

**SUPREME COURT OF SEYCHELLES**

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**Reportable**  
[2021] SCSC  
MC 13/2020

In the matter between:

**JPL EXCHANGE (SEYCHELLES) Ltd**  
*(rep. by Basil Hoareau)*

**Petitioner**

and

**REVIEW PANEL**  
*(rep. by Georges Thachett)*

**Respondent**

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**Neutral Citation:** *JPL Exchange v Review Panel* (MC13/2020) [2021] SCSC 18<sup>th</sup> May 2021.  
**Before:** Burhan J.  
**Summary:** Application for Judicial Review. Decision of Respondent not irrational or unreasonable. No proof of malicious intent by Respondent before court. Application dismissed with costs.  
**Heard:** 6<sup>th</sup> October 2020  
**Delivered:** 18<sup>th</sup> May 2021

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**ORDER**

Application dismissed with costs.

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**JUDGMENT**

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**BURHAN J**

[1] The Petitioner, JPL Exchange (Seychelles) Ltd, filed a petition for Judicial Review against the Respondent the Review Panel seeking the following reliefs:

- (i) *Grant leave to the Petitioner to proceed with the petition in accordance with Rules 5 and 6 of the Supreme Court ( Supervisory Jurisdiction over Subordinate Courts, Tribunals and Adjudicating Authorities ) Rules ( the Rules),*
- (ii) *After hearing of the petition issue a writ of certiorari quashing the findings and decision of the Respondent ; and*
- (iii) *Order the Respondent to pay costs to the Petitioner.*

[2] The application is on the basis that the decision of the Review Panel is irrational and/or unreasonable as:

- (i) *There was no evidence or facts laid before the Respondent upon which the Respondent could have come to the findings and decisions.*
- (ii) *The Respondents failed to take into account the fact that immediately, upon being informed by the Seychelles Civil Aviation Authority (SCAA) that the business plan had not been attached to the bid, the Petitioner forwarded a copy of the business plan thus proving that the Petitioner had the business plan ready and therefore the business plan was annexed to the bid/or*
- (iii) *Further or in the alternative to paragraphs (i) and (ii) above, the Respondent took irrelevant matters into consideration and/or failed to take in to consideration relevant matters, in coming to its findings and decisions including the fact that there was a clear and malicious attempt to disqualify the Petitioner as a bidder based on matters set out in paragraphs 10 of the petition.*

## **THE BACKGROUND FACTS**

[3] The Petitioner JPL Exchange (Seychelles) Ltd was one of the bidders in respect of an invitation for tender issued by Seychelles Civil Aviation Authority (SCAA), inviting interested companies to participate in a tender to provide efficient and reliable Bureau De Change services at the Seychelles International Airport. By letter dated 27<sup>th</sup> February 2019, the Petitioner was informed that its bid had not been successful and that the

contract had been awarded to another bidder. The Petitioner subsequently lodged a challenge under section 98 of the Public Procurement Act CAP 305 by letter dated 13<sup>th</sup> March 2019 to the Chief Executive officer (CEO) of SCAA.

- [4] The Chief Executive Officer of SCAA by letter dated 20<sup>th</sup> March 2019, informed the Petitioner that it had been disqualified from the procurement proceedings for not being compliant with the bidding requirements, specifically that the following (mandatory) documents were missing: (1) Business Plan, (2) Employment contracts or job profile of key personnel/employees, and (3) Proof of operation for at least one site in the form of a lease agreement.
- [5] The Petitioner by letter dated 4 April 2019, applied to the Respondent (Review Panel) under section 100 of the Public Procurement Act, to review the procurement proceedings in relation to the tender and in respect of the decision of the CEO of SCAA rejecting the challenge lodged by the Petitioner. The Respondent heard the Petitioner in respect of the review on 31<sup>st</sup> October 2019. The Appeal was dismissed by written decision dated 2<sup>nd</sup> December 2019. It is from this decision that the Petitioner has filed this Judicial Review Application.
- [6] Learned Counsel for the Respondent (Review Panel) objects to the Petition and avers that the decision of the Respondent was rational, reasonable, legal and justified. The main averments of the Respondent is that there is no evidence to support the Petitioner's contention that the business plan was submitted along with the bid and no evidence to support the allegation of the Petitioner that there were malicious attempts by the Respondent to disqualify the Petitioner.
- [7] It is an established principle that in Judicial Review cases, the court is concerned only with the legality, rationality (reasonableness) and propriety of the decision in question. The court, generally, does not consider the merits of the decision (see *Benker v Government of Seychelles (1999) SLR 48*). Therefore, the court has to determine whether the decision of the Respondent was, in this matter, irrational and/or unreasonable in the circumstances.

## THE LAW:

- [8] The procedure for tender is governed by the Public Procurement Act and in particular, the Public Procurement Regulations 2014 (S.I. 7 of 2014). The Regulations are quite detailed as to the procedure and considerations when it comes to tender. They provide for an evaluation committee to conduct a preliminary examination to determine whether proposals are complete and responsive to the basic instructions and requirements of the bidding document – Regulation 89. This preliminary examination determines, inter alia, whether all key documents and information have been submitted (Reg. 89(2)(h)). Regulation 89 (3) clearly states that: “Any material deviations shall result in rejection of the proposal and such proposals shall not be subject to technical evaluation.”

## ANALYSIS:

- [9] In the case of ***Vidot v Minister of Employment (2000) SLR 77***, the court held that the test for unreasonableness is a subjective test where the court will ask whether an act is of such a nature that no reasonable person would act in such a way.
- [10] The case of ***Michel & Ors v Dhanjee & Ors (SCA No. 05 & 06 of 2012) [2012] SCCA 10 (31 August 2012)*** was a judicial review case where the Constitutional Court was reviewing the decision-making process of a decision making body or person. With regard to the role of the court in such matters, the court held that –

*“It can only review how the decision was made, declare on its fairness and ultimately on its constitutionality. In this respect therefore it has to consider whether relevant considerations were taken into account, whether there was any evidence of deception or bad faith, and whether the body or person making the decision had the legal or constitutional power to make the decision it did. The Court cannot substitute its opinion for that of the public authority.”*

- [11] The main reason given by the CEO of the SCAA for the Petitioner not being successful in its bid is that documents were missing from their bid, namely a business plan. The Petitioner was originally informed that its bid had not been successful and later, in appeal, the Petitioner was informed that it had been disqualified from the procurement proceedings for not being compliant with the bidding requirements (letter dated 20<sup>th</sup> March 2019). It is not disputed that the Petitioner was informed, by email communication, that there was no business plan received along with its bid. The Petitioner maintains that it had attached the said business plan. However, it did respond to that email and sent a copy of the business plan. It is a finding of the Review Panel in review that no evidence exists to clearly demonstrate that the business plan had been submitted prior to that email exchange. The Petitioner argues in their submission that the business plan was in existence prior to the email being sent. Its existence is not what was being contested here, but rather its submission along with the other documents as part of the bid.
- [12] Regulation 89 of the Public Procurement Regulations is clear: a preliminary examination must be done to determine, *inter alia*, whether all key documents and information have been submitted. Proposals must be complete and meet the basic instructions and requirements of the bidding document in order to be considered. Non-compliant proposals are rejected and cannot proceed for consideration.
- [13] It is the view of this court that the regulations being so, the decision appears to have been justified. The Petitioner's allegation that it did submit a business plan with its original proposal has not been proved. The Petitioner reasons that its promptness in responding to the email informing it of the missing business plan is proof that they did have a business plan. This does not prove that the said business plan had actually been submitted, but rather supports their argument that it did already exist. Since the Regulations referred to above provide for automatic rejection of non-compliant proposals, the procuring entity could not have considered the subsequent submission of documents to make the proposal compliant.

- [14] The Petitioner further argues that there was no evidence or facts laid before the Respondent upon which the Respondent could have come to the findings and decisions. The Respondent in this case is the Review Panel, whose procedure is also guided by the Public Procurement Regulations. Regulation 174 sets out in detail what the Review Panel must consider in its examination. The Petitioner avers that the Respondent took irrelevant matters into consideration and/or failed to take in consideration relevant matters, in coming to its findings and decisions including the fact there was a clear and malicious attempt to disqualify the Petitioner as a bidder. It is not quite clear what these irrelevant matters are or what the malicious attempts to disqualify the Petitioner were.
- [15] The Respondent the Review Panel, could only proceed on the basis of information and evidence laid before it. Regulation 171 (2) provides that “*Every hearing of the Review Panel shall be informal and the law relating to admissibility of evidence in a court of law shall not apply.*” The Petitioner was given the opportunity of proving his allegations. It appears that the Petitioner failed to do so and the Respondent was satisfied that the decision taken by the procuring entity was the correct one. The reasoning of the Respondent appears sound and rational in light of the circumstances and evidence put to it.
- [16] I am satisfied on perusal of the contents of the affidavit filed by Brenda Bastienne the Chairperson of the Procurement Review Panel that in her affidavit dated 28<sup>th</sup> July 2020 attached to the objections of the Respondent, she specifically states in her affidavit where she is not personally aware of such facts, the source of her information. In paragraph 2, she states she is informed by the counsel for the respondent. Further, in paragraph 3 and 9, she specifically states that the business plan was not submitted by the petitioner along with the bid which fact she became personally aware of, after consideration by herself of the disclosed bid documents and after perusal by herself of the exchange of the correspondence/ emails between the parties. She further in her affidavit specifically states at paragraph 7 that being the Chairperson of the Procurement Review Panel which heard and decided the Review Application, no evidence regarding submission of the business plan along with the bid was laid before the Panel. It is clear to this court that all these facts were to her personal knowledge as it was she who was Chairing the Review

Panel and therefore learned Counsel for the Petitioner's objection that the affidavit bears facts not within the personal knowledge of the deponent bears no merit. I therefore proceed to accept the evidential contents of the affidavit filed by Brenda Bastienne the Chairperson of the Review Panel and reject the contentions of learned Counsel for the Petitioner in respect of same.

- [17] Learned Counsel for the Petitioner has averred that the Review Panel acted maliciously but there is no substantial evidence other than mere allegations with no proof in respect of same. From paragraph 10 of the affidavit of Brenda Bastienne and the Review Panel letter dated 2<sup>nd</sup> December 2019, it is clear that after inquiry, the Review Panel held in favour of the Petitioner in respect of two issues decided against the Petitioner by the CEO of SCAA i.e. "Employment contracts or job profile of key personnel/employees" and "Proof of operation for at least one site in the form of a lease agreement" stating that the Petitioner was found to have been compliant with these bid requirements. Therefore it cannot be said that the Review Panel was acting maliciously without actual and substantial proof that it was.
- [18] It is also to be noted as borne out in the letter of 2<sup>nd</sup> December 2019, the reviewing of the Tender Opening form is not done in secret but by the Procuring Entity in the presence of other bidders participating in the Tender and it was in the presence of all such persons that it was noted that the business plan of the Petitioner was not included in their tender submission. The fact that the Petitioner was able to send the business plan immediately on being informed that it was not included, does not prove that it had been tendered with the Tender Opening Form. For all the aforementioned reasons this court holds that the Petitioner has failed to satisfy this court that the Respondent took irrelevant matters into consideration and/or failed to take into consideration relevant matters or had acted maliciously in coming to its findings and decision.
- [19] I see no irrationality or unreasonableness or malicious intent in the decision of the Respondent. The petition is dismissed with costs.

Signed, dated and delivered at Ile du Port on 18<sup>th</sup> May 2021.

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M Burhan J