

TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

H.C.A. Cv. 3181 OF 2004

BETWEEN

NH INTERNATIONAL (CARIBBEAN) LIMITED

APPLICANT

AND

**URBAN DEVELOPMENT CORPORATION OF TRINIDAD AND
TOBAGO LTD.**

RESPONDENT

And

HAFEEZ KARAMATH LTD.

INTERVENOR

Before The Honourable Mr. Justice Stollmeyer

Appearances:

**Mr. A. Fitzpatrick SC and Mr. R. Harnanan for the Applicant
Mr. R. Martineau SC and Mrs. D. Peake for the Respondent
Dr. C. Denbow SC and Mr. K. Ramkissoon for the Intervenor**

JUDGMENT

These proceedings flow from a letter written by the Respondent ("UDECOTT") to the Applicant ("NH") on 16th November 2004. NH contends that this letter communicates UDECOTT's decision to award to the Intervenor ("HK") the contract to construct the Administrative Headquarters for the Ministry of Education at Queens Park East, Port of Spain, and that this decision is unlawful, irrational, unreasonable or an abuse/misuse of power. NH seeks a declaration to

this effect and an order that UDECOTT reconsider its decision in accordance with the findings of this Court.

UDECOTT contends first, that this was not a final decision, that these proceedings are premature, and that if the decision is to be regarded as final then it is valid and effective. HK contends similarly, emphasising the prematurity of the proceedings.

NH contends that the decision is irrational because:

- (a) in making the decision UDECOTT disregarded and/or failed to pay any or any sufficient regard to the advice and recommendations of UDECOTT's quantity surveyors, its architect, and its representative and project manager to the effect that:
 - (i) NH was the second lowest tenderer, submitted the best proposal, and was recommended for the award of the contract;
 - (ii) UDECOTT would be exposed to significant non-performance risks if the contract was awarded to HK;
 - (iii) the project manager was doubtful that HK could complete the project for the tender price;
 - (iv) HK's proposed site management was inadequate for the complexity and magnitude of the construction works contained in the contract;
 - (v) if HK did not get labour and materials at concessional rates, it could not successfully complete construction at the tender price without comprising quality;
 - (vi) HK's method statement was incomplete and inadequate;
 - (vii) HK's performance bond was not as complete as NH's;
 - (viii) The quantity surveyors had no hesitation in recommending NH for the award of the contract.

NH also contends that the decision was unreasonable and amounts to an irregular and/or improper exercise of discretion because, in giving reasons for its decision, UDECOTT said that the low bid is likely to be the motivating factor in the award of the contract, together with an appropriate methodology statement.

This, says NH, demonstrates that UDECOTT failed to pay regard to the following relevant considerations:

- (i) the recommendations and reservations set out at (a)(i)-(viii) above;
- (ii) the project manager's advice that the project team (which included the quantity surveyor, the architect, the project manager, the project's civil and structural engineers, the project's mechanical engineer and UDECOTT's chief engineer, Ian Telfer) be given further time to evaluate the two lowest tenders – this would not delay the project because the site was not available before February 2005;
- (iii) HK's method statement was incomplete particularly because UDECOTT had expressly reserved the right, in its invitation to tender, to reject tenders with inadequate method statements.

NH also contends that the decision amounts to an abuse and/or misuse of power, but this is not particularised in any way.

The issues which arise for my determination can be set out as follows:

1. is the decision susceptible or amenable to judicial review.

In deciding this I am required to determine whether the decision was one with a sufficient public function or public flavour. This will also in my view necessitate an examination of the evidence to see whether

- UDECOTT is either a public body or a private body performing public functions, or functions with a sufficient public flavour;
2. if my determination of this issue is in the affirmative, I am then required to determine the nature of the decision i.e. was it merely a provisional decision, or was it a final decision, or whether ultimately there is any difference between the two, given the circumstances;
 3. if it is a final decision, are these proceedings premature;
 4. these proceedings are not premature, then I am required to determine whether the decision was irrational;
 5. if it was not irrational, I am then to decide whether it was unreasonable and/or irregular or improper exercise of discretion;
 6. if not unreasonable etc., then I am to decide whether the decision was an abuse and/or misuse of power;
 7. finally, I am to determine whether the Court in any event should exercise its discretion in favour of NH, given its conduct.

The evidence on behalf of NH is set out in the affidavits of Emile Elias filed 24th November 2004; 25th November 2004; 30th November 2004; and 6th April 2005. The evidence on behalf of UDECOTT is set out in the affidavit of Winston Agard filed 11th March 2005; the affidavit of Neelanda Rampaul of 22nd April 2005 in compliance with my order to answer certain interrogatories; and her affidavit filed 10th May 2005 pursuant to leave granted on 9th May 2005. There was no cross-examination.

I allowed into evidence under the provisions of the Rules of the Supreme Court Order 38 Rule 3 certain hearsay evidence to which UDECOTT had objected. This included Emile Elias's affidavit filed 30th November 2004, as well as certain paragraphs of his affidavit, together with certain of the exhibits referred to therein, of his affidavit filed 6th April 2005. Given the clear state of the law that hearsay evidence is generally not admissible on the hearing of a motion in judicial review, I exercised my discretion with reluctance, but found that given all the

circumstances the scales were tipped very finely in favour of doing so because the justice of the case required it. This was particularly because of the need to have the trial completed as a matter of urgency and the delays that would probably be caused by NH having to provide first-hand evidence of these matters. All of this hearsay evidence, of course, can only have attributed to it such weight as may be appropriate in all the circumstances.

Ultimately, these documents were of no great assistance because they did not go to the issue of whether the challenged decision was susceptible to judicial review. They dealt mainly with UDECOTT's role and function in the context of the government's efforts to refurbish buildings and promote urban development, and go to the issue of whether UDECOTT performs "public functions". Even in relation to this issue, however, I am inclined to accord them little weight, despite their not being contradicted or challenged in any way.

The "Green Paper" on the "Reform of the Government's Procurement Regime" (Exhibit "EPE4") published by the Ministry of Finance in June 2004, for example, is really no more than an expression of the government's intention. There is no evidence to show that this intention has proceeded on to reality.

The information "downloaded" from the Ministry of Planning and Development's "website" (Exhibit "EPE5") was downloaded and printed on 31st March 2005 and I have no great assurance that it reflects the state of affairs in November 2004. Further, it adds little, if anything, to the other, direct, evidence before me as to UDECOTT's role and functions.

Exhibit "EPE3" is made up of extracts from the Ministry of Planning and Development's October 2004 publication "Public Sector Investment Programme 2005". It describes, again, UDECOTT's role and functions and makes reference to the Project in particular, as well as its role in implementing governments'

housing initiatives and thrust. Again, however, it adds little to the other, direct evidence before me.

In the event, I maintain the position I expressed when hearing the applications to strike out that first-hand evidence of these matters could have been sought by NH. That was not done, and I am given no reason for the failure to do so. None of this hearsay evidence can be tested. It is true that it is not denied, but despite that, and for the reasons I have already set out, I attribute little, if any, weight to these documents.

Apart from UDECOTT's application to strike out certain of the evidence on the ground of hearsay, there were two further interlocutory applications.

The first was NH's application for leave to administer certain interrogatories. I gave leave to administer some of these because I considered them relevant and required by the justice of the case. In my view, the answers to these interrogatories would assist in coming to a determination of the issue of whether the decision was susceptible to judicial review.

There was also NH's application to amend the Grounds set out in its Statement so as to include bias. I refused leave for this amendment on the basis that the application was made too late in the proceedings; that there had been ample opportunity to do so previously; and that to allow the amendment would probably delay the trial further.

I will set out first my findings of fact and then deal with the issues in the order I have set out above.

The Background

UDECOTT is a limited liability company continued under the Companies Act whose sole shareholder is the State through the Minister of Finance, Corporation Sole. There are no limitations on the activities or functions it can perform (it is not required as a matter of law to set out in its Articles of Incorporation what these may be) but its "mission statement" sets out its object and purpose as being "to develop, redevelop and rehabilitate the physical fabric of urban and other designated areas of Trinidad and Tobago".

Mr. Agard describes UDECOTT as "a commercial trading company engaged in the business of Real Estate and Property Development for private profit. ...[it] procures goods and services by direct purchase or where appropriate it invites tenders either public or selective of terms and conditions determined by it."

In the event, UDECOTT as employer has undertaken construction of several buildings for various government ministries. These include the Customs & Excise building at Richmond Street, Port of Spain, a 1,600 space public car park; the Ministry of Legal Affairs Tower; and the Administrative Headquarters of the Ministry of Public Administration;

In June 2002, the Ministry of Health retained UDECOTT to design, finance, construct, project manage, outfit and lease to the ministry a building at Queens Park East, Port of Spain to accommodate the ministry's head office and certain centralised programme units ("the Project"). The parcel of land on which this building is to be constructed is "currently vested in the State". The fee being paid to UDECOTT for the Project is an undisclosed percentage of its cost.

UDECOTT retained the services of acla.works as prime consultant/architect to prepare preliminary designs for the project and also engaged the services of London Street Project Company Ltd. as project manager. I refer to them as "the

Architect" and "the Project Manager" respectively. The Architect prepared tender documents after the preliminary designs were completed, and tenders were invited from four contractors who had already been prequalified by UDECOTT. These contractors included NH and HK, and they were prequalified based upon UDECOTT's satisfaction that they all (i.e. all four) had the technical and financial capability and expertise to do projects of this magnitude.

UDECOTT's concern, which is not in issue, was to obtain the best price for the Project within its budget.

All four prequalified contractors submitted tenders. These were handed to the Project Manager for review and evaluation. UDECOTT sought no one else's views and recommendations. Having carried out this function, the Project Manager was to submit its report and recommendations to UDECOTT for consideration and such action as UDECOTT considered appropriate, if any.

Other functions of the Project Manager included procuring construction services, monitoring the Project, including the consultants and the contractor, and working with both the consultants and the contractor to ensure that the Project was successful and within budget.

The Project Manager forwarded the tenders to Skinner and Joseph QS ("the Quantity Surveyors") in their capacity as subconsultants appointed by the Architect. This was done for the purpose of a preliminary examination of the tenders for arithmetical and other errors.

The Quantity Surveyors considered the tenders and subsequently met separately with each tenderer before preparing their report and submitting it to the Architect.

The Architect then forwarded the Quantity Surveyors' Report to the Project Manager for approval under cover of a letter dated 20th October 2004.

In part, that letter reads:

"After careful review of the tenders and interviews we concur with the recommendations of the report to award the main contract to [NH] to construct this project. Please note that the tendered price is only 1.88% higher than our comparable estimate".

Although a copy of this report was sent directly to UDECOTT, it did not consider or take any action on this letter or the Quantity Surveyor's report. It awaited submission of the evaluation report and recommendations by the Project Manager.

The Project Manager did so by letter of 5th November 2004. Excerpts from that letter are as follows:

"Findings

[The Project Manager] endorses the quantity surveyor's conclusion that the second lowest tenderer submitted the best proposal. [UDECOTT] would be exposed to significant non-performance risks if the contract were to be awarded to the lowest tenderer in this case. This is due to two critical issues:

- 1. Pricing Risks*
- 2. Proposed Site Management*

[The Project Manager] has found the Report to be quite comprehensive in terms of the chronology of the tendering process, its analysis of the submissions and identification of the critical issues. However, there is some reservation with respect to the recommendation of the award of the contract to the second lowest tenderer. There is a real possibility that the lowest tenderer would

challenge such an award and thus delay the implementation of the Project, unless they were given ample opportunity to justify their tender, including procurement management in order to mitigate pricing risks.

Pricing Risks

[HK has] confirmed in writing and at the post tender interview that they will stand by their tender including an arithmetical error of \$13,274,522.98 (Excluding VAT). This is due mainly to omission of the quantum that transfers fluctuation risks to the contractor. In this regard, it should be noted that:

- *The QS estimated that the provision for the fluctuation risks was 2% (Appendix1).*
- *.....*
- *Apart from [HK], the other tenderers priced the fluctuation risk at less than 1%.*
- *[HK] indicated that their premium for a fixed price is 10%. The addition of this sum was not obvious in their tender. It is possible that they may have chosen to include the provision in their rate; hence their decision to stand by their tender. This can only be verified by detailed examination of how the rates were built up.*

Appendix 6 illustrates that:

- *[HK]'s tender price is 1.7 standard deviations lower than the mean tender price and this suggest a low probability of completion of the project within budget.*
- *The other tenderers are between 0.3 and 0.9 standard deviations above the mean tender price.*

- *The QS estimate is 0.2 standard deviations lower than the mean tender price which suggest realistic estimating by the QS.*

[HK]'s pricing for Preliminaries and Structural Steelwork is 61% and 25% respectively below the mean prices. These are major points of concern as they directly impact on successful completion of the Project.

In summary, unless materials and labour are obtained at concessional rates, [HK] would not be able to successfully complete the Project for his tender price without compromising its quality. In such circumstances, contract administration would become onerous for all parties.

There is a very real possibility that the Employer would have to rely on the Performance Bond. Accordingly, a decision should not be taken to award the contract to HKL unless the Surety confirms that it is aware of the magnitude and nature of performance risks. Furthermore, the Employer must insist on the highest quality Bond.

Proposed Site Mangement

The proposed project requires high caliber professional and technical staffing. The pricing of Preliminaries and the proposed site organization indicate the tenderers' understanding and commitment to resource requirements. [HK] failed to identify key personnel. On the other hand [NH] provided for strong site organization.

The QS estimated 10.7% for Preliminaries and the average tender price is 9.4%. The lowest price is 3.7% ([HK]) and the highest is 11% (JIL).

Conclusion and Recommendation

The choice for the award of this contract is between the two lowest tenderers.

[The Project Manager] is doubtful that [HK] can complete the project for the tender price. Its site management is inadequate for the magnitude and complexity of the project. [UDECOTT] will be exposed to substantial performance risks if this tender were to be accepted. On the other hand, to accept the next lowest tender, [NH], would expose [UDECOTT] to legal action and implementation delays; unless [UDECOTT] can clearly demonstrate that the lowest tenderer is not capable of implementing the project according to its tender. This requires further investigation and analysis.

[The Project Manager] therefore recommends that the project team be given one (1) more week to verify the capability of the two lowest tenderers, taking into account that tenders were invited based on prequalification and that possession of the site would not be possible before February 2005.

Verification should include the following:

- 1. Their current workload and resources*
- 2. Sources of supply and pricing for critical materials*
- 3. Relationship with specialist and domestic sub*

contractors

4. *Quality of performance security"*

This report reflected the matters set out in the Quantity Surveyor's Report. It analysed and summarised the tenders received but did not recommend to UDECOTT that the contract be awarded to NH or any other tenderer. It noted that the choice for the award was between HK and NH, they being the two lowest tenderers. Given that the tenderers had been prequalified and that possession of the site would not be possible before February 2005, the Project Manager recommended that it be given time to verify the capability of these two tenderers in a number of respects, including their current work load and resources, sources of supply and pricing for critical materials, their relationship with specialist and domestic subcontractors, and the quality of the performance security.

UDECOTT's Board of Directors subsequently met and considered the tenders, as well as the Project Manager's report. The letter of 20th October 2004 and the Quantity Surveyor's report were also "noted". Also "noted" was that HK's tender (the lowest) was \$149,499,600.49 and the second lowest tender was NH's at \$165,244,231.90. By "noted" I take Mr. Agard (who uses this expression in his affidavit of 11th March 2005) to mean "considered".

UDECOTT's Board also considered a breakdown of the tenders prepared by the project manager and the following factors in particular:

- "(1) of the tenders received, only the lowest tender was within UDECOTT's budget*
- (2) both the Quantity Surveyor's estimate and the second lowest tender were above UDECOTT's budget*
- (3) the difference in price between the lowest and the second lowest tender was substantial, almost \$16 million - \$15,745,225.41*

- (4) *an examination of the preliminary design of the building based on the Quantity Surveyor's estimate showed that the cost of the building was too expensive*
- (5) *although there was an arithmetical error in the lowest tender, the tenderer had elected to stand by the tender and in any event, the error was largely made up of the omission to include the tenderer's percentage addition for the risk of fluctuations in prices (which was a contractor's contingency only) of 10% and did not relate to the actual work which was priced in the bill of quantities. The percentage which had been estimated by the Quantity Surveyors for this contingency was 2% while the percentage of two of the tenderers was less than 1%. The second lowest tenderer had not quoted a percentage (as it was required to do by the tender documents) but a sum of \$1,300,000.00 and another tenderer had quoted zero*
- (6) *a tender from a prequalified contractor should not be rejected on the basis of low rates without further investigation*
- (7) *a full breakdown of the Preliminaries of the lowest tenderer should be requested and examined*
- (8) *in the area of the structural steelwork, the lowest tender was closer to the estimate of the Quantity Surveyors than any of the other tenderers. However, its sources of supply needed to be investigated*
- (9) *the lowest tenderer (unlike the other tenderers) may be one of the largest fabricators of structural steelwork in the country so that its price would be more competitive than other tenderers who would have to sub-contract out such work*

- (10) *the contract period quoted by the second lowest tenderer in its tender was 22 months while the letter which accompanied its tender quoted a period of 95 weeks, and not 540 days as stated by the Quantity Surveyors and the Project Manager*
- (11) *the second lowest tenderer stated in its tender that in view of the current volatility in the market place, it had reserved the structural steel through a reliable supplier but this was based upon the steel being manufactured in the 4th quarter of 2004. This appeared to be a qualification to the tender which was not pointed out by the Quantity Surveyors, acla.works or the Project Manager and which the tenderer should be asked to clarify. Further, the Quantity Surveyors had noted that the construction period of 540 days of the second lowest tenderer was reasonable provided that the steel was ordered before the end of October 2004 which was impossible at that time*
- (12) *the composition of the site team of a tenderer could be modified to the satisfaction of the project manager*
- (13) *with proper management of the contractor by the project team, the performance or non-performance risks associated with any tenderer could be minimised and the performance bond was available to UDECOTT in the event of default*
- (14) *the second lowest tenderer had proposed two performance bonds from two sureties instead of one performance bond as required by the tender documents and this could give rise to difficulties*
- (15) *in the light of the significant difference in price between the lowest tender (which was within budget) and the second lowest tender, UDECOTT should not at that stage take a decision to bypass the lowest tender which was the only one*

within the budget in favour of the second lowest or any other tender and thereby lose the opportunity to save a minimum of almost \$16 million (this being the difference between the lowest and the second lowest tenderer) unless it satisfied itself that the lowest tenderer was unable to satisfactorily complete the project at its tender price and within budget

(16) further investigation and analysis would have to be done prior to any award of the contract to the lowest or any tenderer.

Having taken all of this into account, the Board of Directors decided that it was not then in a position to award the contract to any tenderer. Instead, it decided that it would award the contract to the lowest tenderer (HK) provided that all of the Board's concerns were first satisfied and, in particular of HK's ability to complete the project at a tendered sum so as to remain within the budget. In the view of the Board this could only be done after completing a thorough review of all elements of the contract and design and value engineering of project. It agreed that the Project Manager should be requested to take steps to address the Board's concerns, and then submit its views and recommendations at which time the Board would review its position and decide whether an award should be made at all, and if so to whom, or whether it should make "...any other decision ... [it] ... considered appropriate".

On 16th November 2004 NH wrote to UDECOTT. It referred to "... the government's determination to have full transparency ..." in the tender-award process, and the Inter-American Development Bank procedure by which tenderers are allowed sight of a consultant's evaluation report and to register objections prior to an award being made. It then reads as follows:

"Under the circumstances I hereby request that all tenderers on the Ministry of Health Headquarters be advised of any intended

award you propose, at the same time providing each tenderer with full access to the Consultants' evaluation report."

"I am sure you appreciate that an urgent response with your agreement is necessary if the project is to proceed smoothly and without third party intervention."

UDECOTT replied later that day as follows:

"The Board of Directors, at its last meeting, took a decision that this contract would be awarded to the low tender, after completing a thorough review of all elements of the contract and design, as well as value engineering the project, in an attempt to bring it back to budget.

In order to ensure transparency and equity, the position of UDeCott on this and all other tender matters involving the prequalification of contractors for projects is that the low bid is likely to be the motivating factor along with an appropriate methodology statement, as was the case with the Customs & Excise Building award."

This letter then asks for an explanation of the phrase "...without third party intervention". To me it is a clear threat to interrupt the award process if NH was not satisfied with any response it might receive. I turn now to the issues.

Is the Challenged Decision Susceptible to Judicial Review

There is no contention of UDECOTT being a public authority or a public body. It is clearly a private entity.

UDECOTT takes the position that it is a private body and was performing a private function in making the challenged decision. Further, that decision was in relation to a contract which itself had no public flavour or function.

The following can be distilled from the affidavits:

1. UDECOTT was created/incorporated by the State. It is owned by the State and it is reasonable to infer that the State provided at least its start-up capital;
2. it is controlled, even if indirectly, by the State via the appointment/election of directors;
3. it was created and functions for certain specific purposes – these are set out in the "mission statement";
These functions are in my view functions performed by the government in the usual course of events. It falls to the government to provide this type of infrastructure. Doing so is not a "private function", although buildings of this nature may be constructed, built, developed or maintained by private bodies. The end result is that these buildings are all for the benefit of the national community, and it is the government's function to look after the national community;
4. UDECOTT cannot borrow money or otherwise obtain financing without the written consent of the Minister of Finance;
5. UDECOTT has already undertaken several other projects to construct buildings for, or for the use of various ministries. These may be referred to as "public-use buildings". I am not told of any work done or function performed by UDECOTT, whether in construction, development or otherwise, in relation to buildings for use by the private sector;
6. this Project is being constructed on lands "currently vested in the State". This is said in answer to an interrogatory as to who owns the land, and after the submission that paragraphs 6 and 8 of Mr. Agard's affidavit leave it "implicit" that the land is or will be owned by

UDECOTT. I am told nothing more. In the circumstances, it is only reasonable to infer that the land is owned beneficially by the State;

7. UDECOTT says that the project is being financed by its own funds until such time as debt financing is obtained from a financial institution. The latter is to be secured by a mortgage over the property - I take this to mean the land and the building;
8. UDECOTT's total existing borrowings from the private sector are now \$555,000,000.00, of which \$291,000,000.00 is secured by State guarantees. Neelanda Rampaul, UDECOTT's Chief Legal Officer, so deposes in answer to an interrogatory after Winston Agard's previous affidavit leaves a reader with the impression that UDECOTT enjoys no State funding or guarantees, at least certainly not for the purpose of the project;
9. on completion of the Project, the building will be leased to the Ministry of Health at a commercial rent.

Doubtlessly, this rent will be used either directly or indirectly, wholly or partially, to repay the debt financing which UDECOTT expects to raise. Ultimately therefore, the public purse is involved. The public purse is being called upon to pay for the construction of a building on State lands for use by a government ministry.

10. there is no doubt that if UDECOTT, or a similar entity, did not exist, then the government through one of its ministries, public authorities or public bodies, would have had to construct, or arrange for the construction of, the Project.

All of this points to UDECOTT performing public functions. There is, however, more to it than just that.

I accept that public bodies can perform private functions and provide private services, as well as enter into private contracts i.e. those that are purely commercial and without a public flavour. That is clearly the case where a government ministry sells one of its motor vehicles, if I may give just a trite example.

I accept also that the contract between the government and UDECOTT may not be one with a public flavour. It is after all is said and done, akin to no more than one party agreeing with another that the latter will construct and deliver a completely outfitted building for immediate use. UDECOTT is not shown to be an agent of the government for this purpose.

Moreover, I accept that the challenged decision concerns a construction contract, and that there is nothing inherent in a construction contract that gives it a public flavour or includes a public function – not in the usual course of events, at any rate.

Further, this was not a case of an "open tender". All four bidders had been pre-qualified and submitted their bids on that basis.

Additionally, there was no statutory underpinning for the tender procedure or which governed the manner in which UDECOTT went about considering those bids. That was done based upon purely what might be called "private law" considerations and principles, more particularly those in contract. UDECOTT is not a "creature of statute" from which it derives its power, nor is it bound by any statutory requirements or constraints (see e.g. *Mercury Energy Ltd. v. Electricity Corporation of New Zealand Ltd.* [1994] 1WLR 521), nor is the process by which it enters into any contract pursuant or subject to any statutory obligations or restraints.

It is clear that UDECOTT was pursuing what it perceived to be a strategy of obtaining the best value for its money. That is both perfectly legitimate and correct, and it appears well accepted that it is not appropriate for a court to interfere in that process, not being best placed (when expressed at a minimum) to judge what is best value. And, negotiating the final terms of a contract or, in this case, further investigating certain areas of the bid, would not alter the private law element (see *Mass Energy Ltd. v. Birmingham City Council* [1994] 2 Env. L.R. 298). As in that case, this is in reality a battle between two tenderers to be awarded the contract for the Project, UDECOTT having sought voluntarily to enter into a contract via the tender route.

Public funding, or the public purse being imposed upon, is not of itself sufficient to give the required element of public flavour, nor is the fact that UDECOTT may have been carrying out what might otherwise be regarded as governmental function (see *R. v. Lord Chancellor ex parte Hibbits and Saunders* [1993] COD 326). Something more is needed than merely negotiating a contract for the Project to bring this decision within the scope and supervision of public law (see *Mercury Energy*).

In the circumstances, I have come to the conclusion that the contract for the Project is not one that attracts a public law element, and the decision-making process is therefore not susceptible to judicial review. That is not to say that the UDECOTT's functions are generally and necessarily totally outside the purview or scope of public law, or sufficiently so as to remove it and its decisions totally from amenability to judicial review. Its functions are certainly capable of bringing it within the scope of judicial review, as was found to be the case in *Oropune Village Multipurpose Co-Operative Society Ltd.* HCA 483 of 2002, but I make no finding as to whether that is so in the present instance: it is sufficient to say that the nature of the contract is such that it falls within private and not public law.

That the Project is to be constructed on public lands is really of little assistance to NH in the present instance. There is no right of access to the general public to this parcel of land, nor does the public have a right to the use of this parcel of land as was the position in *Regina (Beer (trading as Hammer Trout Farm)) v. Hampshire Farmers' Market Ltd.* [2004] 1 WLR 233, where the respondent was established to grant licences for stalls in farmers' markets. The present proceedings concern construction of a building to house the administrative headquarters of the Ministry of Education. More particularly, the decision is the award of a contract to construct that building. There is a world difference between the two. In *Regina (Beer)* it was conceded that the issue of access and use gave rise to a public function. That is not so in the present case, which concerns a construction contract which by its very nature falls within the realm of private law.

Finally, there is no allegation here of fraud, corruption, or bad faith on the part of UDECOTT in exercising its contractual powers – not that it is a public authority or statutory co-operation in the first place (see *Lawson v. Housing New Zealand* [1997] 4LRC 369).

That being so, the motion must fail.

In deference to the submissions advanced by Counsel, however, I will touch briefly on the other issues.

The Nature of the Decision – Was it Final or Provisional

I agree that it is difficult to say that the decision made was not a final one. UDECOTT obviously intended the contract to go to HK, subject to being satisfied as to certain matters. It is also difficult to see how accord would not be arrived at on these matters, particularly since there would seem to be no fetter on them

being able to agree (on at least some) last minute changes to the contract (see *Mass Energy*) once the tender specification was not varied substantially.

It is also clear that UDECOTT wanted HK as the contractor, based on what it regarded as the best available financial terms.

At the same time, there was nothing to prevent UDECOTT from breaking off any negotiations, or halting its investigations, if it considered that it was not going to get from HK the best value for its money or that an appropriate method statement was not forthcoming. There is nothing before me to indicate an unqualified acceptance to HK of its bid. Any acceptance, assuming that there was acceptance, was clearly subject to qualification i.e. that UDECOTT had to be satisfied about certain matters. If it was not, then it could clearly say to HK that it would proceed no further and it would then be free to deal with any other tenderer, or even perhaps re-open the bidding process. This is an entirely different situation to that in *R v. National Lottery Commission ex parte Camelot Group plc* [2001] EMLR 13, where the decision-making process had come to finality and negotiations were then commenced anew with only one of the original bidders well outside the statutory tender process. It was the decision to commence this new process that was challenged.

I have given the matter considerable thought. In my view, and with the greatest deference to the view expressed by the Court of Appeal in its judgment on the appeal from the refusal of leave (at para. 29), the decision was not final in the sense that HK would be awarded the contract come what may. It was, if anything, a conditional award, and if UDECOTT was not satisfied with the results of its investigations then it was free to take up the matter with any other bidder, or proceed otherwise, if it so chose. The answer to this issue lies in whether HK could have sought to compel the award to it of the contract and performance of it by UDECOTT. In my view it could not.

In any event, the decision was a commercial one in private law, and not susceptible to judicial review, so that the nature of the decision is not material.

Were These Proceedings Premature

Given my conclusion as to the nature of the decision, it is my further conclusion that these proceedings were premature, although I accept that review can take place of a decision that is not final (see e.g. Fordham: *Judicial Review Handbook* 4th Ed. para. 4.7.1 et seq.).

The contract had not been awarded, and there was no guarantee or assurance that it would be awarded to HK.

The decision-making process was interrupted by these proceedings and on what is before me. I am not persuaded that it would be appropriate for a Court to intervene at this juncture, assuming the decision to be susceptible to judicial review (see *R. v. Broadcasting Complaints Commission ex parte BBC* (1994) 6 Admin LR 714; Lewis: *Judicial Remedies in Public Law* 3rd Ed. at para. 11:15).

Was the Decision Irrational

Assuming the decision to be susceptible to judicial review, there then arises the issue of whether it was irrational. Irrationality requires an applicant to cross a notoriously high threshold.

"It [is] rare for an applicant for judicial review against the responsible body on the ground of pure irrationality alone to succeed". (Engleman: *Commercial Judicial Review* 2001 page 31).

In essence, it is on this ground that NH bases its case. To succeed on this issue it must demonstrate that the challenged decision is one

"... which is so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it". (See *CCSU v. Minister for the Civil Service* [1984] 3AER 935 at 951 a-b.

The threshold set out in *CCSU* has not in my view been reduced by the decision in *R v. Parliamentary Commissioner for Administration ex parte Balchin* [1998] 1 PLR1

In my view, NH has failed to cross this hurdle. There is nothing to suggest that UDECOTT failed to consider any material fact, or gave excessive or (conversely) insufficient weight to any particular consideration. UDECOTT obviously took cognisance of matters other than those brought to its attention in the Quantity Surveyors' report, the Project Manager's report, and the Architect's comments. It did not accept without question what these documents set out. UDECOTT did not abdicate the decision-making process to any of its advisors.

Instead, it looked at the reports and the concerns raised there. These concerns were all addressed. UDECOTT of its own volition then raised questions for discussion. It dealt, for example, with the arithmetical error of some \$13 million in HK's bid. Mr. Martineau deals with these matters in detail in his submissions, but all I need say here is that all of the matters put forward by NH as demonstrating irrationality or unreasonableness were considered by UDECOTT. In arriving at its decision it is clear that the various reports were considered and that they were not merely rejected out of hand. That is patent from a reading of Mr. Agard's affidavit of 11th March 2005. That affidavit deals with the factors advanced by NH as demonstrating irrationality or unreasonableness. Mr. Agard is not contradicted on any of this.

There is another aspect to this. Although "abdication of duty" is a matter more usually raised where a decision (which is not a ground of this motion) is alleged to be "illegal", it would be improper for UDECOTT to accept without demur the advice or recommendations of the Project Manager, the Quantity Surveyors or the Architect. To allow them (collectively or individually) to make the decision as to whom the contract should be awarded would be an improper delegation. None of these advisors had the authority, express or implied, to do so, nor was UDECOTT obliged to accept any advice or recommendations obliged they – or any of them – might proffer (see *Judicial Review Handbook* para 50.1 et seq).

Similarly, it has not been shown that UDECOTT failed to consider any matter that was relevant.

UDECOTT placed obtaining value for money high on its list of considerations – indeed, it assumed a very high level of priority. That is not queried, nor can UDECOTT be faulted for this.

HK's bid was the only one within UDECOTT's budget. This is not in issue although that budget is not made known, as Mr. Fitzpatrick pointed out on behalf of NH.

It is clear that the thrust of NH's complaint lies in UDECOTT coming to a decision in the face of what NH considers to be UDECOTT's independent advisors rating its bid higher or better than HK. What must be kept in mind, however, is that those reports and comments were then considered in detail by UDECOTT, and UDECOTT then embarked on an analysis of what was set out in those reports. Having done so, UDECOTT then arrived at the decision which NH challenges. Nothing has been put before me to contradict what Mr. Agard says in his affidavit about those reports and comments being considered and dealt with. Ultimately, the recommendation made to UDECOTT was for further investigation and verification of the two lowest tenders. UDECOTT chose, decided, to award

the contract to HK if, and only if satisfied with the outcome of those further investigations.

HK's bid, however, was not regarded as the beginning and end of the matter. It was not a matter of its bid being accepted without reservation. Indeed, reservations were expressed, and considered by UDECOTT who then required certain further investigations to be carried out. The decision made – and complained of – can hardly be said to fall within the bounds of irrationality.

In all the circumstances I cannot agree that the decision made was irrational.

Was the Decision Unreasonable and/or Irregular or an Improper Exercise of UDECOTT's Discretion

Nor can the decision in my view be regarded as an unreasonable, if a lesser test or lower threshold is to be applied or crossed. Not, in any event, to the extent that I should either supplant that decision with my own, which I am enjoined as a matter of law from doing, nor remit it to UDECOTT for reconsideration.

The fact remains that UDECOTT considered the concerns raised in the reports. Placing emphasis on the lowest bid, the best value for money, and seeking to establish an appropriate methodology statement, is not unreasonable. That there was no further consideration of the two lowest tenderers was clearly a consequence of these proceedings being instituted. Finally, UDECOTT may have reserved the right to reject tenders containing inadequate method statements, but it was by no means compelled to do so. It retained a discretion to do otherwise, and it chose to do so.

I can see nothing unreasoned or arbitrary in the decision, nor anything absurd or perverse. The decision may not satisfy NH (it clearly does not) and there may well be others who do not agree with it. Indeed, there may be those who may

have decided differently if faced with the same material, including myself. That, however, is not the issue.

Similarly, I am not persuaded on what is before me that the decision represents an unreasonable and/or irregular or improper exercise by UDECOTT of its discretion. Indeed, this issue was not pursued vigorously by Counsel.

Was the Decision an Abuse or Misuse of Power

This issue was not canvassed in any depth before me and, again, I am not persuaded that any abuse or misuse has been demonstrated.

Should the Court Exercise its Discretion in Favour of NH Given its Conduct

It has been submitted on behalf of UDECOTT that NH has not come to this Court seeking relief with clean hands. This is based on NH putting before me copies of certain confidential documents which clearly were not made available to NH by UDECOTT pursuant to NH's request in its letter of 16th November 2004. The only inference that can be drawn from this I am told, is that the documents must have been stolen.

These documents are the Quantity Surveyors' report, the Architect's letter of 20th October 2004, under cover of which that report was submitted, and the Project Manager's report. They clearly underpin NH's assertions of irrationality (upon which this motion is predicated almost entirely) and, indeed, its claim for relief by way of the motion generally. They are clearly confidential documents to which NH had no right of sight, or otherwise. It does not avail NH to say that IADB guidelines called for delivery of reports as part of the transparency process. Those guidelines do not affect or govern this tender or its processes, even if the government had previously adopted the IADB guidelines on several major projects.

It is equally clear that NH did not come into possession of these documents from UDECOTT, as is the suggestion implicit in Mr. Elias's affidavit of 25th November 2004. Indeed, the evidence is that if there were not stolen, then they could only have been obtained by way of some subterfuge. They were certainly not given to NH by UDECOTT. None of this is denied. Nor is it denied that the two reports are different in format to the original printed documents.

It is trite law that relief in proceedings of this nature is discretionary and not as of right. In that setting, the conduct of NH is clearly a factor to consider.

It is not an answer to the submissions made on behalf of UDECOTT to say that any element of confidentiality is lost because the documents have been admitted into evidence. Nor will their being admitted cure or alleviate any impropriety on the part of a litigant in obtaining them in the first place. Further, it does not in this particular instance answer the submission that this Court, or the Court granting leave, was led to think that the documents had in fact been obtained licitly. That, as I have said, is clearly not so, and there cannot be too strong a deprecation of the manner in which NH must have come by them, and then presented them to the Court.

I say this while acknowledging the duty on UDECOTT to make full and frank disclosure of all matters relevant to the determining of this matter. I accept that these very same documents may well have come to light in the course of discovery, had such an application been made. That, however, does not condone or sanction NH's chosen information or evidence gathering methodology.

In my view, a party resorting to stratagems such as this runs a very real risk of forfeiting their right to have a Court exercise discretion in its favour. It is obvious that in the present instance, NH came by this documentation by some subterfuge or, at the very least, accepted it knowing full well that it must have been in breach of an obvious confidential relationship. It must have recognised that the

documents were confidential in nature. It cannot then seek to use these documents in furtherance of a claim for a discretionary remedy. In the circumstances I would have refused the relief sought in any event.

Costs

Apart from the costs of the motion, I had reserved for addresses my decision on the costs of the various interlocutory applications.

After addresses on the substantive motion had been completed, however, it was agreed that I would decide this issue without further addresses unless I heard to the contrary from Attorneys by 1st June. I have not heard further.

NH was largely successful in its application for leave to administer interrogatories, and should have been awarded at least a proportion of its costs as against UDECOTT. HK was not heard on this application. NH, however, failed in its application for leave to amend its Grounds to include bias, and in the usual course of events should be required to pay UDECOTT's costs of same. Mr. Fitzpatrick took the view that this was not a matter on which HK should be heard, but I did in fact hear Dr. Denbow's very brief submissions. They were minimal

Similarly, UDECOTT's application to strike out Mr. Elias's affidavit of 30th November 2004, and certain paragraphs of his affidavit 6th April 2005, also failed (almost in its entirety), as did its application that leave to use this latter affidavit be refused. Again, the usual order would be that NH's costs of these applications be paid by UDECOTT, at least in the great majority. Again, HK took no part in the hearing of these applications.

In the round, I think that the costs of each application are balanced off by the other(s) and there is nothing to be gained by either NH or UDECOTT having to tax their respective bill of costs. Even in terms of the time taken up by each of

them, there is not a great deal of difference. I also see little to be gained, and perhaps a fair amount to be lost, by trying to separate the costs of these applications from the costs of the substantive motion. I therefore think it appropriate that the costs of each of these applications be subsumed in the costs of the motion itself.

As to the latter, it is clear that UDECOTT should have its costs. There is authority, however, for the proposition that an intervenor is not always in the same position, particularly when the issues it raises are in reality no different to those raised by a respondent (see e.g. *Judicial Review Handbook* para. 18.1.7 *et seq.*). I accept, however, that the submissions on behalf of HK went further than those on behalf of UDECOTT in some instances.

Having considered the matter, I find it appropriate in this instance to order NH to pay UDECOTT's costs of the motion, as well as 25% of HK's.

In the event, therefore, the motion is dismissed, and the injunction granted on 12th January 2005 therefore stands discharged. The Applicant is to pay the costs of the Respondent and 25% of those of the Intervenor, certified in each instance fit for both Senior and Junior Counsel.

23rd June 2005

C.V.H. Stollmeyer
Judge