R v Avon County Council, ex p. Terry Adams Ltd*, *The Times*, January 20, 1994, on appeal from [1993] C.O.D. 35 (review of tendering for waste disposal contracts).

¹³ *R v Panel on Take-overs and Mergers, ex p Datafin plc* [1987] 1 All ER 564 at 583, CA, per Lloyd LJ.

¹⁴ '[T]he susceptibility of a decision to the supervision of the courts must depend, in the ultimate analysis, upon the nature and consequences of the decision and not upon the personality or individual circumstances of the person called on to make the decision': see *Leech v Deputy Governor of Parkhurst Prison* [1988] 1 All ER 485 at 512, HL, per Lord Oliver of Aylmerton.

¹⁵ In *R (Hopley) v Liverpool Health Authority* [2002] EWHC 1723 (Admin) Pitchford J posed a three-stage test: whether the defendant was a public body exercising statutory powers; whether the function being performed in the exercise of those powers was a public or a private one; and whether the defendant was performing a public duty owed to the claimant in the particular circumstances under consideration.

¹⁶ In *R (on the application of Molinaro) v Kensington RLBC* [2001] EWHC Admin 896 at [65]–[70], [2002] LGR 336, Elias J suggested that the fact that a local authority is exercising a statutory function ought in itself to be sufficient to justify the decision being in principle subject to judicial review; the question then being whether the complaint raises an allegation that power has been abused in breach of any applicable public law principle.

¹⁷ *R (on the application of Tucker) v Director General of the National Crime Squad* [2003] EWCA Civ 57 at [13]; *R (on the application of Simpson) v Chief Constable of Greater Manchester Police* [2013] EWHC 1858 (Admin) at [27], [2013] All ER (D). Contrast *Colville, Re Judicial Review* [2017] NIQB 14. See also *R v Hertfordshire County Council ex parte Nupe* [1985] IRLR 258.

bad faith, or corruption or the contract was awarded pursuant to an unlawful policy.¹⁸

Australia

23. In Australia, the learned authors of “Judicial Review of Administrative Action”¹⁹ opine that the common law is in the process of redefining the sorts of activities which are subject to judicial review but that the pressure in Australia is in the English direction, if not, perhaps, to the same extent.
24. There is some authority for the proposition that an administrative decision may be non-justiciable because it involves consideration by the government of commercial expressions of interest or tenders.²⁰ However, Australia has also seen some tension between cases regarding the reviewability of government contracting processes. Review at general law may have been influenced by case law which has developed in the context of the *Administrative Decisions (Judicial Review) Act 1977*(Cth) (the ‘ADJR Act’), where it has been held that commercial decisions made by government decision-makers are nevertheless of an administrative character and hence justiciable under the ADJR Act, provided that other elements of the test of justiciability under that Act are satisfied.²¹ The cases, however, are not entirely consistent.²²
25. In *KC Park Safe (Brisbane) Pty Ltd v Cairns City Council* (1997) 1 Qd R 497, in relation to whether decisions relating to tenders made by local government were subject to the rules of procedural fairness, Thomas J said:²³

“It is well established that when the government (or the Crown) contracts, it exercises its own prerogative powers. Unless some particular statutory

¹⁸ *R v Lord Chancellor, ex p Hibbet and Saunders (a firm)* [1993] COD 326, (1993) Times, 12 March; *R v Great Western Trains Co Ltd, ex p Frederick* [1998] COD 239; *Mercury Energy Ltd v Electricity Corp of New Zealand Ltd* [1994] 1 WLR 521; *R (on the application of Cookson and Clegg) v Ministry of Defence* [2005] All ER (D) 83 (Jun); *R (on the application of Gamesa Energy UK Ltd) v National Assembly for Wales* [2006] All ER (D) 26 (Aug); *R (on the application of Menai Collect Ltd) v Department for Constitutional Affairs* [2006] All ER (D) 101 (Apr). Many such tendering exercises are now covered by specific rules in the Public Contracts Regulations 2015, SI 2015/102, and other similar instruments.

¹⁹ Mark Aronson and Bruce Dyer, Law Book Co, 2nd edition, 2000, at p.126.

²⁰ *Cord Holdings Ltd v Burke* (1985) 7 ALN 72; *White Industries Ltd v Electricity Commission of New South Wales* (unreported, SC(NSW), Yeldham J, 20 May 1987, BC8701726)

²¹ *Neat Domestic Trading Pty Ltd v AWB Ltd* (2003) 216 CLR 277 at [63], [64] per McHugh, Hayne and Callinan JJ; *L v South Australia* (2017) 129 SASR 180 at [139]-[146] per Kourakis CJ.

²² Cf *Australian National University v Burns* (1982) 43 ALR 25; *Australian Capital Territory Health Authority v Berkely Cleaning Group Pty Ltd* (1985) 60 ALR 284; *General Newspapers Pty Ltd v Telstra Corporation* (1993) 117 ALR 629.

²³ At 501; referred to in *Cubic Transportation Systems Inc & Anor v State of New South Wales & ors* [2002] NSWSC 656 at [53].

system is being applied, the making and breaking of governmental contracts are not matters for judicial review. They are matters for application of the ordinary commercial law..."

26. However, statutory corporations and bodies which depend entirely upon statutory sources for their powers may stand in a different position from the Crown. Court review of such decisions was available even before Judicial Review legislation if mandatory procedures laid down by legislation for the formation of such contracts were not complied with. For instance, where a statutory office-holder performs the function of providing an independent, impartial and thorough investigation of commercial proposals, rather than merely an evaluation of offers to purchase assets, the resulting decision is justiciable for denial of procedural fairness.²⁴
27. More recently, in *Acquista Investments Pty Ltd & anor v The Urban Renewal Authority & Ors* [2015] SASCFC 91, the plurality²⁵ of the Full Court of the South Australian Supreme Court examined a number of the decisions referred to above, and from which, a number of statements of principle may be distilled, including:
- (a) Judicial review may be available in respect of certain decisions and actions of the Executive exercising prerogative, statutory, or common law powers. Where the power being exercised arises from statute, judicial review may be available to determine the limits of that power and whether the decision went beyond those limits.²⁶
 - (b) A distinction is to be drawn between 'a statutory grant of a bare capacity to contract' or a 'mere conferral of capacity to act', on the one hand, and 'decisions which, being authorised or required by an enactment, are given force or effect by the enactment or by a principle of law applicable to the enactment', on the other. Only in relation to the latter may issues concerning the relevant factors to be taken into account, irrelevant factors which should not be taken into account, improper purposes, and the law to be applied will be matters to be decided having regard to the provisions of the enactment

²⁴ *Century Metals and Mining NL v Yeomans* (1989) 40 FCR 564; 100 ALR 383.

²⁵ Vanstone and Lovell JJ, at [91] ff.

²⁶ Citing *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, 584.

under which the decision is made, and the object and purposes of that enactment.

- (c) Where a decision involves entry into a contract and the conduct challenged is conduct leading to the making of the contract, and where the contract is not relevantly authorised or required by and not made under an enactment, the validity of the contract and of the acts done will be governed entirely by the law of contract, not by judicial review statutes.
 - (d) In the absence of an applicable statutory provision, the executive power exercised amounts to a common law power. The fact that the Executive exercises a power it enjoys at common law does not, of itself, render its decision immune from review. However, in circumstances including the absence of any allegation of lack of good faith or any suggestion that circumstances arose in which procedural fairness had to be afforded, any review must necessarily amount to an impermissible merits review.
 - (e) Although a decision is not made “under an enactment” and therefore not amenable to review under the *ADJR Act*, common law judicial review may still be available.²⁷
 - (f) A decision will not be susceptible to judicial review where the decision was one made in the ‘course of a conventional commercial relationship’, rather than being an administrative decision attracting the Court’s supervisory jurisdiction.²⁸
28. In the case before it, the Full Court’s decision that judicial review was not available in relation to the decision to enter into the contract or the contract itself was reinforced by the observation that it was a commercial decision involving wider policy considerations of the kind commonly taken by governments and government instrumentalities and that it is not the role of the Court to assess what weight should be afforded to the desirability of such considerations.

²⁷ *MBA Landholdings Pty Ltd v Gungahlin Development Authority* (2000) 206 FLR 120, in which after a tender process, a decision made to grant a lease was set aside on the basis that the process had not met the requirements of procedural fairness.

²⁸ *Khuu & Lee Pty Ltd v Corporation of the City of Adelaide* (2011) 110 SASR 235.

New Zealand

29. The scope for judicial review of procurement decisions in New Zealand has been described as narrow.²⁹ Commercial decisions do not become amenable to judicial review simply because they are taken by public entities. Decisions by statutory bodies do not necessarily involve the exercise of statutory power.³⁰
30. However, there is scope for a public law overlay giving rise to judicial review. Even when exercising contractual powers, a public authority is not in exactly the same position as a private citizen. In some instances, a decision taken by the public body cannot be treated as purely in the realm of contract; it may be at the same time a decision governed to some extent by statute. In extreme cases, such as bad faith or capriciousness, *Wednesbury* unreasonableness, or where the authority had taken into account some impermissible consideration or failed to take into account some mandatory consideration, exercises of contractual powers by public authorities are open to review by the Courts on public law grounds.
31. In the case of government departments, the fact that they are bound by a government procurement policy may create a legitimate expectation in suppliers that the policy will be adhered to. Policy-based legitimate expectations are most likely to arise as to process but may also affect substantive expectations where it can be shown that the procurement decision is unreasonable in the *Wednesbury* sense.³¹
32. The Privy Council has said that it does not seem likely that a decision by a State owned enterprise to enter into or determine a commercial contract to supply goods or services will ever be the subject of judicial review in the absence of fraud, corruption or bad faith: *Mercury Energy Ltd v Electricity Corporation of New Zealand Ltd* [1994] 2 NZLR 385.
33. In *Lab Tests Auckland Ltd v Auckland District Health Board* [2009] 1 NZLR 776, it was held that in assessing the standard of judicial review or the scope of the

²⁹ “Public Procurement in New Zealand” by Ian Gault, Bell Gully, Auckland [2005] NZLJ 323.

³⁰ E.g. *New Zealand Stock Exchange v Listed Companies Association Inc* [1984] 1 NZLR 699, which makes the distinction between a statutory power and a statutory function.

³¹ E.g. *Jim Harris Ltd v Minister of Energy* [1980] 2 NZLR 294.

procedural obligations to be applied, it was necessary to look at the nature of the public body, the particular function being performed, the context within which that function was performed, and what it was said had gone wrong. In the case of a contracting decision by a public body in a commercial context, judicial review would be available where there was fraud, corruption or bad faith. It was further held, that as a matter of principle, review might be available in analogous situations such as where an insider with significant inside information and a conflict of interest had used that information to further its interests and to disadvantage rivals in a tender. In such a case, it might be that the integrity of the contracting process had been undermined in the same way as in the case of fraud, corruption or bad faith.

34. That limited approach was affirmed more recently by the New Zealand Supreme Court, in *Ririnui v Landcorp Farming Ltd* [2016] 1 NZLR 1056. However, the decision under review there, by a state-owned enterprise, involving tenders for the sale of land, was regarded as being reviewable on a broader basis than simply fraud, corruption, bad faith or something analogous. The decision making had not been simply commercial in nature. The decision had a substantial public interest component to it as a result of the context in which the decision-maker operated, and where one of its legitimate activities was to assist the Crown to meet its treaty obligations. The Court considered that where an applicant for judicial review seeks to have a contract set aside in a case where the contracting public body had the capacity to make the contract, the fundamental issue will be the existence and extent of prejudice to third parties. Although relief in judicial review is discretionary, courts today will generally consider it appropriate to grant some form of relief where they find reviewable error. Where there has been a fundamental error by a decision-maker concerning an applicant's legal status, for which the decision-maker is responsible, a court would usually grant relief by ordering the decision-maker to reconsider on the correct basis. In that case, however, the position was complicated by the fact that there was a concluded agreement for sale and purchase in relation to the land, which raised the question of the circumstances in which a court will be prepared to set aside a contract in judicial review proceedings; and, also that the other

contracting party argued that it was an innocent third party which will suffer significant prejudice if the relief sought was granted.

Statutory requirements for MEIDECC's decision

35. The approaches of the Commonwealth jurisdictions surveyed above suggest that the question of whether MEIDECC's decision on the tender process here is justiciable, or amenable to judicial review, requires consideration of a number of factors, including:
- (a) whether the decision was the result of a purely commercial decision or a power exercised pursuant to statute;
 - (b) whether, for the purposes of the procurement of the water tanks, MEIDECC was bound by a procurement policy;
 - (c) whether there was any statutory system being applied or requirement that the tendering exercise be carried out in a particular way;
 - (d) if the power exercised arose from statute, whether the decision went beyond the limits of the statutory power;
 - (e) whether there has been bad faith, corruption or the contract was awarded pursuant to an unlawful policy.
36. The list is not exhaustive. It does, however, provide a starting point in determining this apparently novel question. If Rotomould's complaints about MEIDECC's decision are amenable to judicial review, then the public law considerations raised by Rotomould may be examined.
37. Accordingly, the question calls for some examination of the statutory basis for MEIDECC's ability to call for tenders and enter into a contract for the procurement of the water tanks as well as any other legislative imperatives for how the tender process was to be conducted and a decision reached, and, if there were, whether any such regulatory requirements had not been complied with. Those considerations or bases for judicial review were not referred to in Rotomould's

application, proposed Statement of Claim or Mr Edwards' submissions.³² Counsel for the other parties did not make any submissions on the point.

38. The statutory genesis and powers of what is now the conglomerate ministry known as MEIDECC are not easily found among Tonga's legislation. The Attorney General's website does not contain any indication of how MEIDECC grew from at least one of its original components, the Ministry of Environment and Climate Change. MEIDECC's own website, which still only refers to itself and its functions in terms of its former incarnation as the 'Ministry of Information and Communications', was unresponsive.
39. The *Environment Management Act* commenced in 2010. It established (or more correctly, continued) the Ministry of Environment and Climate Change to ensure the protection and proper management of the environment and the promotion of sustainable development. The objects of the Act include to promote the concept of sustainable development in relation to the environment and natural resources of the Kingdom and to facilitate implementation of measures to increase the resilience of the Kingdom and its environment to climate change.³³ The functions of the Ministry prescribed by s.8 include all manner of activity associated with issues affecting the environment and climate change but do not expressly include procurement, although, the omnibus subsection (1)(l) provides that the Ministry shall perform any other act or thing that attains or furthers the objects of the Act. Subsection 2(d) refers to functions relating to desertification and drought relief. While the non-exhaustive list of powers of the Minister specified in s.9 again do not expressly include procurement, the overarching power described in the chapeau to that provision - to do all things necessary or convenient to be done in connection with the functions of the Ministry and in order to attain or further the objects of this Act – arguably includes procurement. Section 10 confers similar powers on the Chief Executive Officer.
40. On the assumption that water tanks are a measure to combat, at least, desertification and drought relief, then for present purposes, it may be accepted

³² Save for a reference at [8] of his submissions to Rotomould's complaint to MEIDECC being made pursuant to the Public Procurement Regulations.

³³ Section 4(d) and (g).

that MEIDECC has statutory power to procure water tanks. It is highly unlikely any of the parties hereto would suggest otherwise.

41. Section 9(1) of the *Public Finance Management Act* 2002 prohibits the expenditure of public money unless the expenditure has been authorised by an Appropriation Act limited in accordance with subsection (2) or is statutory expenditure. Section 44 permits the Minister of Finance, with the consent of Cabinet, to make regulations for the proper and efficient administration of the Act.
42. Such regulations which have been promulgated include, relevantly, the *Public Procurement Regulations* 2015, as amended by the *Public Procurement (Amendment) Regulations* 2019, which provide, relevantly:
 - (a) Subject to certain exceptions (none of which appear to apply to the present case), the Regulations apply to all procurement by all Ministries (regulation 3).
 - (b) Regulation 5 establishes the Government Procurement Committee. The functions of the Committee include issuing standard forms of contracts and standard bidding documents prepared by the Procurement Division for mandatory use by all procurement units (sub regulation 7(1)(c)). In addition, for procurements with a value exceeding \$100,000, the Committee shall review the bidding process and issue a "Letter of No-objection" to the contracting entity, prior to the issuance of the Notification of Award. In so doing, the Committee shall review the compliance of the contract award procedure leading to that decision with the Regulations but, to the extent that the Committee does not accept the recommendation of the Evaluation Committee, it shall do so only on the basis of written reasons (sub regulation 7(2)).
 - (c) Regulation 8 establishes a Procurement Division whose functions include preparation of standard documents and templates to be used in connection with public procurement (sub regulation (4)(d)).
 - (d) Evaluation Committees are to be appointed by the Head of the contracting entity for all contracts whose value exceeds \$20,000 (regulation 10(1)). The

evaluation Committee shall include skills, knowledge and experience relevant to the procurement requirement which may include technical skills relevant to the procurement requirement (sub regulation (3)).

- (e) The duties of the Evaluation Committee include evaluating bids and preparing a bid evaluation report and recommendations for award of a contract and submitting them to the procurement unit or central procurement unit, as the case may be, and responding to any queries raised by the approving authority (regulation 15).
- (f) The contracting entity's detailed requirements with respect to quality and quantity, including any certification, testing and test methods or other means for evaluating the conformity of the performance of the contract to those requirements shall be set out clearly in the bidding documents (regulation 23(1)).
- (g) Evidence requested of a bidder's technical abilities may include certificates drawn up by official quality-control institutes or agencies of recognised competence attesting the conformity of products clearly identified by references to specifications or standards (sub regulation 27(2)(g)).
- (h) Part 6 provides for a number of methods of procurement including international procurement, competitive bidding, two-stage competitive bidding, selective bidding, restricted bidding, limited bidding and requests for quotations method. The material on this application does not indicate which method was adopted by MEIDECC for the tender process hereunder consideration.
- (i) A contracting entity is required to use standard bidding documents as may be prescribed including any manuals or guidelines pertaining thereto and issued by the Division (sub regulation 40(1)). The bidding documents shall provide bidders with all the information that they require in order to submit bids that are responsive to the needs of the procuring entity. In particular, the bidding documents shall inform bidders concerning, among other things, where not already determined through prequalification in the case of selective bidding, qualification requirements and the documentation

required to satisfy those requirements which will require the bidder to show that it possesses the necessary professional and technical qualifications and competence, among other things, to perform the contract as set out in the prescribed regulations and standard bidding documents; the criteria and methodology for evaluation of bids and the selection of the successful bidder in accordance with the provisions of regulation 56; and whether alternatives to the technical or contractual specifications would be considered and, if so, how those alternatives would be evaluated (sub regulation 40(4)(b),(f) and (i)).

- (j) Notwithstanding any law to the contrary, information relating to the content of bids or to the examination, clarification, evaluation and comparison of bids is not to be disclosed to suppliers or to any other person not involved officially in the examination, evaluation or comparison of bids or in the decision on which bids should be accepted (regulation 50).
- (k) The bid evaluation process shall determine which of the bids received are responsive and thereafter compare the responsive bids against each other to select the best value for money bid in accordance with section 56 (regulation 51(1)). Bids are substantially responsive if the bidders fulfil the conditions of eligibility and qualification, if any, laid down in the bidding documents, the bids comply with the terms and conditions set out in the bidding documents and are complete with the required information and duly filled in forms prescribed in the bidding documents and the bids responded to the terms, conditions and technical specifications detailed in the bidding documents without "material deviation or reservation" (sub regulation (4)). A material deviation or reservation includes one which affects in any substantial way the scope, or performance of the assignment under bid (sub regulation (5)(a)). Any deviations which are considered to be material deviation shall result in rejection of the bid and such bid shall not be subject to technical evaluation. Deviations which are considered to be non-material shall not result in rejection of the bid (sub regulation (6)).
- (l) The contracting entity shall disqualify a bidder if it finds that the information submitted in a bid concerning its qualifications is false or misleading. The

contracting entity may disqualify a bidder if it finds that the information submitted in a bid concerning its qualifications is materially inaccurate or materially incomplete (regulation 54).

- (m) The Evaluation Committee or Procurement Unit, as the case may be, shall assess technical responsiveness by comparing each bid to the technical requirements of the description of goods in the bidding document, to determine whether the bids are substantially responsive (regulation 55(1)). The assessment shall not take into account any requirements which are not included in the bidding documents (sub regulation (4)). Any material deviation shall result in rejection of the bid and such bid shall not be subject to further evaluation (sub regulation (5)).
- (n) Bids are to be evaluated on the basis of best value for money. The criteria on which the contracting entity shall assess best value for money shall be either the lowest evaluated price only; or, a combination of price together with various award criteria linked to the subject matter of the contract in question (regulation 56 (1)).
- (o) Other than negotiations approved by the Head of the contracting entity with the lowest evaluated bidder to try to obtain a satisfactory contract through a reduction in the scope which could be reflected in a reduction of the contract price, there shall be no negotiation between the contracting entity and a supplier with respect to a bid submitted by the supplier (regulation 58).
- (p) The contract shall be awarded to the bidder having submitted the bid providing the best value for money in accordance with section 56 (regulation 59(1)).
- (q) A contracting entity shall, upon request, communicate promptly to a bidder the reason for the rejection of its application to prequalify, or of its bid. Any debriefing shall be provided in writing, within a reasonable period of time of the receipt of the request. The debriefing shall state at which stage of the evaluation the bid was rejected, provide brief details of any material deviation, reservation or omission leading to rejection of the bid; and state that a bid was substantially responsive, but failed to offer the lowest

evaluated price or highest score, as required. Except insofar as they are identified, the debriefing shall not provide details of any other bids, other than information that is publicly available from bid openings or published notices (regulation 64).

- (r) The contracting entity shall maintain an individual record for each procurement requirement, which shall be marked with the relevant procurement reference number. The record shall contain the originals and copies, where appropriate, of all information, documents and communications related to that procurement proceeding, including a summary of the evaluation of bids and a summary of any review proceedings, and the related decisions. The record shall be prepared and disclosed in a manner that avoids disclosure of proprietary commercial information. The record shall, on request, be made available to any person after a bid has been accepted, unless any portion of the record is required to be disclosed earlier pursuant to law, or by order of a competent court or a duly appointed arbitrator (regulation 66).
- (s) Every officer responsible for any aspect of the procurement of a contracting entity, including the requisitioning, planning, preparing and conducting procurement proceedings and administering the implementation of procurement contracts, shall, as a procurement officer, and among other things, ensure that each decision is based on adequate information in light of the circumstances, is made in good faith, for a proper purpose in accordance with the Regulations and in the best interests of the Government (sub regulation 67(1)(a)). A bidder shall not engage in or abet corrupt or fraudulent practices, including ... misrepresentation of facts, in order to influence a procurement process or the execution of a contract, including by inducing the commission of inappropriate acts (sub regulation 68(2)).
- (t) A bidder who claims to have suffered or that is likely to suffer loss or injury due to a breach of a duty imposed on a contracting entity by the Regulations may seek review at any stage of the procurement proceedings (sub regulation 73(1)).

- (u) Prior to the entry into force of a contract, a complaint shall be made, in the first instance, in writing, to the Head of the Contracting entity (regulation 74 (1)). The Head of the contracting entity shall not entertain the complaint unless it was submitted within 10 days of when the bidder submitting it became aware, or should have become aware, of the circumstances giving rise to the complaint, whichever is earlier (sub regulation (2)). Unless the complaint is resolved by mutual agreement, the Head of the contracting entity shall suspend the procurement proceedings unless he is satisfied that urgent public interest considerations require the procurement to proceed, and within five days after submission of the complaint, issue a written decision stating the reasons and, if the complaint is upheld, indicating the corrective measures to be taken (sub regulation (3)). If the Head of the contracting entity does not issue a decision within the five days stated, or if the complainant is not satisfied with the decision, the complainant may submit a complaint to an Independent Expert under regulation 76 (sub regulation (4)). Complaints under sub regulation (4) shall not be heard unless submitted to the procurement Division within 10 days from the elapse of the time stated in sub regulation (3) or from the date on which the contracting entity's decision was communicated to the complainant (sub regulation (5)).
- (v) The Government Procurement Committee shall appoint one or more Independent Experts for the purpose of reviewing a bidder's complaint with respect to any breach of its obligations under the Regulations (regulation 75(1)).
- (w) An application for review may be brought in a number of circumstances including in the form of an appeal by the complaining bidder against the decision by a Head of contracting entity under regulation 74, provided that the appeal is submitted within 10 days of the date of the decision; where the Head of the contracting entity to whom a complaint is made pursuant to regulation 74 fails to render a decision within the required timeframe, provided that the application for review is filed within 10 days of the expiry of the time for the decision; or, in the case where the contract has already entered into force, any application for review submitted in the first instance to the Procurement Division shall not be entertained unless it is submitted

within 10 days of when the bidder submitting it became aware of the circumstances giving rise to the complaint or of when that bidder should have become aware of the circumstances, whichever is earlier (regulation 76(1)). Within seven days of receiving an application for review, the Procurement Division shall advise the parties of the single Independent Expert that will conduct the review and shall notify the bidder of the date for the commencement of its activities which shall be known as the date of establishment (sub regulation (2)).

- (x) The Independent Expert shall make a written decision, containing the reasons for the decision, within 10 days after the date of selection. That period may be further extended by 10 days at the discretion of the Independent Expert, with the approval of the Attorney General, where it is deemed necessary to reach a decision (regulation 77(1)). Such decision shall be binding on all the parties (sub regulation (2)). An application for review may be dismissed for, among other things, failure to submit the application within the time limit specified (sub regulation (3)). Unless an application for review is dismissed, the remedies that may be ordered by the Independent Expert include prohibiting the contracting entity from acting or deciding in an unauthorised manner or from following incorrect procedure; annulling in whole or in part any unauthorised act or decision of a contracting entity, other than any act or decision bringing the contract into force; reversing a decision by the Head of contracting entity, other than any decision bringing the contract into force; where a contract has been concluded unlawfully, the award of compensation to be paid by the contracting entity to the aggrieved bidder amounting at least to the cost of bid preparation (sub regulation (4)). The timely submission of a complaint in accordance with deadlines set in the regulation suspends the procurement proceedings until a decision on the complaint is issued by the Independent Expert (sub regulation (5)). The Independent Expert may, upon application of the contracting entity, end the automatic suspension in sub regulation (5) where the contracting entity satisfies the Independent Expert that the continuation of the suspension would cause disproportionate harm to the public interest, the contracting entity or to other suppliers and

contractors (sub regulation (6)). The proceedings of the Independent Expert shall be governed by Schedule 2 of the Regulations which ensure that all parties to the dispute are heard and given fair opportunity of making their case (sub regulation (8)).

Conclusion on justiciability

43. For reasons which should now be apparent, it has not been possible to responsibly determine this application for leave merely on a quick perusal of the material available.
44. Further, upon consideration and application of the principles as to justiciability considered above, and for the reasons which follow, I am satisfied that it is arguable that MEIDECC's decision in this case is justiciable and amenable to judicial review:
 - (a) The tender process arose pursuant to apparent statutory power by which MEIDECC may procure water tanks in pursuance of its statutory mandate.
 - (b) The decision was therefore not the result of a purely commercial decision but of a power exercised pursuant to statute.
 - (c) The procurement process was governed by and subject to the Public Procurement Regulations.
 - (d) For the purposes of the procurement of the water tanks, MEIDECC was bound by the said Regulations.
 - (e) The Regulations provide a mandatory detailed prescription for the manner in which the procurement and tender processes were to be conducted.
 - (f) Insofar as the decision arose from statute, Rotomould's allegations raise issues as to whether the decision went beyond the limits of the statutory power, whether MEIDECC otherwise complied with the Regulations and bad faith.

Leave granted

45. Although it has been said in a number of the authorities referred to above that the only interests affected by a decision to enter into a contract are the parties to it, I consider that Rotomould's allegations herein point to conduct which, if ultimately found to be correct, may have affected its rights; alternatively, deprived it of the benefit and and legitimate expectation³⁴ that the tender process would be conducted lawfully, meaning in accordance with the Regulations and the specific bidding requirements, fairly and reasonably.
46. I am therefore satisfied that the present is a case fit for further investigation on a full inter partes hearing.
47. Accordingly, in the exercise of judicial discretion, I grant Rotomould leave to apply for judicial review.

Issues for review

48. The application, as examined above, reveals a number of issues for review. Some are already articulated in the proposed Statement of Claim; others are not. They will be a matter for Rotomould should it wish to pursue them or any of them by way of amendment to its pleading. The issues include:
- (a) broadly, whether MEIDECC conducted the tender and bid evaluation process in accordance with the requirements of the Regulations;
 - (b) more specifically, whether MEIDECC properly understood and applied the bid requirement for certification in accordance with AS/NZ 4766 when it determined that M&J's bid so complied and was therefore a responsive bid under the Regulations;
 - (c) whether the information provided by M&J to MEIDECC to the effect that it met the certification requirements was considered by MEIDECC to be accurate and responsive to the relevant bid requirement and, if so, whether

³⁴ *Flyniu v Ata* [2006] Tonga LR 10.

MEIDECC took into account all relevant considerations in determining that M&J was compliant;

- (d) whether the information provided by Rotomould, including the letter from Matrix, was relevant to MEIDECC's determination as to whether M&J was certified in accordance with AS/NZ 4766;
- (e) if it was, whether MEIDECC failed to take into account that relevant consideration;
- (f) if the information provided by M&J to MEIDECC about certification was false or misleading, MEIDECC:
 - (i) was misled or otherwise misapprehended the purport of any inaccuracy, and thereby took into account what ought to have been regarded as an irrelevant consideration; and/or
 - (ii) was required by regulation 54(1) to disqualify M&J; or
- (g) if the information provided by M&J to MEIDECC about certification was materially inaccurate, MEIDECC had a discretion pursuant to regulation 54(2) disqualify M&J, and if so, whether and how MEIDECC exercised that discretion;
- (h) whether, in determining that Rotomould's bid was non-responsive due to not meeting all "the requirements (specifications) of the bidding documents", MEIDECC:
 - (i) took into account technical requirements which were not in fact part of the bid documents, in contravention of regulation 55(4) and which were therefore irrelevant;
 - (ii) failed to take into account the further information or clarifications provided by Rotomould during meetings and in subsequent correspondence, and/or thereby acted in bad faith;
- (i) whether MEIDECC failed to respond to Mr Edwards's further letter dated 28 September 2020, and if so, whether:

- (i) MEIDECC was required by the Regulations to reply and within a certain time frame;
 - (ii) MEIDECC's failure to reply was a material contravention of the Regulations; and
 - (iii) if so, whether that contravention has any vitiating effect on MEIDECC's decision to award the contract to M&J;
- (j) if:
- (i) M&J was not certified in accordance with AS/NZ 4766, and as such, its bid should have been rejected; and
 - (ii) Rotomould's bid was compliant with the relevant bid requirements; and
 - (iii) Both bids were for the same price,
- whether, pursuant to regulation 56, MEIDECC was required to award the contract to Rotomould;
- (k) whether Rotomould pursued all its rights of complaint, review and appeal provided by Part 10 of the Regulations, including referral for review by an Independent Expert, and if not, whether any such failure can or should affect its rights in relation to this proceeding and any relief to be considered;
 - (l) whether, depending on the outcome to the above issues and subject to any amendment to the Statement of Claim, the Court can and, if so, should, grant any relief in the form of cancelling any contract entered into between MEIDECC and M&J for the supply of the water tanks;

Injunction

49. Rotomould's application for an interim injunction cannot be entertained in this application for leave to apply for judicial review.
50. Firstly, Order 22 rule 1 of the Supreme Court Rules requires an undertaking as to damages. The undertaking is mandatory: *Public Service Association (PSA) v*

Government of Tonga [2016] TOSC 34. Rotomould has not given any such undertaking.

51. Secondly, in circumstances where Rotomould alleges that M&J started supplying tanks to MEIDECC on or about 20 October 2020, Rotomould waited about a month before issuing these proceedings and did not seek to bring on for hearing a separate application for injunction prior to or at the hearing conducted on 9 December 2020. There is no evidence of urgency in Mr Fonua's affidavit.
52. Thirdly, and in the face of the alternative plea for damages, Mr Fonua also did not depose to any irreparable harm should an injunction not be granted.

Result

53. The application for leave to apply for judicial review is granted.
54. The Plaintiff has leave to rely upon the Statement of Claim filed 20 November 2020. Alternatively, any Amended Statement of Claim is to be filed by 15 January 2021.
55. If MEIDECC wishes to participate in the proceeding, rather than simply abide by the determination of the Court, and it opposes the relief sought by Rotomould, it is to file a Statement of Defence by 12 February 2021.
56. Any Statement of Defence by M&J to the allegations by Rotomould which are relevant to M&J and its interests, is also to be filed by 12 February 2021.
57. Rotomould has leave to renew its application for an injunction, upon proper material being filed, and upon three days written notice. The matter will be listed for further directions on 19 February 2021.

NUKU'ALOFA
24 December 2020



M. H. Whitten QC
LORD CHIEF JUSTICE