

SUPREME COURT OF SEYCHELLES

Reportable
[2023] SCSC 318
MC43/ 2018

In the matter between:

AIRTEL (SEYCHELLES) LIMITED
*(Represented by its Acting Chief Executive Officer,
Mr. Lukalangindu Papas of Providence East Coast)
(Represented by Mr. Kieran Shah)*

Petitioner

and

**THE REVIEW PANEL OF THE NATIONAL
TENDER BOARD**
*(Represented by Mrs. Langsinglu Rongmei,
State Counsel from the Attorney General Chambers)*

1st Respondent

ATTORNEY GENERAL OF SEYCHELLES
*(Herein representing the Government of Seychelles,
including the Department of Information
Communication and Technology, National House, Victoria)
(Represented by Mrs Langsinglu Rongmei standing for
Mr. Ananth Subramanian, then Assistant Principal
state Counsel from the Attorney General Chambers.*

2nd Respondent

Neutral Citation: *Airtel Limited v Tender Board and Attorney General* (MC43/2018) [2023]
SCSC 318 (28 April 2023)

Before: Adeline, j
Summary: Judicial review
Heard: 16th May 2022 (By way of submissions)
Delivered: 28th April 2023

FINAL ORDER

The petition on the grounds of unreasonableness and irrationality have no merits and cannot succeed. The petition does succeed on the ground of procedural impropriety. As such, this Court squashes the ruling of the Review Panel of the National Tender Board on the basis of procedural impropriety.

RULING

Adeline, j

INTRODUCTION

- [1] By way of a petition filed in Court on the 27th June 2018, Airtel (Seychelles) Limited, a limited liability company registered and incorporated in Seychelles under the provisions of the Companies Act, 1972 (“the Petitioner”) entered proceedings in the Supreme Court against the Review Panel of the National Tender Board, a body corporate established under Section 13(1) – (2) of the Public Procurement Act, Cap 305, and the Attorney General representing the Government of Seychelles (“the Respondents”).
- [2] By its petition, which is supported by an affidavit sworn by one Lukalangindu Papus in his capacity as the Acting Chief Executive Officer, the Petitioner thereby seeks to invoke the Supervisory jurisdiction of this Court under Article 125 (1) (c) of the constitution for judicial review of the 1st Respondent’s decision, for *inter alia*, the issue of a writ of Certiorari quashing the entire ruling and order of the Review Panel dated 29th March 2018 dismissing the Petitioner’s appeal from the decision of the National Tender Board dated 17th January 2018.

FACTUAL BACKGROUND

- [3] The factual background of this case for judicial review from the date the petition was filed in Court can be succinctly summarised as follows. Leave for the Petitioner to proceed with proceedings for judicial review was denied at first instance by the Supreme Court under Rule 6 of the Supreme Court Rules (Supervisory Jurisdiction Courts, Tribunals and Adjudicating Bodies) Rules 1995 pursuant to an order of the Supreme Court made on the 2nd November 2018 in MC43/2018.
- [4] On appeal to the Court of Appeal against the order of the Supreme Court in SCA 70/2018 (Appeal from MC 43/2018), the appeal was allowed, and accordingly, the Petitioner was granted leave to proceed with judicial review on the merits of the petition.

THE PLEADINGS

[5] The grounds pleaded as the basis for the reliefs being sought, can succinctly be said to be the following;

“1. The Review Panel did not provide sufficient reasons for their decision, in that, they merely repeated the conclusion of the National Tender Board without considering the substance of the submissions put forth as well as the point of law raised by the Petitioner and canvassed at the review hearing which were to invalidate the conclusions reached.

2. The decision of the Review Panel was unreasonable under all circumstances of the case, as it failed to consider the Petitioner’s written submissions as canvassed dated 17th January 2018 (Annexure L) coupled with the submission the Petitioner made on the day of the hearing when making their decision, given that the Review Panel’s decision conveyed by letter, makes no reference to any of the points raised by the Petitioner, and

3. The Petitioner was denied its constitutional right to a fair hearing by the Review Panel, and was unfairly treated by the Review Panel”

THE AFFIDAVIT EVIDENCE

[6] As per the affidavit evidence in support of the Petition, the sequence of events that precipitated into the Petitioner’s grievance, began after the Department of Information, Communication Technology (“DICT”) had on the 3rd October 2017, invited bids for “Tender for the Provision of Mobile Communications Services to Government’s CUG to fulfil its Present and Future Mobile Telecommunication Needs” (Annexure A).

[7] It is averred by the Deponent, that on the 13th October 2017, they received a written request from the Principal Secretary of DICT, one Mr. P Moustache, informing them that Cable and Wireless (Seychelles) Limited had made certain queries regarding the said tender, and that they were being invited to respond to those queries by 16th October 2017, (Annexure B).

[8] It is also averred, that on the 17th October 2017, the Petitioner submitted their comprehensive bid for the tender (Annexure C)

- [9] It is further averred, that on the very same day (17th October 2017) DICT, sought from the Petitioner clarification as to the content of their proposals, which responses were promptly provided to DICT (Annexure D)
- [10] It is the averment of the Deponent, that on the 26th October 2017, (by Annexure E) they sought to clarify the content of their proposals, and that on the 7th November 2017, DICT sought from the Petitioner further clarification over their technical solutions and their financial proposals (Annexure F). On the same day (7th November 2017) the Petitioner provided DICT with detailed responses for their request (Annexure G).
- [11] It is an averment in the supporting affidavit to the petition, that on the 29th November 2017, the National Tender Board held, that the Petitioner's bid was non-responsive and proceeded to approve the only other bid which was from Cable and Wireless (Seychelles) Limited (Annexure H). Thereafter, on the 1st December 2017, the Petitioner was formally informed by DICT that Cable and Wireless (Seychelles) Limited were the successful bidder for the tender (Annexure I).
- [12] The Petitioner avers, that on the 18th December 2017, pursuant to Section 98 (2) (a) of the Public Procurement Act, (Cap 305), it mounted a challenge of the decision of the National Tender Board and DICT, and as a consequence thereof the matter was remitted to the Chief Executive Officer (Annexure J).
- [13] The Petitioner also avers, that its challenge was dismissed on the basis that it had failed to make use of the Prescribed Financial Form. The Petitioner further avers, that it was informed by DICT, that it had "no right to challenge the decision".
- [14] It is an averment made by the Petitioner, that in accordance with Section 99 of the Public Procurement Act, Cap 305, that on the 17th January 2018, it lodged an application for review of the decision to the Review Panel of the National Tender Board (Annexure L)
- [15] It is also an averment made by the Petitioner, that in its absence, on the 14th March 2018, the Review Panel of the National Tender Board heard its case (grievance) taking evidence from the National Tender Board.

[16] The Petitioner avers, that on the 29th March 2018, the Review Panel of the National Tender Board dismissed its appeal (Annexure M) which decision, it avers, “is devoid of sufficient reasons and is unreasonable under all circumstances of the case.

[17] The Petitioner also avers, that it has been informed by Counsel and verily believe it to be true that the Review Panel of the National tender Board violated all the principles of natural justice, acted recklessly disregard of its constitutional right to a fair hearing, and made serious procedural errors.

[18] In the affidavit in response filed in Court by the Review Panel of the National Tender Board, (“the 1st Respondent”), the Deponent, one Jean-Claude Doffay, *inter alia*, makes the following averments under the different paragraphs specified therein denying any wrong doing whilst stating the following;

“4. The Review Panel of the National Tender Board is mandated to avoid formality in its proceedings, and is empowered to conduct its proceedings in such manner as it thinks fit under Section 99(6) of the said Act and did adhere to the principles of Natural Justice

5. there is no unreasonableness as all the submissions by both, the procuring entity (DICT) (Respondent No 2 herein) and the Applicant were received and heard by Respondent No1, and their arguments duly considered before the Review Panel arrived at the impugned decision of confirming the award to Cable and Wireless (Seychelles) Limited as per Section 100 of the Act.

6. that Respondent No1 has given equal opportunity to the parties of being heard. Therefore, the impugned decision of the Review Panel/ Respondent No1 is not arbitrary nor was the Applicant denied its right to natural justice or any prejudice caused. The Respondent No1 also acted within its mandate and committed no procedural impropriety.

7. That I state that clause 3.5 of Section 2, Instruction to Bidders as read with clause 3(iii) of Section 3 Data Sheet of the Tender Document (please see Annexure A of the petition) mandatorily require the Applicant to file its Financial Proposals in Section 7 Financial Proposals Form of the Tender Document. Section 7 Form sought one that rate for local calls, one

8. That I state, that the bid of the Applicant is in breach of Regulation 64(2) (a) and (c) which requires that an evaluation committee shall conduct a preliminary examination to determine whether bids are complete and responsive to the basic instructions and requirements of the bidding documents. A preliminary examination found, that the bid of the Applicant was not in the correct format, and the bid was in deviation from the terms and conditions of the bidding document” that rate for international calls and one that rate for roaming. However, the Applicant is in breach of the mandatory requirements, modified the Section 7 Form on its own and provided different rates for the aforesaid calls (please see Annexure N of the petition). This deviation caused material impact on the cost of the bids and denied the other bidder equal chance/fairness in the bidding process which is classified by the Evaluation Committee as a material deviation.

9. That I state that hence in accordance with Regulation 64(6) of the Public Procurement Regulation, 2014, the bid of the Applicant was rejected. The Review Panel by its decision dated 29th March 2018 upheld the decision of the Procuring Entity (DICT) and dismissed the Appeal of the Applicant herein, in exercise of its power/function under Section 100 of the said Act.”

[19] In its affidavit in response by the 2nd Respondent, sworn by one Benjamin Choppy, *inter alia*, it is averred under the following paragraphs, that;

“4. the Petitioner and Cable and Wireless submitted their bids. On the 25th October 2017 opening of bids were done at the office of the National tender Board in the presence of their representatives. The Evaluation Committee scrutinised the bids and rejected the bid submitted by the Petitioner since the Petitioner did not use the Technical and Financial Forms which is contrary to Section 64 (2) of the Public Procurement Regulations. The said deviation committed by the Petitioner impact on cost was classified as a material deviation and the bid submitted by the Petitioner was rejected.

5. That after careful scrutiny of both bids, and based on the scoring points as well as amount (bid price) quoted by the Petitioner (Airtel) is higher than the successful bidder (Cable and Wireless) and also for the reasons stated above, the award was not made in favour of the Petitioner.

9. that I state that the Respondent No2 acted procedurally and substantively in compliance with the Public Procurement Act, and Regulations”.

- [20] At paragraph 6, 7, and 8 the Deponent repeats the averment made at paragraph 7, 8 and 9 of the affidavit in response to the Petitioner’s sworn affidavit on behalf of the 1st Respondent.
- [21] In the light of the affidavit evidence of the 1st Respondent in response to the Petition, learned Counsel for the Petitioner, in writing, sought to argue the case for the Petitioner to justify the grounds pleaded for Judicial Review by relying on Statutes, Regulations and Case Law Authorities. Learned Counsel did so within the background, that in his opinion, there are grounds for judicial review, namely, illegality irrationality and procedural impropriety as stated by Renaud J in Lotus Holding Company Ltd v Seychelles International Business Authority [2012] SLR 153.
- [22] Expounding on learned Counsel’s proposition that the Review Panel of the National Tender Board did not disclose sufficient reasons for their decision thereby rendering the decision – making irrational and unreasonable, learned Counsel sought to rely on the Wednesbury Principle deriving from the English case of Associated Provincial Picture House Ltd Wednesbury Corporation [1948] 1 KB 223, which principle is entrenched in our domestic laws confirmed by Trajter v Morgan [2013] SLR 329.
- [23] As correctly stated by learned Counsel for the Petitioner, the principle states, “that the decision-maker must take into account factors that ought to be taken into account, and he must not take into account factors that ought not to be taken into account and the decision he takes must not be so unreasonable that no reasonable authority would ever consider imposing it”. Learned Counsel contended, that the Respondents have failed to take into account factors that ought to have been taken into account that by failing to do so they took a decision which was unreasonable.
- [24] That principle in mind, it is the contention of learned Counsel, that “ the Review Panel merely repeated the conclusion of the National Tender Board, and did not appear to have considered any of the substantial submissions put forth, or points of law raised by the

Petitioner in their application for review, and then canvassed during the Review hearing, despite these submissions serving to invalidate the final conclusion drawn by the Review Panel”

[25] To support his contention, that the Review Panel of the National Tender Board did not disclose sufficient reasons for their decision, learned Counsel quoted a number of English case law authorities emphasizing, that giving reason is of utmost important in decision making. As an example, learned Counsel cited *Flannery v Halifax Estate Agencies Ltd* [2000] 1 WLR 377 when the Court said, that the Court’s duty to give reason is a function of due process and therefore of justice”.

[26] “In *R v Ministry of Defence exp Murray* [1998] COD 134, the Court held, that the duty to give reasons concentrates the decision-maker’s mind on the right questions and demonstrates that the issue has been conscientiously addressed. In the case of *R v Westminster City Council, ex parte Ermakov* [1996] 2 ALLER 302, it was held that the reasons obligation was necessary “so that the person affected by the decision may know why they have won or lost, and in particular, may be able to Judge whether the decision is valid and therefore unchallengeable, or is invalid and therefore open to challenge”.

[27] To support his proposition that, “the decision of the Review Panel was unreasonable under all the circumstances of the case”, learned Counsel quoted *Karunakan j in Intershore Consult v Govinden* [2013] SLR 469, in saying the following;

(1) “*Where judicial Review is sought on the ground of unreasonableness, the Court is required to make value judgments about the quality of the decision under review.*”

(2) “*Fairness or unreasonableness cannot be defined, ascertained and brought within the parameters of law, a subjective assessment of the case is required and such assessment ought to be made applying the yards stick of human reason an rationality*”

[28] It is the contention of learned Counsel for the Petitioner, that the Review Panel did not consider the detailed submissions canvassed by the Petitioner dated 17th January 2018 (Annexure L) and the additional submissions made on the hearing date when making their

decision, given that no reference was made to any of the points raised therein in the Review Panel's decision letter, the basis of which the contention is made.

- [29] In answer to the claim by the Review Panel that the Petitioner had made a material deviation in not using the prescribed Form in Section 7 of the tender invitation entitled "Format for Financial Proposal," and therefore breached Regulation 64(2) (a) of the Public Procurement Regulation 2014, learned Counsel submitted, that it has not been disputed, that the Petitioner provided all the internal information required for their bid. Learned Counsel maintains, that the Petitioner, at all times, complied with the prescribed Form, and that it is unfair, unjust and unreasonable to render the Petitioner's bid non-responsive simply because they provided additional information which serve to make the overall bid more comprehensive and transparent.
- [30] It is the contention of learned Counsel, that the Petitioner was informed that the different format could result in their bid being rendered nonresponsive, and were not given a real opportunity to rectify the deficiency before the ultimate decision was made. Relying on the case of *Lotus Holding Company Ltd v Seychelles International Business Authority* [2012] SCR 153, learned Counsel submitted, that this was procedurally improper and constituted a breach of natural justice because the Petitioner was not given a real or sufficient opportunity to be heard to rectify the deficiency before the decision was made.
- [31] Learned Counsel took issue with the Review Panel suggestion that, there has been no breach of Section 15(2) of the Public Procurement Act, 2008 because of Section 21(1) of the Act, contending, that the Review Panel's interpretation of Section 21(1) is erroneous. Learned Counsel quoted the case of *Kandar Government of Malaya 1962, AC322, 337*, in which case, the Court held, that "the Rule against bias is one thing. The right to be heard is another. Those two rules are essential characteristics of what is often called natural justice. They are the twin Pillars supporting it." Learned Counsel also stated, that the Review Panel did not permit the Petitioner to hear and respond to the National Tender Board's submissions which was highly prejudicial to the Petitioner.
- [32] Another point of contention raised by Learned Counsel for the Petitioner, is that "the Petitioner was unfairly treated before the Review Panel by being denied their constitutional

right to a fair hearing”. Learned Counsel contended, that the Petitioner was denied its constitutional right to a fair and public hearing afforded to it under Article 19(1) of the constitution. He also emphasised, that there is a “golden rule in administrative law, guarded by the Courts, that no executive decisions adversely affecting the rights of a citizen may be taken without affording the citizen the opportunity to be heard, and that this rule is founded on the principles of natural justice that is of universal application. Learned Counsel cited the case of *Linyon Demokratik Seselwa vs Electoral Commission* 2016 (SLR) 469 in which case he said this very point was made.

[33] It is contended by learned Counsel, that the rule was not followed because “the evidence of the National Tender Board was heard in the absence of the Petitioner at the instance of the Review Panel, indicating a lack of transparency in, and the illegality of the decision-making process, which is also a breach of the National Tender Board’s obligations under Section 15(2) of the Public Procurement Act 2008”. Learned Counsel is of the view, that “the failure of the Review Panel to afford the Petitioner the opportunity to be heard and respond to the National Tender Board’s submission during the hearing is a procedural irregularity which caused undue prejudice to the Petitioner.”

[34] Learned Counsel cited the case of *Alrawi vs Security Services* [2011] UKSC 34 [2012] 1 AC 531 at [12] [14] to support this view, contending that, the Court did hold, that “trials are conducted on the basis of the “principle of natural justice” and that the right to know and effectively challenge the opposition’s case has long been recognised by the common law as a fundamental feature of the judicial process.

[35] At this juncture, it is observed, that the written submission made by Counsel for the 2nd Respondent fails to address the issues raised by the Petitioner in its affidavit in support of the application for judicial review, and in the Respondent’s response to the Petitioner’s objection on the merit of the application.

[36] I observe, that the submission made on behalf of the 2nd Respondent merely centres around the general proposition that bids that do not meet the minimum requirements as stipulated in a bid document are to be regarded as non-responsive and rejected without further consideration, and that bidders found to be non-responsive are excluded from the bidding

process regardless of the merits of the bids. It then seeks to spell out the various statutory provisions of the Public Procurement Act, notably, Section 2, 15, 79, 78 and 100. Learned Counsel also refers to various clauses of the Tender Invitation Document referring to the rules which he said ought to have been strictly followed by the Petitioner.

[37] It is part of the submission, made on behalf of the 2nd Respondent, that the bids submitted by the Petitioner and cable and Wireless (Seychelles) Limited, were correctly evaluated by the procuring entity (DICT) in accordance with the Regulations in force made under the Public Procurement Act. Specific mention is made in the submission in respect of Section 61 (2), 61 (3) (c), 64, 64 (2) (a) and (c), 64 (4), 64 (b) and 64 (c). Special mention is made of regulation 64 (6), which the author of the submission, learned Counsel submitted, that only deviations which is considered to be a material deviation shall result in the rejection of the bid, and such bid shall not be subject to technical evaluation.

[38] In the submission on behalf of the 2nd Respondent, it is contended, that the financial proposal terms (Section 7 Form) used by the Petitioner for submission of its bid, was entirely different from the Financial Proposal Form prescribed, provided for in the invitation documents by producing its own Financial Proposal Form (annexure "N"), the Petitioner reformulated its own way of providing many break up prices (unacceptable key contract terms and conditions, such payment terms price adjustment) are deemed to be a material deviation as per regulation 64(4) of the regulation.

[39] In essence, the 2nd Respondent's position viz a vis this application for judicial review is summed up at page 3 in the last paragraph of the written submission made on its behalf that reads as follows;

"Therefore, the National Tender Board as well as the Review Panel rejected the bid as non-responsive with the tender requirements and also stated, that the Petitioner has got no right to challenge the decision because the Petitioner was not to be considered as a bidder due to the rejection of his bid at the preliminary stage. The Petitioner not passed the preliminary threshold in order to consider for the next level of evaluation. The bid submitted by the Petitioner was rejected due to non-responsiveness with the tender conditions and requirements."

[40] In its attempt to justify the lawfulness of the decision, the case of Dr Js Moroko Municipality is cited, in which case, the Supreme Court of South Africa had said;

“A bid that does not satisfy the necessary prescribed minimum qualifying requirements simply cannot be viewed as a bid validly submitted.”

In that case, the Court went on as to say, that;

“the tender submitted by the 1st Respondent was not an “acceptable tender” as envisaged by the Procurement Act, and did not pass the so called threshold requirement to allow it to be considered and evaluated. Indeed, its acceptance would have been invalid and liable to be set aside”.

Another case law authority cited in the submission made on behalf of the 2nd Respondent is the case of Bakshi Security vs Devkishan Computed PVT Ltd & others, in which case, the Court held;

“the law is settled that an essential condition of a tender has to be strictly complied with”

[41] Having read all the pleadings, the affidavit evidence supported by exhibits in support of the same, and the oral and written submissions made on behalf of the parties in this Judicial Review Petition, I am of the opinion, that the issues raised by the parties have to be examined and determined on the basis of the substantive and procedural law.

[42] Clearly, on account of the facts and circumstances of this case as succinctly rehearsed in the preceding paragraphs of this ruling, the Petitioner’s case effectively seeks to challenge the decision of the Review Panel which for the purposes of this ruling, I will consider it as “the secondary decision”, which in effect, maintains the decision of the National Tender Board which I consider to be “the primary decision”, that is to say, the decision which disqualified its bid on the basis that there was a “material deviation”. I find the need to make such distinction necessary in view of what the issues that transpired in the course of the proceedings are, and what the Petitioner seeks from this Court as reliefs.

[43] It is evident, on account of the pleadings, that the affidavit evidence and the submission of the 1st and 2nd Respondents, that they both rely mostly on the substantive law under the

provisions of the Public Procurement Act, 2008 and the Public Procurement Regulations 2014 to justify the lawfulness and correctness of their decisions, although in few instances, they rely on few case law authorities. This, therefore, makes it necessary for this Court to have regard to some of these statutory provisions which the Court considers to be most relevant.

To set the scene, I am reminded, that the National Tender Board is a creature of statute having been established as a body corporate by virtue of Section 13(1) read with Section 13(2) of the Public Procurement Act, Cap 305 (“the Act”). Its functions as prescribed under Section 15(1) of the Act, inter alia, are;

“15(1) (a)

(b) to receive and publicly open bids

(c) to review the recommendation of a bid evaluation committee, and

(i) approve or reject the award of a contract, or

(ii) on specified grounds, may require the evaluation committee to make a fresh or further evaluation or seek an independent evaluation”.

[44] In the performance of its statutory functions, it is provided for under Section 15(2) of the Act that;

“(2) the board shall strive to achieve the highest standards of transparency and equity in the performance of its functions, taking into account,

(a) the evaluation criteria, and the methodology disclosed in the bidding documents,

(b) the qualification criteria and methodology disclosed in the bidding documents

(c) equality of opportunities for all bidders

(d) fairness of treatment to all parties

(e) the need to obtain the best value for money in terms of price, quality delivery having regard to set specifications, and transparency of process.”

[45] The Petitioner seeking for judicial review of the decision of the National Tender Board, and indeed the Review Panel, takes issue over what it sees as the board having been in breach of their statutory functions in the way it handled and decided on its bid, arguing, that the process was not transparent and equitable. Conversely, the 1st and 2nd Respondents remain adamant, that they processed the Petitioner’s bid in the light of their statutory functions and that they handled it as the law so requires, and that they took their decision on application of the law.

[46] The existence of the Review Panel as a legal entity is provided for under Section 99(1) of the Act, and as such, a decision by a procuring entity is subject to challenge before the Review Panel by virtue of Section 98(1) of the Act. Section 98(1) of the Act is couched in the following terms;

“98(1). A bidder, or supplier who;-

(a) is aggrieved by a decision made by a procuring entity under this Act, or

(b) claims to have suffered, or is likely to suffer, loss or injury due to a breach of a duty imposed on a public body, or the Board under this Act, may challenge procurement proceedings at any time before the entry into force of the procurement contract”.

[47] It is, admittedly, in exercise of this right that the Petitioner lodged its grievance before the Review Panel in seeking to challenge the decision of the National Tender Board, which decision of the Review Panel is now under review by this Court. It is worthy of mention, at this particular point, that under Section 98(5)(c) of the Act, “unless a challenge is

dismissed or resolved by mutual agreement between the Applicant and the procuring entity, the Chief Executive Officer shall, inter alia;

“98(5)(c) issue a written decision within ten working days after the submission of the challenge”.

[48] It is also worthy of mention, and perhaps quite significant to determine this petition, that under Section 98(6) of the Act, a decision issued by the Review Panel shall state,

“(a) whether the challenge is upheld in whole or in part or dismissed,

(b) the reasons for decision, and

(c) any corrective measures that are to be taken by the procuring entity or bidder”

[49] In contending that both, the National Tender Board as well as the Review Panel have carried out their statutory functions within the confine of the law, the 1st and 2nd Respondents have nonetheless remarked, that under Section 18(1) of the Act, the board regulates its own proceedings as does the Review Panel by virtue of Section 99(6) of the Act. Section 99(6) of the Act reads;

“99(6) The Review Panel shall endeavour to avoid formality in its proceedings and may conduct them in such manner as it thinks fit”

[50] In denying any wrong doing by the Review Panel of the National Tender Board, and refuting the suggestion that it acted unreasonably, it is contended by the 1st Respondent, that it did afford the Petitioner its right to be heard and that all the submissions made by the parties were considered prior to arriving at the impugned decision. A per its averment in reply, the 1st Respondent stated, that it felt compelled to do so because the Petitioner had a right of review under Section 100(1) of the Act, and as such, it had to observe the principles

of natural justice whilst ensuring that the Petitioner obtains a fair hearing. It is therefore necessary to spell out the provisions of Section 100(1) that reads as follows;

“100(1) An unsatisfied bidder or supplier shall be entitled to apply to the Review Panel for review of the procurement proceedings where;

(a) ...

(b) the bidder or supplier is not satisfied with the decision of the Chief Executive Officer...”

[51] Now that the most relevant provisions of the Act which the 1st and 2nd Respondents rely on in trying to justify their decision have been cited, it is now appropriate to cite the Provisions of the Public Procurement Regulations 2014 (SI 7 of 2014) which the 1st and 2nd Respondents relied upon to make their decision. By contending that the Petitioner’s bid was not responsive, the 1st and 2nd Respondents relied on the Provisions of the Public Procurement Regulations 2014 (SI 7 of 2014). Regulation 61(2) defines a substantially responsive bid as;

“one that conforms to all the instructions, requirements, terms and conditions of the bidding documents without material deviation, reservation or omission.”

Regulation 61(3) defines a material deviation, reservation or omission as one that;

61(3) “(a) affects in any substantial way, the scope, quality or performance of the goods, works and services specified in the bidding documents,

(b) limits, in any substantial way, the procuring entity’s right or the bidder’s obligations under any resulting contracts or would be inconsistent with the bidding documents, or

(c) if corrected, would unfairly affect the competitive position of other bidders presenting substantially responsive and compliant bids”.

[52] As per regulation 61(4), *“a procuring entity shall reject any bid which contains a material deviation, reservation or omission, and is therefore not substantially responsive, and such*

bid shall not subsequently be made responsive by the bidder or the procuring entity". Furthermore, as per Regulation 64(4), material deviations, reservations or omissions may typically include;

"(a) ...

(b) unacceptable alternative technical details, such as design, materials, workmanship, specifications, standards or methodologies, and

(c)"

- [53] It is to be noted, that the preliminary examination of bids is carried out by an evaluation committee which functions are specified under regulation 64(1) of the Regulations, which is couched in the following terms;

"64(1) An evaluation committee shall conduct a preliminary examination to determine whether bids are complete and responsive to the basic instructions and requirements of the bidding documents".

- [54] Therefore, it is within the interpretation and application of these statutory provisions and regulations, that the National Tender Board held, that the Petitioner's bid was non responsive, and that this was after the evaluation committee had found, that there was a material deviation, in that, the Petitioner had modified the Section 7 Form and provided different rates that impacted on the cost, and caused the bid to be rejected.

- [55] The point raised by the Petitioner that the Review Panel of the National Tender Board did not disclose sufficient reasons for their decision calls for the need to consider the point in a wider perspective. Lord Woolf, in his book "Protection of the Public", at Page 92, regards *"the giving of satisfactory reasons for a decision as being the hallmark of good*

administration". In an article written by one Ms. Jamela A. Ali, and update in 2008, entitled "Duty to give reasons – the way forward", the following argument is advanced;

"The giving of reasons (by decision makers) is considered to be inextricably bound up with natural justice or the right to be fairly heard and is fundamentally important as a public law principle".

In fact, in *Breen V AEU* 1971, 1 ALLER, 1148-1154, Lord Denning MR, once described the giving of reasons as the following;

"one of the fundamentals of good administration".

[56] In her article mentioned in the preceding paragraph, Ms Jamela Ali goes on as to say that;

".... to omit reasons is not only to take away the "good" in the administration, but also to instil bad administration on society. The giving of reasons is a fundamental requirement of fairness, and is necessary for the satisfaction of parties. The concept of fairness, justice and reasons are interchangeable and one cannot be achieved without the other. Reasons are the link between the decision and the mind of the decision maker"

[57] Clearly, therefore, I am of no illusion, that in the administration of justice, there is a common law duty to give reasons which is a catalyst for good administration. Even, if one would disagree with that proposition, the duty is also implied as is the case in the instant case by virtue of Section 98(6) of the Act. This is so because there is a need to ensure fairness, personal liberty and to prevent an aberrant, unreasonable or irrational decision. Thus, to give reason is to invite accountability and transparency and to not expose oneself

to criticism. This helps to ensure that power is not abused, or arbitrarily exercised. This, of course, will in turn prompt public confidence in the system.

[58] In *Flannery v Halifax Estate Agencies Ltd* [2000] 1 WLR 337 at 381, LJ stated, that;

“the duty is a function of due process, and therefore justice”

In *R v Civil Service Appeal Board expt Cunningham* [1991] 4 ALLER 310, Lord Donaldson, MR had this to say,

“There is a principle of natural justice that a public law authority should always or even usually give reasons for its decision”

similarly, Pill J in *R v Crown Court at Harrow exp Dave* [1994] 1 ALLER 315b said that;

“a refusal to give reasons might amount to a denial of natural justice”.

[59] It is noted however, that the Petitioner is not alleging that no reasons were disclosed by the Review Panel. It alleges that insufficient reasons were given. What the Review Panel may have considered to be sufficient reasons, in the eyes of the Petitioner they were insufficient.

[60] As to the allegation that the decision of the Review Panel was unreasonable, it is the contention of the Petitioner that the decision was unreasonable and indeed irrational because the Review Panel did not consider the detailed written submissions made at the hearing date. Upon reading the reply and submission of the 1st and 2nd Respondents, it appears, that the Review Panel upheld the decision on the premise that the primary decision of the National Tender Board complies with the law. This, the Petitioner argues, was unfair and unreasonable because it breaches the rules of natural justice, and one constitutional right to be heard.

[61] In the leading House of Lords case of *Doody v Secretary of state for the Home Department* [1993] 3 ALLER, 92 Lord Musfill referred to the term “fairness” *as an insistence on*

greater openness, or “transparency” in the making of administrative decisions”. The law lords had this to say;

“Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representation on his own behalf either before the decision is taken, with a view to producing a favourable result, or after it is taken, with a view to procuring its modification, or both, since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interest fairness will very often require that he is informed of the gist of the case which he has to answer”.

[62] At this juncture, therefore, the question that calls for an answer, is whether the decision by the Review Panel to uphold the primary decision was unreasonable, and indeed irrational? To find the correct answer to this question, I have had regard to the provision under several regulations under the Public Procurement Regulations, 2014. I find, that the decision cannot be irrational nor unreasonable in the face of Regulation 61(2), (3) and 4, taking also into account Regulation 64(4). Regulation 61(2) says, that a substantially responsive bid is one which inter alia, follows the instructions and requirements of the bidding documents without material deviation. Material deviation under Regulation 61(3) (a) shall be, inter alia, one that substantially affects the scope of services specified in the bidding documents. By adding additional information on the call tariffs, further demonstrated by amending the relevant form to accommodate this, it did affect the scope of the services in a substantial way.

[63] Material deviation in Regulation 61(3) (C) is one which shall place one bidder at an unfair competitive advantage. The Petitioner has sought to argue, that if the National Tender Board was dissatisfied with the manner which the form was filled out by the addition of extra details, it ought to have been given the chance to amend its bid and correct the errors. This argument, arguably, faces the challenge of Regulation 61(3) (C). This is because if the deviation as contemplated and found under Section 61(3) (a) above and demonstrated in the manner the form was filled, and further amended was permitted to be corrected, it would have placed the Petitioner at an unfair competitive advantage prohibited under

Regulation 61 (3) (c). The Petitioner would have had a second bite at the cherry to submit their bid with an extension of time which was not awarded to other bidders. This view is also strengthened on a closer reading of Regulation 64(4) which provides other items which may be considered material deviation. Regulation 64(4)(b) expressly states, that alternative technical details are a material deviation. Admitted, by the Petitioner offering the technical details as they did, however *bonafide* as they assumed, did offer alternative technical details which were not required, and first found to be unacceptable.

[64] The law is clear, on a finding of material deviation under Regulation 61(3), it is a requirement by regulation 61(4) that such a bid be disqualified. Similarly, on a finding of material deviation under Section 64(4), it is required by Regulation 64(6) that such bid be disqualified. The National Tender Board did so, and the Review Panel upheld that primary decision. In doing so, it cannot be said, that the Review Panel were unreasonable and irrational which based on the findings of this Court they were not.

[65] The question that now calls for consideration, is whether there has been procedural impropriety on the part of the Review Panel. It is noted, that it is in respect of the procedure adopted at the hearing which brought about the secondary decision, that the Petitioner feels aggrieved. The Petitioner argues, that they were denied a fair hearing, and as such, sought to challenge the procedure at the hearing. This is because the evidence of the National Tender Board was heard in the absence of the Petitioner, and that of course, gives the Petitioner good reason to argue, that there was a breach of Section 15(2) of the Public Procurement Act 2008. Part XVI of the Regulations lays out the procedure to be adopted when a bidder seeks to challenge, appeal or review of the decision of the National Tender Board.

[66] Regulation 171(3) provides that;

“An Applicant and any Respondent shall be entitled to give evidence, call witnesses, cross examined witnesses and address the Review Panel, and any time in the course of the

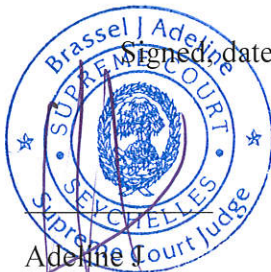
hearing, request any other party to produce any document alleged to be in possession of that party which is relevant to the Application”

[67] Over and above that, there are general rules of natural justice which adjudicating Authorities such as the Review Panel are bound by. The case law cited in the preceding paragraphs are instructive on that point. Furthermore, in *Chio v Tave* [2011] SLR 157, the Court held, that procedural impropriety includes a failure of an administrative body to follow procedural rules, the failure to observe the rules of natural justice, or the failure to act with procedural fairness.

In the cases cited in the preceding paragraphs from other jurisdiction, similar point is made. It is within these background, therefore, that I have to agree with learned Counsel for the Petitioner, that it is procedural irregularity to not permit the Petitioner to hear and respond to the National Tender Board’s submission during the hearing. Therefore, the Petitioner’s case succeeds on procedural impropriety.

CONCLUSION

[68] In conclusion, therefore, I find, that the grounds of unreasonableness and irrationality in this judicial review proceedings have no merits, and on that basis, the petition cannot succeed. I find however, that the petition does succeed on the ground of procedural impropriety. To accord the Petitioner’s prayer to quash the entire ruling and order of the Review Panel (the secondary decision), this Court quashes the ruling and order of the Review Panel of the National Tender Board on the basis of procedural impropriety. The primary decision stands until otherwise successfully challenged, and overturned.



Signed, dated and delivered at Ile du Port on 28th April 2023

Adeline J