[2015] JMSC Civ 21

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2014 HCV 05928

BETWEEN	**BUILD-RITE CONSTRUCTION COMPANY LIMITED**	**1ST APPLICANT**
AND	**GM AND ASSOCIATES LIMITED**	**2ND APPLICANT**
BETWEEN	**NIF RESORT MANAGEMENT COMPANY LIMITED**	**1ST RESPONDENT**
AND	**THE ATTORNEY GENERAL OF JAMAICA**	**2ND RESPONDENT**

Mr. Charles Piper Q.C. and Mr. Duane O. Thomas for the Applicants

Mr. Patrick Foster Q.C., Mrs. Camile Wignall-Davis and Mr. Mark Paul Cowan instructed by Nunes, Scholfield, DeLeon & Co. for the 1st respondent

Ms. Marlene Chisholm instructed by the Director of State Proceedings for the 2nd Respondent

Heard: February 5, 6, and 19, 2015

Administrative law- Application for leave to apply for judicial review

IN CHAMBERS

LAING J

The Application

[1] By Notice of Application for Court Orders, filed on 2 December 2014, the 1st Applicant, Build-Rite Construction Company Limited and the 2nd Applicant, GM and Associates Limited have sought the following orders.

1. *That leave be granted to the Applicants to apply for Judicial Review, by way of:*

   (i) *A Declaration that the 1st Respondent's cancellation of the tender process in respect of Invitation for Sealed Bids, concerning the projects known as, the Braco Hotel Infrastructure Improvement Room Blocks Renovations Phase 1A – RFP004a1 and Braco Hotel Infrastructure Improvement Room Blocks Renovations Phase 1B – RFP004a2 (hereinafter referred to as "1st tender"), dated July 2014, and which bids were delivered to the 1st Respondent on or before 3:15pm., Tuesday August 26, 2014, (communicated by the 1st Respondent's letters to the Applicants, dated October 22, 2014) was unlawful, unreasonable, and not carried out in accordance with the provisions of Government of Jamaica, Handbook of Public Sector Procurement Procedures, Volume 2, Procedures for the Procurement of Goods, General Services and Works, which binds the Respondent;*

   (ii) *A Prohibitory Injunction restraining the Respondents, whether by themselves and /or their servants or agents from receiving, opening and/ or accepting any or all bids submitted in response to the 1st Respondent's Invitation for Seal Bids, in respect of the projects known as, the Braco Hotel Infrastructure Improvement Room Blocks Renovations Phase 1A – REP 0004a1 and Braco Hotel Infrastructure Improvement Room Blocks Renovations Phase 1B – RFP0004a2 (hereinafter referred to as "2nd tender), dated November 2014, and which bids were delivered to the 1st Respondent on or before 11 a.m., Thursday December 4, 2014;*

   (iii) *An Order of Certiorari quashing the decision of the 1st Respondent to cancel / abort the tender and procurement process in respect of the 1st tender, and the decision to initiate the 2nd tender process; and*

   (iv) *A Mandatory Injunction:*

      (i) *Ordering the 1st Respondent to resume and continue the bidding process in respect of the 1st tender; and*

      (ii) *Ordering the 1st Respondent to comply with the National Contracts Commission's decision that the 1st Respondent must evaluate the 1st Applicant's bid submitted in response to the 1st tender, which decision was made and issued pursuant to the Administrative Complaints Review Process outlined in Section 2.5, Volume 1, Government of Jamaica Handbook of Public Sector Procurement Procedures.*

2. *Costs of the Application to the Applicants.*

3. *That an interim injunction be granted against the Respondents for a period of 14 days from the date of this Order or any period determined by the Court, or alternatively, that the interim injunctions granted by Morrison, J. on December 4, 2014 against the Respondents, which expires on the 18th December 2018, be extended, for a further period determined by this Honourable Court…"*

[2] At the hearing of the Notice of Application the Court granted the oral application for the amendment of paragraph 3 of the Notice of Application, and as amended it now reads as follows:

> *"That an Interim Injunction be granted against the Respondents pending the hearing and determination of the matters which are the subject of the Judicial Review".*

The background

[3] The Braco hotel ("***the Hotel***"), is situated in the parish of Trelawny on lands owned by the Government of Jamaica. Although once a thriving resort it has been closed for some time and is haemorrhaging the limited resources of the Country at a rate of more than three Hundred million Jamaican Dollars (J$300,000,000.00) for every year that it remains closed.

[4] There have been recent efforts aimed at applying a tourniquet to stem this loss and eventually returning the Hotel to profitability. With this objective in mind a management agreement has been entered into on 19 November 2013, between the 1st Respondent and the Spanish hotel chain, Melia Hotels International S.A. ("***Melia***") for the management of the Hotel under its widely recognized brand.

[5] As part of the efforts to get the Hotel re-opened, the 1st Respondent was required to effect certain refurbishment at the Hotel, which is to consist of 2 phases ("***the Works***") and engaged Michael Robinson Associates, quantity surveyors, to oversee the Works. Michael Robinson Associates were also required to assist in the management of the tendering process pursuant to which a qualified contractor would be chosen to

complete the Works.

[6] The Applicants were among a group of six contractors which successfully pre-qualified as eligible contractors. The Applicants purchased the bid documents and were in fact the only two (2) bidders to properly submit bids in response to the 1st Respondent's invitation for bids. Their sealed bids were opened on 26 August 2014.

[7] After assessing the Applicants' bids Michael Robinson Associates disqualified the 1st Applicant's bid as being non-responsive. This was on the ground that it contained a material deviation from the bidding requirements, in that, based on its bidding data sheet chart submitted as part of its bid, it proposed to carry out the construction works in six (6) months. This was as opposed to the stipulated four (4) months as expressed in the "Abstract of Particulars." It later appears that the conclusion was that the period was in fact in excess of five (5) months but not much turns on this distinction.

[8] The 2nd Applicant's bid was evaluated and Michael Robinson Associates concluded that it did not have the experience or the capacity to carry out both phases of the Works. It was therefore recommended for one phase only.

[9] Being faced with one qualified bidder in respect of one phase of the Works only, the 1st Respondent decided to terminate the bidding process, and that decision was communicated by way of a letter dated 22 October 2014, which was sent to the Applicants herein.

[10] In early November, the 1st Respondent began a second tender process for the Works. The deadline for the submission of bids in that process was 4 December 2014.

[11] The Applicants made complaints about the conduct of the first bid to the 1st Respondent, copied to the National Contracts Commission, the Contractor General and other parties. After limited participation in the second bidding process, on 2 December 2014 the Applicants filed the Application herein.

[12] An *ex parte* injunction was granted by Morrison J on 4 December 2014, which has not been extended, but the 1st Respondent has given an undertaking to preserve the *status quo* and at the end of the hearing of this matter, Counsel for the

Respondent's extended that undertaking until Friday 20 February 2015.

[13] The Applicants assert that there is a clear right to apply for judicial review in circumstances in which they have been treated unfairly in relation to the tender submitted by each of them and that they are both entitled to ask the Court to review the entire bidding process and its eventual termination.

Is the claim justicable by way of judical review?

[14] Civil Procedure Rules, 2000 as amended ("**CPR"**) rule 56.2 provides for an application for judicial review to be made by any person with a sufficient interest in the subject matter of the application. This includes anyone who has been adversely affected by the decision which is the subject matter of the application. The Applicants assert that they have been adversely affected by the decisions of the 1st Respondent in the assessment of their bids and in the termination of the first bid. However it is not every decision which adversely affects a party which is justiciable by way of judicial review and the Court must assess the decisions complained of against the background of the applicable law before granting leave to apply for judicial review.

[15] Mr. Piper Q,C. submitted that there is a clear public law element on which the Application for leave is based, since, (as I summarise it), the matter concerns, *inter alia*, procurement of services in the public sector by a state owned body using public funds. He submits that when such a body as the 1st Respondent invites tenders from the public and makes a decision in respect of such tenders, it is required to do so in compliance with the Government of Jamaica Handbook of Public Sector Procurement Procedures (the ***"GOJ Handbook"***). In doing so, he argues, it is performing a public duty.

[16] Mr. Piper further submits that the GOJ Handbook at clause 2.5.5 of section 2, Volume 1, expressly provides that the Courts have jurisdiction over actions pursuant to the handbook, and petitions for judicial review of decisions made by reviewing bodies, or of the failure of those bodies to make a decision within the prescribed time limits.

[17] I do not interpret clause 2.5.5 to be purporting to establish an independent route to judicial review or to be conferring a right to judicial review of all decisions of reviewing

bodies that relate to procurement of goods and services. In my view, it is merely confirming the existence of a right which arises from the prevailing legal regime. Decisions of reviewing bodies must therefore be considered within the context of the general rules governing judicial review and the bases of entitlement thereto.

[18] The starting position of Mr. Foster Q.C. was that the matter does not have a public law element and the Court should not grant leave to proceed to judicial review. He referred the Court to the guiding principles which can be extracted from the dictum of Lord Scott Baker in the Court of Appeal (UK) case of ***R (on the application of Tucker) v Director General of the National Crime Squad*** [2003] EWCA Civ 57 where he stated the following:

> *"[16] What are the crucial factors in the present case? In Leech v Deputy Governor of Parkhurst Prison [1988] AC 533, [1988] 1 All ER 485 Lord Oliver of Aylmerton said that the 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. I regard this as a particularly important matter to keep in mind in the present case…*
>
> *[24] In The Queen on the application of Hopley v Liverpool Health Authority & Others (unreported) 30 July 2002 Pitchford J helpfully set out three things that had to be identified when considering whether a public body with statutory powers was exercising a public function amenable to judicial review or a private function that was not. These are:*
>
> *"i) Whether the defendant was a public body exercising statutory powers;*
>
> *ii) Whether the function being performed in the exercise of those powers was a public or a private one; and*
>
> *iii) Whether the defendant was performing a public duty owed to the claimant in the particular circumstances under consideration."*

[19] Mr. Foster also referred the Court to the case of **R (on the application of West) v Lloyd's of London** [2004] EWCA Civ 506 in which the **Tucker** test was applied and

to the case of **R (on the application of Menai Collect Ltd and others) v Department for Constitutional Affairs and another** [2006] EWHC 727 where Justice McCombe opined as follows at para. 47:

> *"…the tender evaluation process was an essentially commercial process, notwithstanding the nature of the services which are to be the subject of the contract. The manner in which the Defendant chose to inform itself as to the merits of the tenders was designed to be as objective as possible. It is not every wandering from the precise paths of best practice that lends fuel to a claim for judicial review. It is, I think, for this reason that the examples given of cases where commercial processes such as these are likely to be subject to review are such as they are in the reported cases, namely bribery, corruption, implementation of unlawful policy and the like. In such cases, there is a true public law element. Here, as in Hibbit, the fact that the decision sought to be reviewed is the placing of a contract with one bidder as opposed to another adds force to the contention that there is no relevant public law obligation in issue…"*

[20] The case of **R v Coventry City Council, ex parte Coventry Heads of Independent Care Establishments and others** [1997] EWHC Admin 172 was also relied on by Mr. Foster Q.C. to support his submission that what the Court ought to consider is the general paramountcy of the contractual relationship between parties in considering judicial review claims and whether an administrative Court ought properly to intervene.

[21] It is my view that the authorities provided to the Court on behalf of the 1st Respondent indicate an over-arching principle that the right to judicial review does not necessarily arise because there is a public or statutory body exercising a statutory function, without more, but that the important consideration is whether the subject matter of the decision being challenged involved duties owed as a matter of public law.

[22] Mr. Piper submitted that the cases relied on by the 1st Respondent on the issue of whether the matter is justiciable by way of judicial review are all cases in which the issue was examined at the stage of judicial review hearing and not at the stage of an application for leave to apply for judicial review. He submitted that it was not a correct

approach to make that determination on an application for leave to apply for judicial review. He urged the Court to be cautious when approaching the cases. He further submitted that the cases cited also demonstrate that there must be a public body exercising statutory powers.

[23] Whereas I am guided as to the need for caution in this regard, especially at this stage of these proceedings, I do not accept that this is an issue which I should not consider at this stage or that I should not refuse to grant the leave to proceed with the application if I find that it is clear that there is no public law element.

[24] I do not find that the evaluation process of the first tender in this case was anything other than a purely commercial exercise which is governed by private/civil law considerations. This was not a case involving bribery, corruption, implementation of unlawful policy or any other breach of proper evaluation procedure (for the reasons which are discussed in greater detail later in this judgment). I therefore do not find that there is a true public law element to be reviewed by the Court in this case.

[25] The Hotel is a purely commercial endeavour. The refurbishing of the Hotel is being done in an effort to make it attractive and competitive in a hospitality market in which there is increasing competition as a result of new participants. The 1st Respondent was set up as a commercial enterprise to manage and maximize the income earning potential of the Hotel and there is an agreement in place for the Melia Spanish hotel chain to contribute its expertise by managing the Hotel under the umbrella of its well known brand. The procurement process was therefore being driven by purely commercial considerations (and correctly so), which were not influenced by the fact that the 1st Respondent is owned by the state. There was no general overriding public duty in conducting the assessment process and no public duty was owed to the Applicants in particular. The procurement process did not have a general public law element and did not have a public law element which might have arisen from any bribery, corruption, implementation of unlawful policy or unfairness in the evaluation or cancellation of the first bidding process, and the Court found none of those factors present.

[26] Any remedy which the Applicants seek will therefore properly lie in the realm of private law and it is settled that in certain circumstances an invitation to tender may give rise to contractual obligations as held in ***Blackpool and Flyde Aero Club Ltd v Blackpool Borough Council*** [1990] 3 All ER 25.

The Termination of the first tender process

[27] In order to fully assess the decisions of the 1st Respondent being complained of by the Applicants, it is necessary to examine those decisions, not in a vacuum but in the context and against the background of the operation of an invitation to tender generally and the objectives of the tender process.

[28] The Court fully recognizes that the 1st Respondent had an obligation to abide by the GOJ Handbook Section 1.1 of which outlines "*the procedures and methods for public Officers engaged in planning and managing the procurement of goods, works and services on behalf of the GOJ in accordance with its policy on Public Sector Procurement.*" Provided that the 1st Respondent acts fairly, this provision does not mean that the 1st Respondent is thereby automatically deprived of the ability to make sensible commercial decisions in its procurement process, or to make decisions which would be made by a non-governmental entity applying commercial considerations to its decisions in the circumstances as faced by the 1st Respondent,

[29] Bingham LJ summarises the usual operation of the tender process in ***Blackpool and Flyde Aero Club Ltd v Blackpool Borough Council*** [1990] 3 All ER 25 at page 30 as follows:

> *"…A tendering procedure of this kind is, in many respects, heavily weighted in favour of the invitor. He can invite tenders from as many or as few parties as he chooses. He need not tell any of them who else, or how many others, he has invited. The invitee may often, although not here, be put to considerable labour and expense in preparing tender, ordinarily without recompense if he is unsuccessful. The invitation to tender may itself, in a complex case, although again not here, involve time and expense to prepare, but the invitor does not commit himself to proceed with the project, whatever it is, he need not accept the highest tender; he*

> *need not accept any tender; he need not give reasons to justify his acceptance or rejection of any tender received. The risk to which the tenderer is exposed does not end with the risk that his tender may not be the highest (or, as the case may be, lowest).*

[30] The above quoted passage explains why the complaint by the Applicants in relation to the fact that they were not advised of the reasons for the termination of the first bid will not provide a proper basis for leave to apply for judicial review. Furthermore, the Applicants being entities involved in the construction field would in all likelihood be familiar with the usual requirements on an invitation to tender and should have noted specifically Clauses 29.1 and 30.1 of Section II Instructions to bidders in respect of the Works which provide as follows:

> *"29.1 Subject to Clause 30, the Procuring Entity will award the Contract to the Bidder whose Bid has been determined to be substantially responsive to the bidding documents and who has offered the lowest responsive bid price, provided that such Bidder has been determined to be (a) eligible in accordance with the provisions of Clause 3, and (b) qualified in accordance with Clause 4.*
>
> *30.1 Notwithstanding Clause 29, the Procuring Entity reserves the right to accept or reject any Bid, and to cancel the bidding process and reject all bids , at any time prior to the award of Contract, without thereby incurring any liability to the affected Bidder or bidders or any obligation to inform the affected Bidder or Bidders of the ground for the Procuring Entity's action."*

[31] The Applicants should also have noted that Section 2 of the GOJ Handbook at clause 2.5, which deals with complaints and appeals, provides that the selection of the method of procurement and the decision of the procuring entity to reject all tenders, proposals, offers or quotations are not subject to review.

> *2.5 Any contractor, who claims to have suffered loss or injury due to a breach f these procedures by the Procuring Entity, may seek a review of the specific procurement process. Notwithstanding the foregoing, it should be noted that the following are not subject to review: (i) the selection of the method of procurement and (ii) the decision by the procuring entity to reject all tenders, proposals, offers or quotations.*

[32] The Instructions to Bidders in respect of the Works and the GOJ Handbook therefore recognize the commercial wisdom and practicality in having the procuring

entity retain the right to terminate the procuring process, should this become necessary as a matter of prudent decision making. The Applicants ought to have been aware of this right when they submitted their bids and participated in the process.

[33] As it relates to the 2nd Applicant specifically, there is the assertion that the decision to disqualify it from one phase of the Works was not based on any evidence. However the Court has not been provided with sufficient evidence to suggest that it ought not to have been so disqualified.

[34] I therefore find that the 1st Respondents having determined that the 1st Applicant's bid was not substantially responsive, and having been left with the 2nd Respondent's bid only, (which was only recommended in respect of one phase), was constrained to consider terminating the first bidding process. I find that its decision to terminate the first bidding process in those circumstances was a prudent business decision and manifestly reasonable when all the facts are considered in the round. The Court does not find that the first tender procurement process was unlawfully cancelled by the 1st Respondent and consequently, I do not accept that the complaints of the Applicants regarding the termination of the first tender are valid complaints capable of invoking judicial review.

[35] Having found that that the issues between the parties are not amenable to judicial review, that effectively disposes of the Application. Mr. Foster QC had suggested that if the Court did not so find, it should go on to consider whether there are any discretionary bars which apply. Notwithstanding my findings above I do consider that it would be sensible to also consider the existence of any discretionary bars.

Is There An Alternative Remedy Available To The Applicants?

[36] Mr. Foster submitted that Justice Beatson in ***Regina (on an application by JD Wheatherspoon Plc) v Guilford Borough Council*** 2006 EWHC 815 (Admin) at para. 90 provides helpful guidance on the issue of the availability of an alternative remedy where he stated:

> *"The test of whether a claimant should be required to pursue an alternative remedy in preference to judicial review is the 'adequacy,' 'effectiveness' and suitability of that alternative remedy. See ex parte Cowan R v Devon CC, ex parte Baker (1985) 1 All ER 73 at 92, 91 LGR 479, 11 BMLR 141. In R v Leeds CC ex parte Hendy (1994) 6 Admin LR at 443 it was said that the test can be boiled down to whether 'the real issue to be determined can sensibly be determined' by the alternative procedure and in R v Newham LBC ex parte R 1995 ELR 156 at 163 that it is whether the alternative statutory remedy will resolve the question at issue fully and directly."*

[37] The Court was also referred to the decision of Batts J in the case of **Paymaster Jamaica Limited v Postal Corporation of Jamaica** [2013] JMSC Civil 196 in which the learned Judge, in a public procurement case, refused the application for leave on the ground of "the availability of alternative remedies." Batts J found as follows:

> *"[17] Furthermore, and perhaps more to the point of alternative relief, the legislature in the Regulations and the Handbook of Public Sector Procurement Procedures has clearly signaled that breaches or alleged breaches of procurement procedures ought not to prevent the public sector entity proceeding with a contract already entered into. In this regard see also Regulations 39 and 40 which provide for criminal and civil relief by way of damages. The Regulations do not say, as they well might, that the impugned contract will be set aside and the wronged person reinstated or substituted…*
>
> *[18] The position it seems to me may have been otherwise if there was a credible suggestion that the conduct of the public sector entity was ultra vires. Not in the sense of a wrongful mode of doing something it is entitled to do, but in the sense that it was doing something it had no authority to do. In this case there is no suggestion that the Respondent did not have authority to enter into the contract. The issue is whether it went about it in the correct way."*

[38] Based on my findings that the dispute between the parties is essentially a commercial dispute between the parties to which remedies may be sought by a civil claim for breach of contract, I also find that such a claim would provide an adequate suitable and effective remedy. For these reasons (independently of the other reasons expressed in this judgment), I find that judicial review would not be appropriate in this case.

[39] Mr. Piper submitted that there is no alternative remedy because in any event damages would not be an appropriate remedy since there was a matter of great significance at stake, from the standpoint of public law. He submitted, (and I hope my summary does justice to his eloquent formulation of the point), that no award of a sum of money can compensate to the Applicants for the missed opportunity to be given a fair consideration on the first tender and to be awarded the multimillion dollar contract. He submitted that the matter concerned a neglect or refusal of the 1st Respondent to follow and be guided by the relevant policy of the Government, and this was done in disregard of the constitutional rights of the Applicants. Counsel also pointed out that the Claimants viewed the opportunity to participate in the Works as an opportunity to serve the Country and to contribute to nation building. He further submitted that there were important matters of good governance to be considered including the avoidance of corruption (or the perception of corruption) and the need to prevent governmental bodies from concluding that they can behave as they wish, unfettered by the Courts, with the wronged party having no recourse save for a claim in damages.

[40] With all due respect to learned Queen's Counsel, I do not agree with his characterization of the nature of the dispute. In my view, Mr. Piper has sought to elevate the dispute to a level of significance which is not justified on the evidence. The project involves a hotel which happens to be owned by the Government of Jamaica. It bears no particular significance in terms of its historical, archaeological or cultural place in our growing nation, albeit admittedly its financial success will ensure to the benefit of the Country as a whole. Reduced to its core, this is a complaint by the Applicants, which are commercial entities that intended to pursue a business opportunity to make a profit, as is their main objective. The evidence does not suggest that any emotional or nationalistic element was significant in the decision to submit a bid. If the Applicants have in fact been wronged, assessment of the extent of damages is clearly possible based on the contract price and anticipated profit, factoring in any other applicable considerations. The amount of damages as properly determined, will no doubt provide an adequate remedy.

Reasonable Prospect of Success

[41] In **Sharma v Brown-Antoine and Others** (2006) 69 WIR 379; [2007 1 WLR 780] an appeal from the State of Trinidad and Tobago to the Privy Council, at para. 14 (4), against the backdrop of the Judicial Review Act 2000 of that nation, the Privy Council stated the general rule as follows:

> *"The ordinary rule now is that the court will refuse leave to claim judicial review unless satisfied that there is an arguable ground for judicial review having a realistic prospect of success and not subject to a discretionary bar such as delay or an alternative remedy; R v Legal Aid Board, ex parte Hughes (1992) 5 Admin LR 623 at 628, and Fordham, Judicial Review Handbook (4th Edn, 2004), p 426. But arguability cannot be judged without reference to the nature and gravity of the issue to be argued."*

[42] The Court was also referred by Mr. Foster to the statement of Sykes J in the **IDT ex parte Wray and Nephew** [2009] HCV 04798 where he said the following:

> *"58. The point then is that leave for application for judicial review is no longer a perfunctory exercise which turns back hopeless cases alone. Cases without a realistic prospect of success are also turned away. The judges, regardless of the opinion of the litigants, are required to make an assessment of whether leave should be granted in the light of the now stated approach….*
> *…It also means that an application cannot simply be dressed up in the correct formulation and hope to get by. An applicant cannot cast about expressions such as "ultra vires", "null and void", "erroneous in law", "wrong in law", "unreasonable" without adducing in the required affidavit evidence making these conclusions arguable with a realistic prospect of success. These expressions are really conclusions."*

[43] At paragraph 60 in considering whether leave should be granted, Sykes J approached the matter as follows:

> *"I now turn to an examination of the material placed before the court and ask myself, "Is there an arguable case disclosed by the material which has a realistic prospect of success? " I remind myself that arguability does not exist in splendid isolation but in relation to the nature and gravity of the matter. Realistic prospect of success does not mean that the applicant has to establish a more than 50% chance of success."*

[44] In adopting a similar approach it is necessary to look at the points of complaint of the Applicants and remind myself of the need to be cautious particularly in assessing any facts which may be in dispute. It was submitted on behalf of the Applicants that one issue for Judicial Review would be how long was the required time period for the Works, whether it was six months, five months or as the 1st Respondent claims, four months.

[45] Another issue for Judicial Review, Mr. Piper submits, is whether the 1st Applicant was entitled to have an opportunity to clarify any issues relating to its tender and in relation to its the time for completion, prior to the rejection of its tender by Michael Robinson Associates on behalf of the 1st Respondent.

[46] As it relates to the 2nd Applicant, it was submitted that the 1st Respondent wrongfully determined that it was incapable of performing both phases of the Works without any evidence to support such a conclusion. Although the 2nd Applicant was accepted as a qualified bidder it was only recommended in respect of one phase of the Works and in the end the first bid was terminated thereby costing the 2nd Applicant its opportunity to perform any part of the Works.

What was the required period for the performance of the works?

[47] The bidding documents provided to prospective tenderers including the Applicants included the Abstract of Particulars which expressly prescribed a "***Date for Completion of the Works***" of four (4) months.

[48] By Letter dated 16 September 2014 addressed to the 1st Applicant, Michael Robinson Associates notified it that:

> *"...The period stated on the Abstract of Particulars for the completion of the works is four (4) months.*
>
> *The period proposed by Build-Rite Construction Company Limited by means of the programme submitted as requested by Clause 12.1(a) of the Bidding Data sheet is six (6) months.*
>
> *In light of the counteroffer of six (6) months with regards to the period for completion, the bid submitted by Build-Rite Construction Company Limited is not considered substantially responsive in accordance with Clause 26 of the Instructions to Bidders and is hereby rejected...."*

[49] The position of the 1st Applicant is represented in its letter dated 16 September 2014 in which it stated:

> "...*In response to your letter dated September 16, 2014 re the captioned project informing us of the rejection of the bid, we hereby challenge that decision and clarify the assumptions made in your interpretation of the schedule.*
>
> *The invitation to tender requested that the job be completed within 4 months which can be interpreted as 120 consecutive days or 80 working days. The collective work items were scheduled with a total duration of 110 consecutive days which would be equivalent three and a half calendar months. Microsoft Projects however automatically assigns weekends as non-working days and this is what is reflected on the graphical timeline of the schedule. We understand that time is major factor in this project and we stand by our ability to complete the job in 110 consecutive days (Three and a Half Months) at the offered tender price.*
>
> *There is no written mention of a 6 month completion time in our tender, neither did the bid document say whether or not the four month project duration of 120 consecutive calendar days was used. We have made no counter offer of 6 months as you have stated in your letter. The misunderstanding may have been guided by a technical error in the timetable of your printed schedule (as explained above re Microsoft projects), however this is a simple point of clarification that should have been requested before your position of rejection was arrived at..."*

[50] In its letter dated 14 September 2014 to Mr. Raymond McIntyre, Chairman, National Contracts Commission, the 1st Applicant raises another point which is that *"Further investigation of the tender document has specified no project duration. The Abstract of particulars (see attached) refers to a "date for completion of works" which it requires to be Four (4) Months. There is no mention of contract duration or contract period. Therefore, Michael Robinson Associates has no right under the tender to disqualify us on grounds of our schedule being deemed to surpass the requested project period as there was none in the document."*

[51] Mr. Carvel Stewart of the Incorporated Masterbuilders Association of Jamaica in his letter of 19 November 2014 also observes, *inter alia* that there was an error in the Abstract of Particulars which stated the Date for Completion of the Works as four months when four months is a duration. This point was also made by Mr Owen Campbell of the 1st Applicant in paragraph 16 of his Affidavit sworn on 7 January 2014

in reply to the Affidavits of Michael Robinson and Audrey Deer Williams. Although heavy weather has been made of it, I do not find that the fact that the Abstract of Particulars refers to a "date for completion of Works" rather than a "time" or "period" for completion of works could have reasonably misled the 1st Applicant, or any other bidder to conclude that the four month period referred to anything other than the period of time within which the Works were to be completed. It is noted that the issue of the required period of 4 months was not an issue in respect of the 2nd Applicant's bid.

[52] I specifically do not find any merit in the suggestion that the parties were not aware that the period required for the completion of the Works, referred to as the "contract duration" or "contract period", was four months.

[53] In addition to the reasonable construction to be applied to the Abstract of Particulars as mandating a four month period for the completion of the Works, there is uncontroverted evidence that the prequalified tenderers including the 1st Applicant attended a mandatory meeting/site visit to the Hotel on Tuesday 12 August 2014. The evidence of Michael Robinson contained in paragraph 9 of his affidavit sworn on 17 December 2014, is that the purpose of the site visit was to give the prospective bidders an opportunity to examine the site of the Works and to obtain all information that would have been necessary for the preparation of the bid. Since the required period for the completion of the Works is obviously a critical component which would inform a prospective bidder in the formulation of its bid, one would have thought that if the 1st Applicant had any doubts whatsoever as to the meaning of "date for completion" of four months in the Abstract of Particulars, it would have afforded itself of the opportunity to seek the necessary clarification at the site visit or at some other time before submitting its tender.

[54] Mr. Michael Robinson in paragraph 13 of his Affidavit sworn on 17 December 2014 also states that he emphasised a number of key points to the prospective bidders during the site visit in August 2014 including the time-sensitive nature of the project, an intended start date for the construction projects in the month of September and the requirement that the renovations be completed in time to catch the winter tourist season as well as the expectation that the bidders should target a December 2014 end date. It

was also pointed out that given the location of property there would be no issue of nuisance and the contractors could work night and day as well as on weekends to ensure that the Works were completed within the specified period.

[55] It is of importance that clause A8.3 of Appendix 8 of the GOJ Handbook (Volume 2) specifically provides that bidders may in writing request clarification of the information contained in the Bidding Documents from the Procuring Entity which shall respond to these requests in writing.

[56] It is also noteworthy that on 14 August 2014 Michael Robinson Associates received a written request for clarification from Y.P. Seaton and Associates Limited, a prospective bidder, about several matters related to the Works including night works and weekend works and a request from Kier Construction, another prospective bidder which also sought clarification of other issues by letter dated 15 August 2014.

[57] By letter dated 19 August 2014, Michael Robinson Associates responded to these queries confirming that the project was one of national importance and that time was of the essence. It responded to the query in respect of night works and weekend works and reaffirmed the position that contractors were not restricted to any specific day or time to carry out their work and could work day and night to achieve the stated completion date.

[58] The 1st Applicant therefore had ample opportunity to clarify any uncertainty that it may have had in respect of the duration of the period within which the Works were to be completed and did not avail itself of that opportunity. The 1st Applicant cannot now seek to rely on what it asserts is an ambiguity in relation to the appropriate time period.

[59] The evidence of Michael Robinson indicates that pursuant to Clause 12.1(a) of the Bidding Data Sheet the prospective bidders were required to complete and submit a programme of construction works in a Gantt Chart format providing a breakdown of the works to be done and the period of time in which they would be completed. The Gantt Chart submitted by the 1st Claimant indicated a start date of what is acknowledged to be 28 September 2014 and a completion date of 1 March 2015. It is this indicated period for the completion of the construction works which formed the basis for conclusion that

this was a material deviation from the terms of the tender process, which constituted a counter-offer. As a consequence the bid of the 1st Applicant was disqualified pursuant to Clause 17 and 26 of the instruction to bidders and Clause A8.12.2.6 of the GOJ Handbook Vol.2.

Was there a duty or obligation on the part of the 1st Respondent to seek clarification?

[60] It was advanced on behalf of the 1st Applicant that there was a duty on the 1st Respondent to seek clarification of the 1st Applicant in relation to the timeline reflected on its Gantt chart.

[61] As pointed out earlier in this judgment, Section A8.3 of the Appendix to the GOJ Handbook addresses requests for clarification of the Bidding Documents. The "Instructions to Bidders" addresses clarification concerning the substance of a tenderer's bid in this way**:**

> *"25.1 To assist in the examination, clarification, evaluation, and comparison of bids, the Procuring Entity may, at the Procuring Entity's discretion, ask any Bidder for Clarification of the Bidder's Bid, including breakdowns of unit rates (or the prices in the Activity Schedule for lump sum contracts). The request for clarification and the response shall be in writing or by cable, telex or facsimile, but no change in the price or substance of the bid shall be sought or offered, or permitted except as required to confirm the correction of arithmetic errors discovered by the Procuring Entity in the evaluation of the bid in accordance with Clause 27."*

[62] The GOJ Handbook addresses clarification of deviations and provides at Section A8.12.6.3 as follows:

> *"The details and implications of any deviations which are not explicit should be clarified by the Procuring Entity in discussion with the respective Bidders, without changing the substance or price of the bids ..."*

[63] It was submitted by Mr. Foster that it cannot be said that the 1st Respondent had a duty to consult with or seek clarification from the 1st Applicant in relation to what it

considered to be a material deviation from the bidding documents as that course of action would have unfairly prejudiced GM and Associates Limited and would have exposed the Applicant to a possible charge of unethical conduct (See: Section 4.3.1. (c) of the GOJ Handbook Vol. 1) and a potential breach of the 1st Respondent's implied duty to conduct the tendering process in a fair and transparent manner.

[64] In support this submission Mr. Foster referred the Court to the case of **R (on the application of Harrow Solicitors and Advocates) v Legal Services Commission** [2011] EWHC 1087 (Admin), CO/11630/2010 and the reasoning of Judge Waksman QC which I find to be instructive on the issue and a portion of the judgment is reproduced below:

> *"[30] Pausing there, from those three cases it seems to me to be possible to discern the following principles:*
>
> > *"(1) All tenderers must be treated equally;*
> >
> > *(2) It would violate that principle and the principle of good administration in the tendering process if any tenderer were permitted to change its bid after bidding had closed;*
> >
> > *(3) If the awarding authority had a discretion to seek clarification about a bid from the tenderer, the court would not normally interfere with the exercise of that discretion unless (a) it was exercised unequally or unfairly across the relevant bidders or (b) it was not exercised, yet it appeared to the awarding authority that there was an ambiguity or obvious error which probably had a simple explanation and could be easily resolved; seeking clarification in the latter case was required in order that consideration of what might be an advantageous bid should not be excluded; it would be for the awarding authority to determine whether the clarification exercise would be simple or not;*
> >
> > *(4) But any purported clarification must not amount to a change in the bid."*
>
> *[31] In my judgment, the critical factor which gives rise, or may give rise, to a duty to seek clarification is where the tender as it stands cannot be properly considered because it is ambiguous or incomplete or contains an obvious clerical error rendering suspect that part of the bid. If the inability*

to proceed with a bid, which may be an advantageous addition to the competitive process, can be resolved easily and quickly it should be done, assuming there is no change to the bid or risk of that happening. If there is an obvious error or ambiguity or gap, clarifying it does not change the bid because, objectively the bid never positively said otherwise.

[32] What those cases do not establish is that a tenderer which has made a mistake which does not render the tender in any way ambiguous or deficient on its face, but which is objectively verifiable, is nonetheless entitled to have it rectified, as contended for by Mr Clarke, for Harrow… The reason why apparent ambiguity or other deficiency is required is because it is only in those cases where there is an obstacle, as perceived by the awarding authority, to considering the bid. If the awarding authority perceives no such obstacle it is entitled to consider it in the usual way. If, on occasion, this may work against a tenderer which has not taken care with its tender, that is unfortunate but it is a function of the overriding need to have properly prepared, timely and accurate tenders as a matter of good administration. If it were otherwise and tenderers could assert a mistake even when there was no problem on the face of the tender, which the awarding authority had to investigate, it is likely that it would become involved in lengthy and time-consuming investigations, often with no clear outcome, and which would be likely to slow the tendering process down and where there would be the risk of abuse. The process of evaluating the evidence as to the cause of the mistake may not always be straightforward and there would be the risk of not treating all tenderers equally."

[65] Mr. Piper submitted that there was an ambiguity in the tender documents of the 1st Applicant because the period of four (4) months is reflected in its documents as evidenced by the Abstract of Particulars exhibited at "OC-1" to the affidavit of Owen Campbell sworn and filed on 2 December 2014. The four months reflected in the Abstract of Particulars to which the Court was referred originated with the 1st Respondent and does not appear capable of providing confirmation that the 1st Applicant was asserting that it was prepared to complete performance within this period.

[66] The graphic representation as expressed in the Gantt Chart was the medium through which the 1st Respondent assessed the time period which was being proposed for completion by the bidder. I agree with the submissions of Mr. Foster that in the instant case, the period of 5 months as reflected on the Gantt Chart for the construction

duration period was not an “ambiguity” or an “obvious clerical error” which would have posed an obstacle to the 1st Respondent in duly considering the 1st Applicant’s bid and which required investigation by the 1st Respondent for purposes of clarification. It is clearly the duty of the tenderer to ensure that its bid complies with the specific requirements of the procuring entity bearing in mind any unusual feature of the software or other tools the tenderer is using to produce the documents for the bid, for example, the treatment of weekends by such software. Furthermore, enquiries in respect of important but unambiguous issues may serve to unfairly “tip off” the tenderer to the detriment of other bidders.

[67] I therefore do not find that there was any duty on the part of the 1st Respondent to seek any clarification from the 1st Applicant in respect of its timeline for the completion of the Works. I also do not find that there is any evidence that the 1st Respondent acted unfairly in recommending the 2nd Applicant for one phase of the Works only.

Conclusion

[68] For the reasons outlined earlier in this Judgment, I do not find that the decision to terminate the first bid process was unreasonable given the circumstances existing at the time that decision was taken. I also do not find that the failure to communicate its reason for the cancellation of the first bid constitutes an arguable ground for judicial review having a reasonable prospect of success.

[69] As I have indicated earlier I do not find that this is a matter which is justiciable by judicial review and for this reason I find that the Application fails. However in any event it is the finding of this Court that neither of the Applicants have satisfied the Court that there is an arguable ground for judicial review having a realistic prospect of success. I also find that there is an alternative remedy available in the form of ordinary civil proceedings and on these bases, in exercising my discretion I refuse the application for leave to apply for judicial review.

[70] Given the findings above I do not find that there is a proper basis for the granting by this Court of a mandatory injunction as prayed for in the Notice of Application and the application for an interim injunction until the hearing of the judicial review application falls away naturally.