

A Joyless Bid: Challenging Public Tenders

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An application for leave to obtain judicial review was brought before the High Court recently in the case of *Bayangan Sutera Sdn Bhd v Suruhanjaya Tenaga*.¹ The applicant, Bayangan Sutera Sdn Bhd (**BSSB**), was dissatisfied with the results of the third round of the Large-Scale Solar (**LSS**) Programme instituted by the Energy Commission (**EC**), under which bidders, including BSSB, had submitted proposals to the EC to develop and operate large-scale solar power plants.

BSSB challenged the EC's decision in not selecting BSSB as a shortlisted bidder after the completion of the tender exercise. A successful bidder would have been allowed to enter into a long-term power purchase agreement with the relevant utility offtaker, under which it would, among other things, sell electricity at a profit to the utility offtaker.

However, the EC took the view that its selection of successful bidders was a non-justiciable act and therefore not susceptible to judicial review. The High Court agreed with the EC and since that meant there was not an arguable case to merit further argument, it rejected BSSB's leave application.

In coming to its decision, the High Court reaffirmed certain key legal principles relevant to the act being impugned in this case:

- (a) the act must involve a public law element before judicial review can be available, and where it involves both private and public laws, then the court will ascertain which of the two was more predominant;
- (b) public law governs the relationship between governments or public authorities and subjects, where governments or public authorities have power in matters that affect the rights of subjects, or relationships that are of direct concern to society such as criminal law; and
- (c) private law deals with relationships between private individuals or entities with which the state is not directly concerned.

The High Court also appeared to suggest that any tender process and subsequent acceptance of any bid submitted in response must necessarily involve only contract law, i.e. private law, and therefore concluded that the tender process undertaken, and the subsequent shortlisting of bidders by the EC, were matters of private law not susceptible to judicial review. However,

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¹ [2020] MLJU 756 (HC)

it is not clearly obvious that a tender process carried out by any government entity would always only be seen as an exclusively contractual matter. For example, government entities may sometimes operate under regulations which apply certain standards or requirements in carrying out any tender procurement exercises. It would not be fanciful for courts to exercise judicial oversight of compliance with such regulations.

The EC, in some ways, could be seen to be an alter ego of the government. Under the Energy Commission Act 2001,² the EC has the functions of, among others, implementing and enforcing energy supply laws and promoting efficiency, economy and safety in the generation, production, transmission, distribution, supply and use of electricity. The fact that:

- (a) the generation and supply of electricity is of immense importance to the public and represents a national security interest;
- (b) the government exercises effectively a near monopoly over such generation and supply by virtue of the requirement to be licensed by the government to carry out the generation or supply of electricity under the Electricity Supply Act 1990³ (ESA); and
- (c) a successful bidder for the LSS Programme is unlikely to have been selected if it would not have qualified for a generating licence under the ESA,

indicate that the tender process under the LSS Programme could involve some element of public law. The question then is whether public law or private law would be predominant.

Although the circumstances of this case merit some further consideration of whether public law was wholly absent, the decision of the High Court was unsurprising. It reflects common law's orthodox ambivalence on extending judicial review to government contracting.

² [Act 610]

³ [Act 447]

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