Independent Review Panel

Decision No. 09/20

In the matter of:

Agiliss Ltd

(Applicant)

v/s

Ministry of Health and Wellness

(Respondent)

(Cause No. 13/20/IRP)

Decision

A. History of the case

The Public Body, the Ministry of Health & Wellness (the 'Ministry'), through the open national bidding method, invited bids for the procurement of full cream and semi skimmed milk for all hospitals bearing reference **MHPQ/NMW&S/2020-2021/ONB/Q23** and the closing date was 29th July 2020.

B. Evaluation

A Bid Evaluation Committee was set up by the Ministry to evaluate the bids received. Its bid evaluation report was submitted on 31st August 2020.

C. Notification of Award

On 23rd September 2020, the Public Body in response to the Invitation for Bids informed the Applicant that an evaluation of the bids received has been carried out and the particulars of the successful bidder are as mentioned below:

Item No.	*Description*	*Quantity (Kgs)*	*Selected Bidder*	*Total Price (Rs) (Exclusive of VAT)*
1	Full Cream Milk Powder	51,700	A.A.R Oosman & Co 12, Louis Pasteur Street Port Louis	7,721,395.00
2	Semi Skimmed Milk Powder	68,900		10,669,165.00
Make: Fonterra country of Origin: New Zealand				
Total Contract Price (Exclusive of VAT)				**18,390,560.00**

D. The Challenge

On 30th September 2020, the Applicant challenged the procurement proceedings on the following grounds:

"(a) Agiliss Ltd is the lowest evaluated substantially responsive bidder, especially when attributing due weight to the premium quality of products offered.

(b) Agiliss Ltd wishes to emphasize that its price in respect of Item 2, is the lowest bid, such that in the worst case scenario, Agiliss Ltd ought to have been awarded the contract for the Item No.2, Semi Skimmed Milk Powder.

(c) The Public Body ought to have awarded the contract for both Item No.1 and Item No.2 to Agiliss Ltd, the lowest substantially evaluated responsive bidder."

E. The Reply to Challenge

On 6th October 2020, the Public Body made the following reply to the challenge and stated that:

"a) ***Agiliss Ltd is the lowest evaluated substantially responsive bidder, especially when attributing due weight to the premium quality of products offered.***

Reply:

(i) *The requirements of the Ministry were set out in the bidding document.*

(ii) *Agiliss Ltd is not the lowest substantially responsive bidder for Item 1. Though the offer for that Item met the technical requirements, the price quoted by your company therefor was higher than that of the selected bidder.*

(iii) *With regard to Item 2, your offer does not meet line specification 2.4.6 with regard to yeast mould. Your offer for that Item has a yeast mould of maximum 50/g whereas the requirement of the Ministry is for a maximum of 10/g. Moreover, you have indicated in your bid that that your offer does not comply with the requirement for protein content of not less than 34% of milk protein as non-fat milk solids. As such, your offer for that item was not found to be technically responsive.*

b) ***Agiliss Ltd wishes to emphasize that its price in respect of Item 2, is the lowest bid, such that in the worst case scenario, Agiliss Ltd ought to have been awarded the contract for the item no.2, Semi Skimmed Milk Powder.***

Reply: Please see comments at paragraph(2) (a) (iii) above.

c) ***The Public body ought to have awarded the contract for both Item No.1 and Item No.2 to Agiliss Ltd, the lowest substantially evaluated responsive bidder.***

Reply: Agiliss Ltd is not the lowest substantially evaluated responsive bidder for both Item No 1 and Item No 2 for reasons spelt out above."

F. Grounds for Review

On 13th October 2020, the Applicant seized the Independent Review Panel for review on the following grounds:

"A. *The Applicant is the lowest evaluated substantially responsive bidder, especially when attributing due weight to the premium quality of products offered.*

B. *The Applicant wishes to emphasize that its price in respect of Item No 2, is the lowest bid, such that in the worst-case scenario, the Applicant ought to have been awarded the contract for the Item No.2, Semi Skimmed Milk Powder.*

C. *The Public Body ought to have awarded the contract for both Item No.1 and Item No.2 to the Applicant, the lowest substantially evaluated responsive bidder.*

D. *The Applicant is not satisfied with the response of the Public Body in its letter dated 6th October 2020, in reply to the Applicant's challenge dated 30th September 2020 and states that:*

(i) Fonterra is not a make but the name of a manufacturer of the Milk Powder in New Zealand;

(ii) The selected bidder failed to provide the make of milk powder for both Item No. 1 (line specification 1.2.1) and Item No. 2 (line specification days2.2.1), thus its bid ought to have been declared non-responsive and could not have been retained for award;

(iii) The manufacturer, Fonterra does not provide Full Cream Milk Powder in sealed laminated foil bag of one kg of food grade type inasmuch as there is no Full Cream Milk Powder of such make Fonterra in one kg foil bag on sale on our local market, thus it is impossible for the selected bidder to supply ItemNo.1, Full Cream Milk Powder in compliance with the technical specification provided at line specification 1.5.1, which is a material technical requirement;

(iv) The Public Body failed to properly evaluate and assess that Item No. 1 of the Applicant was of a premium instant full cream milk powder whilst that of the selected bidder was a regular full cream milk which is of a lower quality;

(v) The Semi Skimmed Milk Powder, Item No. 2, which has been offered by the Applicant is manufactured by Fonterra and is of the make NZMP;

(vi) The Semi-Skimmed Milk Powder offered by the Applicant is exactly the same product as that offered by the selected bidder inasmuch it is manufactured by the same factory, namely Fonterra of New Zealand;

(vii) Consequently, since Item No. 2 of the Applicant and that of the selected bidder are exactly the same product, the offer for Item No. 2 of the selected bidder would likewise not be technically responsive; and

(viii) The Public Body failed in its duty to carry out a proper evaluation and comparison of the bids when it awarded the contract for both Item No.1 and Item No. 2 to A.A.R. Oosman & Co."

G. Statement of Case

"A. ***FACTS OF THE CASE***

1. *On or about 23rd June 2020, the Respondent issued bidding documents for Procurement of Full Cream and Semi Skimmed Milk Powder for all Hospitals bearing Procurement reference No.:* ***MHPQ/NMW&S/2020-2021/ONB/Q23***

2. *On or about 28th July 2020, the Applicant submitted its bid in response of the bidding documents issued by the Respondent for the Procurement of Full Cream and Semi Skimmed Milk Powder for all Hospitals bearing Procurement reference No.:* ***MHPQ/NMW&S/2020-2021/ONB/Q23,*** *within the deadline.*

3. *By letter dated 23rd September 2020 (Notification to Unsuccessful Bidders), the Public Body informed the Applicant that an evaluation of the bids received has been carried out, and its bid for both Item No.1 (Full Cream Milk Powder) and Item No.2 (Semi Skimmed Milk Powder) has not been retained for award. The selected bidder for award is A.A.R Oosman & Co of 12, Louis Pasteur Street, Port Louis for Item No.1 for the total price of Rs.7,721,395.-(Exclusive of VAT) and for Item No.2 for the total price of Rs.10,669,165.00 (Exclusive of VAT). The milk powder is of the make, Fonterra of New Zealand. The total price for both items is Rs.18,390,560.00 (Exclusive of VAT). A copy of the said letter is annexed and marked as* ***DOCUMENT 1****.*

4. *Feeling aggrieved and dissatisfied with the intention to award the contract to A.A.R. Oosman & Co of 12, Louis Pasteur Street, Port Louis both Item No.1 and Item No.2., the Applicant filed its challenge on the 30th September 2020. A copy of the said challenge dated 30thSeptember 2020together with its annex is herewith annexed and marked as* ***DOCUMENT 2****.*

5. *By letter dated 6th October 2020, the Respondent replied to the Applicant's challenge and informed the Applicant that its bid was not the lowest substantially responsive bid for Item No.1 as its price quoted was higher than that of the selected bidder and as regards Item No.2, the offer of the Applicant was not found to be technically responsive. A copy of the said letter dated 6th October 2020 is annexed and marked as* ***DOCUMENT 3****.*

6. *Feeling dissatisfied with the decision of the Public Body of its intention to award the contract to A.A.R. Oosman & Co of 12, Louis Pasteur Street, Port Louis for Item No.1 for the total price of Rs. 7,721,395.-(Exclusive of VAT) and for Item No.2 for the total price of Rs.10,669,165.00 (Exclusive of VAT).and with the reply of the Public Body dated 6th October 2020, the Applicant applies for review of the procurement proceedings pursuant to Section 45 of the Public Procurement Act 2006."*

H. Statement of Reply

*"**On the merits***

1. *Respondent admits paragraph 1 of the statement of case and further avers that Respondent invited bids, through the open national bidding method, for the procurement of full cream and semi skimmed milk for all hospitals bearing reference MHPQ/NMW&S/2020-2021/ONB/Q23 and the closing date was 29 July 2020.*

2. *Respondent admits paragraph 2 of the statement of case and further avers that:-*

   (a) bids were received from 3 bidders, including Applicant, by the closing date; and

   (b) Applicant's bid was dated 28 July 2020.

3. *Respondent admits paragraph 3 of the statement of case and further avers that the said notification was sent to Applicant by post on 23 September 2020.*

4. *Save and except that Respondent received the letter/challenge dated 30 September 2020 from Applicant (Document 2 of the statement of case refers), Respondent takes note of the other averments made at paragraph 4 of the statement of case without making any admission thereto.*

5. *Respondent admits paragraph 5 of the statement of case and further avers that:-*

   *(a) as per records, the letter dated 06 October 2020 was issued and sent by fax by Respondent to Applicant on the same date, that is, 06 October 2020 **(Annex R1)**; and*

   *(b) by way of email dated 09 October 2020 **(Annex R2)**, Applicant acknowledged receipt of the "letter dated 06th October 2020, received at 15:28 hours".*

6. *Without making any admission, Respondent takes note of paragraph 6 of the statement of case.*

7. *Respondent admits paragraph 7 of the statement of case and reiterates the averments made at paragraph 5 above.*

8. *Respondent denies paragraphs 8(A) to (C) of the statement of case in their form and tenor and avers that:-*

   (a) Applicant was not the lowest substantially evaluated responsive bidder for both items;

(b) *with regard to item 1, although Applicant's offer for that item met the technical requirements, the price quoted by Applicant was higher than that of the selected bidder; and*

(c) *with regard to item 2, Applicant's offer did not meet line specification 2.4.6 in the Specification and Compliance Sheet with regard to yeast moulds. Applicant's offer for that item had a yeast mould of maximum 50/g as set out in its bid offer. However, Respondent's requirement was for a maximum of 10/g. Moreover, Applicant had indicated in its bid offer that it did not comply with the requirements for protein content of not less than 34% of milk protein as non-fat milk solids (line specification 2.3.1). Applicant's offer for that item was not found to be technically responsive.*

9. *Respondent makes no admission to paragraph 8(D) of the statement of case.*

10. *Respondent denies paragraphs 8(D)(i) to (viii) and 9 to 13 of the statement of case in their form and tenor, reiterates the averments made at paragraph 8 above and further avers that:-*

(a) *the selected bidder had provided in its bid offer the make for both items as NZMP Fonterra in the Specification and Compliance Sheet. The selected bidder had provided the information regarding make for both items 1 and item 2 in its bid offer;*

(b) *the selected bidder had indicated that it would comply with the line specification 1.5.1 regarding supply of the item 1;*

(c) *Respondent's requirement for full cream milk powder under line specification 1.1 was for full cream milk powder or whole milk powder or dried whole milk;*

(d) *the offer for item 2 submitted by Applicant was of make NZMP New Zealand and that submitted by the selected bidder was of make NZMP Fonterra New Zealand. They were not exactly the same product as per the product information sheet submitted by the respective bidders in their bids;*

(e) *Applicant's offer for item 2 was not technically responsive as it did not comply with the line specifications 2.3.1 and 2.4.6 of technical specifications of the bidding documents; and*

(f) *Applicant was not found to be the lowest substantially evaluated responsive bidder for both item 1 and item 2.*

11. *Respondent moves that the present application be set aside."*

I. The Hearing

A Hearing was held on 30th October 2020. There was on record a Statement of Case and a Statement of Reply, by Applicant and Respondent respectively.

The Applicant was assisted by Miss S.Chuong, Barrister while the Respondent was assisted by Mr N. Jheelan Acting Principal State Counsel.

The successful bidder was assisted by Mrs S. Abdul Carrim.

J. Findings

This is an application for review by Agiliss Ltd (the "Applicant") in respect of public procurement of full cream and semi skimmed milk powder for 'all hospitals' by the Ministry of Health and Wellness (the "Ministry" or the "Public Body"). In this open national bidding, full cream milk powder was termed 'Item 1' while semi-skimmed milk powder fell under 'Item 2'. The successful bidder for both Items was A.A.R. Oosman & Co Ltd. The Applicant was found to be technically responsive solely for Item 1 and was not the lowest priced under that Item.

Preliminary Objection

The Ministry has raised a preliminary point in its Statement of Defence which reads as follows:

"The present application cannot be entertained inasmuch as it is outside the prescribed delay as provided under Regulation 48(5) of the Public Procurement Regulations 2008."

We heard the submissions of Counsel on both sides on this preliminary point. In a gist, the Applicant's case is that, although it concedes that its application reached the Panel one day late, we should exercise our discretion to look beyond this technical and procedural breach. To support this contention, the Applicant relies on the fact that, on the merits, there are indication that the bid of the successful bidder – which was for, apparently, the same product and brand as that of the Applicant – should equally be struck down for not being technically responsive. Issue is also taken about the successful bidder not having properly indicated the brand it proposes to supply and instead wrote, in its bid, the name of the manufacturer (the same manufacturer supplying the Applicant).

The Applicant draws a parallel with the Supreme Court's approach to appeal deadlines in respect of criminal matters **Sooklaul v The State 2018 SCJ 168** and **Alighan v The State 2015 SCJ 53** and goes on to suggest that, if the Supreme Court can allow spill overs in such serious cases as criminal matters involving prison and heavy fines, we should afford more leeway in the context of procurement proceedings reviews. Finally, the Applicant submitted that the Panel shall seek to avoid formality

(vide section 44(4) of the Public Procurement Act 2006) and should exercise its discretion to entertain the present application, ours being the task of guarding the integrity of the public procurement process coupled with the duty of public officials to act in accordance with section 51 of the Public Procurement Act (the "Act"). To this latter submission, we drew the attention of the Applicant's Counsel that this applied to the Ministry's staff and not the Panel, and she graciously conceded the point.

The operative part of very brief submissions on behalf of Ministry was that the Act and the Public Procurement Regulations 2008 (the "Regulations") are clear and they do not afford the Panel a discretion to disregard set deadlines. To do so, in Principal State Counsel's submissions, would amount to the Panel making new law and jeopardising the principle of Separation of Powers – presumably, we gather, between the Executive (under which the Panel falls) and the Legislature.

We shall now address the many principles that we feel arise from the succinct preliminary objection raised on behalf of the Ministry. It is helpful, first, to set out the relevant provisions of the Act and the Regulations; sections 44(4) and 45(1) - (2B) of the Act, and Regulations 48 and 56 of the Regulations, respectively:

"44. Independent Review Panel
(4) The Review Panel shall subject to section 45, seek to avoid formality in its proceedings and shall conduct them in such manner as may be prescribed.

45. Right of review
(1) An unsatisfied bidder shall, subject to section 39(5), be entitled to ask the Review Panel to review the procurement proceedings where -

(a) the Chief Executive Officer of the public body does not issue a decision within the time specified in section 43(4);

(b) he is not satisfied with the decision; or

(c) after the entry into force of the procurement contract, the value of which is above the threshold prescribed by regulations but does not exceed the prescribed threshold referred to in section 40(3), he is not satisfied with the procurement proceedings on a ground specified in section 43(1).

(2) An application for review under subsection (1) shall -

(a) be in writing;

(b) specify the precise reasons for making the application;

(ba) be accompanied by a statement of case and a witness statement, if any; and

(c) be made within such time as may be prescribed.

(2A) (a) For the purpose of subsection (2), a statement of case shall contain precisely and concisely –

(i) the facts of the case;

(ii) where a challenge has not been resolved, the reasons stated in the written decision issued pursuant to section 43(4), if any;

(iii) the issues in dispute and the arguments relating thereto;

(iv) submissions on any point of law; and

(v) any other submission on the case.

(b) A witness statement shall contain a signed statement by the witness certifying that the witness statement faithfully reproduces the facts obtained from the examination of records,
statements or other documents or from any other source in relation to the case before the Review Panel.

(2B) (a) The unsatisfied bidder shall, at the time of his application for review, submit to the public body a copy of the application together with the documents specified in subsection (2).

(b) The exchange of information and particulars relating to the statement of case and witness statement referred to in subsection (2A) shall be carried out in such form and manner as may be prescribed.

48. Challenge and appeal procedures
(1) A challenge under section 43 of the Act shall be made in the form set out in the Second Schedule.

(2) For the purposes of section 43(3)(b), a challenge shall not be entertained unless it is submitted within 5 days from the invitation to bid or from the opening of bids.

(3) Where the challenge concerns any aspect of the procurement process prior to the award of the contract, the Chief Executive Officer of the public body concerned shall in the case of a major contract, obtain all relevant information from the Board.

(4) Unless the challenge is resolved by mutual agreement, the Chief Executive Officer of the public body shall issue a written decision stating his reasons within 7 days of the filing of the application.

(5) Where the Chief Executive Officer of the public body fails to issue a decision within 7 days or if the bidder is not satisfied with his decision, the bidder may submit an application for review to the Review Panel, provided that the application is filed within 7 days of receipt of the decision of the public body or the time when that decision should have been received.

(6) For the purposes of section 45(1)(c) of the Act the threshold shall be 1 million rupees.

(7) An application for review under section 45(1)(c) of the Act, from an unsatisfied bidder after the entry into force of a procurement contract the value of which is above the prescribed threshold, as specified in paragraph (6), stating that he is not satisfied with the procurement proceedings on a ground specified in section 43(1), shall be made within 5 days of the date the applicant becomes aware of alleged breach.

56. Dismissal of Application for Review
An application for review may be dismissed for -

(a) failure to comply with any of the requirements of sections 43 to 45 of the Act, and these Regulations;

(b) setting forth allegations that do not state a valid basis for an application for review, or that do not set forth a detailed legal and factual statement;

(c) having been filed in an untimely manner, either at the initial level of review by the public body, or with respect to deadlines for filing an application for review by the Review Panel; or

(d) contract implementation or administration instead of contract award."
(underlining is ours)

True it is that Supreme Court has often relaxed the rules, in its discretion, as can be seen in the two judgments referred to above and relied upon by Counsel for the Applicant. They both relate to criminal matters and she submits that since the Supreme Court can condone appeals lodged belatedly in criminal matters – criminal matters being the most serious in terms of their punishment- the same should apply to this Panel. One may consider, however, the opposite argument that such discretionary relaxing of the rules should only be restricted to those very serious matters.

Besides, it is a well-established principle of law that the Supreme Court has a discretion to entertain belated appeals in a civil setting. In a recent judgment, an appeal by way of case-stated against the Assessment Review Committee, **Scenic Land Design Ltd v The Assessment Review Committee 2020 SCJ 170**, Chan Kan Cheong and Lau Yuk Poon JJ usefully summarised the discretion of the Court:

*'In **Sewraz Freres Ltd v British American Tobacco** [2013 SCJ 400], the Court refused leave to appeal to the Judicial Committee of the Privy Council outside the statutory delay, while reiterating the following principle:-*

"It is in fact well settled that the golden rule regarding delays governing appeals is that time limits in such matters are peremptory unless the appellant can show that the fault is not his or that of his attorney."

The stringency of the rules governing time limits for appeals can easily be explained. There is a need for judicial decisions to be final and certain at some stage. As was

held in ***Lagesse v Commissioner of Income tax*** *[1991 MR 46], "the guiding principle, it seems to us in procedures governing appeals is that at some stage the finality of judicial decisions should be certain and procedural requirements governing appeals from those decisions should not be disregarded so as to prolong uncertainty and the holding up of the execution of a judgment which a litigant had obtained unless... non-compliance is shown not to be due to acts or, more frequently, the omissions of the appellant or his legal advisers."*

Be that as it may, it is also clear from the above authorities that the Courts retain a discretion to allow a party to lodge an appeal outside the statutory delay in a deserving case. The Courts may exceptionally allow a party to appeal outside delay where there is, in their view, sufficient justification for such exercise of discretion ***(Ramtohul v The State*** *[1996 MR 207]).'* (underlining is ours)

The underlying principle that may be inferred from the above cases, which would be of relevance to appeals to the Supreme Court and the two Courts of Appeals, and to the granting of leave to appeal to the Judicial Committee of the Privy Council, is that the judges of the Supreme Court have a discretion that they can exercise in deserving cases.

Similarly, there have been many instances of the Supreme Court affording some flexibility in judicial review applications – which are proceedings that share some similarities with applications for review before us. In **Joaheer v National Transport Authority 2016 SCJ 97**, the then Senior Puisne Judge Mr Balancy and Mr Justice Marie-Joseph had this to say:

"The applicant's failure to file a statement of case.

The applicant has neither filed a statement of case at leave stage nor thereafter. Counsel for the applicant has submitted that the failure to file a statement of case is not a serious lapse in the present case and should be condoned.

According to Order 53, rule 3 of the English Rules of Court, an application for leave must be supported by a statement setting out inter alia the relief sought and the grounds upon which it is sought. Order 53, rule 6 (1) further provides in relation to proceedings after leave has been granted, that copies of the statement in support of an application for leave under rule 3 must be served with the notice of motion, and that subject to any amendment of the statement allowed by the Court at the hearing of the motion, "no grounds shall be relied upon or any relief sought at the hearing except the grounds and relief set out in the statement". In ***Ballchand & Ors. V Central Water Authority [1995 SCJ 398],*** *the Court pointed out that a statement is important because it delimits the issues and this was further emphasized in* ***Radio Plus Ltd v The Independent Broadcasting Authority and Anor [2004 SCJ 213]*** *and* ***Trilochun & Ors v The Minister for Consumer Protection and ors [2010 SCJ 353]***

However, the Court has a discretion in dealing with the failure to file a statement. And, as pointed out in ***Heeramun v The Public Bodies Appeal Tribunal [2015 SCJ 269],*** *the cursus of our Courts has been to refrain from dealing with the objection raised on that procedural issue on its own and to look at the substance of the*

application before exercising its discretion. The Court added that this was in line with the approach of the Judicial Committee in ***Peerless Ltd v Gambling Regulatory Authority & Ors [2015] UKPC 29.*** *We shall therefore defer our decision on this procedural deficiency until we have considered whether there is any real legal merit in the applicant's grounds for challenging the impugned decisions.*

The delay in lodging the present application.

Order 53 rule 5 (5) provides that a motion must be entered for hearing within 14 days after the grant of leave. The motion for the present application was entered some six months after leave was granted. At paragraph 17 of his affidavit in support of the present application, the applicant vaguely attributes the delay to unemployment and stress. Here again however, we propose to decide whether such delay can be condoned after having considered whether there is any legal merit in the applicant's grounds for challenging the impugned decisions." (underlining is ours)

Once again, the Supreme Court looks to the merits of the applicant's case before determining whether to condone any particular procedural breach. Of note, however, is the fact that judicial review proceedings are brought for prerogative orders under Rule 2(4) of the Supreme Court Rules 2000 which, in turn, makes reference to Order 53 of the English Rules of the Supreme Court developed in the late 19th Century, revised in 1965 and repealed, at the turn of the millennium, by the Civil Procedure Rules. Our own Supreme Court Rules themselves are a schedule to the Courts Act of 1945. Judicial review procedural provisions are, therefore, mostly subsidiary legislation.

Furthermore, as recently as 16th October 2020, the Supreme Court (Mrs Justice Narain and Mrs Justice Hamuth-Laulloo) allowed an applicant to carry on with his judicial review proceedings on a decision of the Public Bodies Appeal Tribunal despite not asking for leave to apply for judicial review- he had moved directly for a review on the merits (*vide* **Cheddy v Public Bodies Appeal Tribunal 2020 SCJ 254**).

Drawing further on the analogy between applications for review and judicial review, one may bear in mind the famous speech of Lord Roskill in **Council of Civil Service Unions v Minister for Civil Service [1985] 1 AC 374** where he recounts how and why the Courts have intervened to review actions by the Executive branch of Government:

"Before considering the rival submissions in more detail, it will be convenient to make some general observations about the process now known as judicial review. Today it is perhaps commonplace to observe that as a result of a series of judicial decisions since about 1950 both in this House and in the Court of Appeal there has been a dramatic and indeed a radical change in the scope of judicial review. That change has been described — by no means critically — as an upsurge of judicial activism. Historically the use of the old prerogative writs of certiorari, prohibition and mandamus was designed to establish control by the Court of King's Bench over inferior courts or tribunals. But the use of those writs, and of their successors the corresponding prerogative orders, has become far more extensive. They have come to

be used for the purpose of controlling what would otherwise be unfettered executive action whether of central or local government. Your Lordships are not concerned in this case with that branch of judicial review which is concerned with the control of inferior courts or tribunals. But your Lordships are vitally concerned with that branch of judicial review which is concerned with the control of executive action. This branch of public or administrative law has evolved, as with much of our law, on a case by case basis and no doubt hereafter that process will continue."

Based Miss Chuong's submissions, coupled with the cases we have referred above, the Applicant may have a compelling case for the Panel to look beyond the time-limits set out in its enabling legislation.

On the other hand, one should not lose sight of those applicable provisions from the Act and the Regulations which we have set out above. Section 44(4) directs us to seek to avoid formality except in respect of section 45 or any matter prescribed. Section 45(2)(c) holds that an application for review must be lodged within the deadline prescribed. These are two primary pieces of legislation and the latter one directs us to Regulation 48(5) and defines the time-limit which it fixes it to 7 days.

It is our considered view that this 7-day time-limit enshrined in Regulation 48(5), in furtherance of section 45 of the Act, is a mandatory provision from which we cannot depart. It appears to us that the Legislator's intent was to impose strict observance to time-limits, and to formality requirements - in lodging challenges to public procurement proceedings; this, with a view to ensuring the efficiency and expediency of *l'action gouvernementale*. In this context, section 45(4) of the Act gives us the power to suspend the procurement proceedings pending our determination – which must be handed down within 30 days from the date of the application by operation of Regulation 57A of the Regulations.

We also note that there is strong emphasis on procedural requirements regarding the structure of applications and the timing for the lodging of challenges and applications for review (*vide* Regulation 49 and 50 of the Regulations). Belated applications are, again, referred to in Regulation 56 which empowers the Panel to dismiss applications outright if they have been filed in *'untimely manner, either at the initial level of review by the public body, or with respect to deadlines for filing an application for review by the Review Panel'* or there has been a *'failure to comply with any of the requirements of sections 43 to 45 of the Act, and these Regulations.'* [emphasis added]. The Panel may not, it seems, allow a belated application any more than it could entertain an application lodged otherwise than in writing or an application with no statement of case enclosed (*vide* section 45 of the Act).

The Panel is mindful of the caselaw cited above which show the flexible approach adopted by the Supreme Court. We are also mindful, on the related matter of jurisdiction, of the well-known judgment handed down by the Judicial Committee of the Privy Council on appeal from the Mauritius courts in the case of **Toumany v Veerasamy 2010 PRV 17** where the Board invited the Mauritius courts to be *'less technical and more flexible in their approach to jurisdictional issues and objections.'*. On the other hand, one should recall the *dictum* of Lord Rodger, in an employment

law matter, **Mauvilac Industries Ltd v Ragoobeer 2006 PRV 33**, *'The courts must respect the policy which lies behind the time-limits that the legislature has imposed.'*

As such, when it concerns public procurement proceedings and, specially, challenges to those proceedings, the message from the Legislator is, to us, very clear. Time-limits are to be observed lest the challenge fails *ab initio*. This Panel is not expressly afforded any flexibility in this regard nor is it empowered with some form of inherent jurisdiction similar to that which the Supreme Court derives from the Constitution. In fact, Parliament has gone the opposite way and has placed emphasis on the time-limits and the penalty for non-observance. A quasi-judicial tribunal, like ours, falling under the Executive arm, would be loath to go against the clear guidance from, or depart from the express confines indicated by, the Legislative arm, which is the supreme branch of Government.

In cases like the present one, the Legislator has provided that, by operation of various provisions of the Act and Regulations, challenges (including reviews) to the selection of a bidder be dealt with by Day 48, the date of notification of award being Day 1. Parliament intended that any 'uncertainty' exist only for those 48 days and not more than that. After this cut-off point, rights and obligations are expected to accrue between the public body and the successful bidder.

Added to that is the fact that criminal appeals concern only the fate of an accused person, civil appeals involve only the parties to the case and judicial review proceedings may or may not have a national bearing- notwithstanding the fact that judicial review proceedings do not lead to the suspension of the decision of a public body and their determination may or may not lead to a reversal of the initial decision of that public body.

By contrast, procurement proceedings always have a national bearing and are part and parcel of the Government's day-to-day operations. Moreover, review proceedings involve a temporary suspension that precludes the awarding of a procurement contract by ministries and government bodies. After that suspension lapses, the contract is awarded to the bidder initially chosen by the ministry or public body unless the Panel indicates otherwise- but it must do so within the strict 30-day delay. Otherwise, the Panel can only award reasonable costs to applicants (section 45(10)(d) of the Act).

It is certainly not expected of a public body or ministry to terminate the procurement contract it has already awarded. Observance to the strict procedural requirements, including time-limits, are thus made quintessential in public procurement proceedings, at all stages including before this Panel. To condone belated challenges and applications would, in our view, open the floodgates.

Be that as it may, even if we were minded to adopt a similar approach as that of the Supreme Court and look to the merits of the present application before determining whether to allow any given procedural breach, we note that the Applicant has not placed before us much in terms of justification why it has applied late – other than its having a 'good' case. On this score, we have perused the bidding documents and the bid evaluation report, and we observed that the bid of the Applicant is deemed not

compliant with the bidding requirements for Item 2: the proposed packaging was not as required, the proposed protein content was indicated to be less than 30% when a minimum of 34% was asked for, and the maximum yeast moulds were to be 10 per gramme and the Applicant indicated its product could contain up to 50/g.

In the specific context of a direct comparison between the two bids in respect of Item 2 **(Grounds D (vi) and (vii))**, the Applicant's case reduced to its core ingredients would be that, since the successful bidder intends to supply a similar product from the same supplier from New Zealand, its bid should also be rejected. In support, the Applicant has bought a unit from the shop of successful bidder and had it analysed by the Mauritius Standards Bureau. That analysis has revealed a protein content of less than 34%. Nevertheless, this does not account for the successful bidder ordering, for the purposes of this tender, a slightly differentiated product from New Zealand that meets the bidding requirements. Procurement proceedings necessarily rest on what the bidders indicate in their bids and it is the ultimate responsibility of the client (public bodies, here) to monitor whether the products delivered to them are as per requirements – if they are not, the bidder will be sanctioned in some shape or form. If the public body's officers allow unlawful *manquements*, the law has a number of remedies and punishment lined up to ensure justice is done. This also disposes of **Ground D (iii)**.

In respect of the successful bidder having indicated the 'make' as 'Fonterra' **(Grounds D (i), (ii) and (v))**, the Panel is of the considered that this would not be of such a nature as to warrant any exercise of any discretion it might have had to entertain late applications. In a world of conglomerates (such as Fonterra), of brands and of sub-brands, perhaps the bidding documents should be revised and further fields added, if that level of detail is expected. Admittedly, it would have been preferable for the bidders to indicate, in the **'Make'** fields, entries such as 'Fonterra – NZMP' or 'Fonterra – Anchor' – by way of illustration. In any event, the Oxford dictionary defines the noun 'make' as *'the manufacturer **or** trade name of a product.'* (emphasis is ours) It is not disputed here that the manufacturer is Fonterra. We do not feel, therefore, that the bid of the successful bidder is to be rejected because it indicated only 'Fonterra' as the 'make'.

As regards **Grounds A** and **D (iv)**, we do not see any reason to interfere with the Bid Evaluation Committee's findings on the basis that the Applicant's product is, it is alleged, of a more premium quality. The Committee has evaluated the bids in accordance to the technical requirements of the Ministry. If the Applicant has chosen to bid for premium instant full cream instead of regular full cream (the minimum level expected by the Ministry), thereby quoting a higher price, it is not expected of the Bid Evaluation Committee to go above and beyond the bidding documents and give extra points to those bidders that have bid for more than was asked for.

Finally, in respect of the remaining Grounds, which are of a very general nature, we hold that they cannot succeed in light of what we have stated above.

K. Conclusion

In the circumstances, we do not subscribe to Miss Chuong's submissions that we have some form of discretion that would allow us to disregard Regulation 48(5) and entertain the present application. It should accordingly be dismissed in line with Regulations 56(a) and (c).

In a recent decision, **Golden Valley Sonalall JV v FAREI (Decision No.7/20)**, a differently-constituted Panel had the opportunity to address the application of Regulation 56 and indicated that cases falling short of those provisions could be deemed as 'frivolous' for the purposes of section 45(3)(b) of the Act. We agree with that decision and would add that, even though the Regulation uses the words *'may dismiss'*, the breaches it sets out are, to us, fatal to any application, by their very nature.

Accordingly, this Application is dismissed for being frivolous and in breach of Regulation 56 of the Regulations.

H. Gunesh
(Ag. Chairperson)

A. K. Namdarkhan
(Member)

A. Gathani
(Member)

Dated: 10th November 2020