

Tiwi Islands Shire Council v Procurement Review Board & Ors
[2013] NTSC 83

PARTIES: TIWI ISLANDS SHIRE COUNCIL
v
PROCUREMENT REVIEW BOARD
AND
POWER AND WATER
CORPORATION
AND
ATTORNEY-GENERAL FOR THE
NORTHERN TERRITORY

TITLE OF COURT: SUPREME COURT OF THE
NORTHERN TERRITORY

JURISDICTION: SUPREME COURT OF THE
NORTHERN TERRITORY
EXERCISING TERRITORY
JURISDICTION

FILE NO: 99 of 2013 (21342070)

DELIVERED: 30 December 2013

HEARING DATE: 17 October 2013

JUDGMENT OF: SOUTHWOOD J

CATCHWORDS:

ADMINISTRATIVE LAW – Judicial review – Procurement Review Board – Remedies sought in the form of certiorari and mandamus pursuant to Order 56 *Supreme Court Rules* (NT) – Procedural fairness – Failure to give reasons

– Failure to ask the right question – Failure to exercise jurisdiction –
Jurisdictional error.

Attorney-General of NSW & Anor v Kennedy Miller Television Pty Ltd (1998) 43 NSWLR 729; *Campbelltown City Council v Vegan* (2006) 67 NSWLR 372, applied.

Brandy v Human Rights and Equal Opportunity Commission (1995) 183 CLR 245; *Craig v State of South Australia* (1995) 184 CLR 163; *Kioa v West* (1985) 159 CLR 550; *Mobil Oil Australia Pty Ltd v Federal Commissioner of Taxation* (1963) 113 CLR 475; *Public Service Board of New South Wales v Osmond* (1986) 159 CLR 656; *R v Chairman of Parole Board; Ex Parte Patterson* (1986) 43 NTR 13, followed.

Supreme Court Rules (NT) r 56
Procurement Act (NT) s 11
Procurement Regulations (NT) r 6(7)

REPRESENTATION:

Counsel:

Plaintiff:	M Crawley
Defendants:	
Attorney General for the Northern Territory:	C Smyth

Solicitors:

Plaintiff:	De Silva Hebron
Defendants:	
Intervener:	Solicitor for the Northern Territory

Judgment category classification:	B
Judgment ID Number:	Sou1314
Number of pages:	19

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Tiwi Islands Shire Council v Procurement Review Board & Ors
[2013] NTSC 83
No. 99 of 2013 (21342070)

BETWEEN:

TIWI ISLANDS SHIRE COUNCIL
Plaintiff

AND:

PROCUREMENT REVIEW BOARD
First Defendant

AND:

POWER AND WATER CORPORATION
Second Defendant

AND:

**ATTORNEY-GENERAL FOR THE
NORTHERN TERRITORY**
Intervener

CORAM: SOUTHWOOD J

REASONS FOR JUDGMENT

(Delivered 30 December 2013)

Introduction

- [1] This is an application for judicial review brought under r 56 of the *Supreme Court Rules*. The plaintiff seeks the following orders:

1. An order in the nature of certiorari quashing a decision of the Procurement Review Board whereby it disallowed the plaintiff's appeal from the Power and Water Corporation's exclusion from assessment of the Plaintiff's tender in response to Request for Tender PRO00068-13 Northern Region.
2. An order in the nature of mandamus remitting the plaintiff's appeal back to the First Defendant to be heard and determined according to law.

[2] Both the Procurement Review Board and the Power and Water Corporation have indicated that they are prepared to abide the outcome of the application and the Attorney-General of the Northern Territory has intervened to act as a contradictor.

[3] The plaintiff submits that the decision of the Procurement Review Board is vitiated on three grounds. First, the Procurement Review Board failed to accord the plaintiff procedural fairness. Second, the Procurement Review Board failed to give reasons. Third, the Procurement Review Board failed to ask itself the right question and thereby failed to exercise its jurisdiction.

The facts

[4] There is no dispute about many of the facts.

[5] Under an existing contract, the plaintiff has provided services to the Power and Water Corporation for a period of over three years and it continues to provide those services. In early 2013 the plaintiff was asked to extend the term of the existing contract to October 2013. In October 2013 the plaintiff was asked to extend the term of the existing contract to December 2013.

- [6] At no time during the operation of the existing contract was the plaintiff required to hold accreditation from Contractor Accreditation Limited (“CAL”).
- [7] During 2013, the Power and Water Corporation issued a Request for Tender bearing a number PRO00068-13 described as “Northern Region Contract for the day to day operation and maintenance of power, water and sewerage systems for remote communities for a period of 60 months”. The Northern Region communities comprise, among other communities, Wurrumiyanga (Nguiu). The tender period closed on 28 August 2013. The Request for Tender includes the provision of similar services to those currently supplied by the plaintiff under the existing contract. The contract which is ultimately let under the Request for Tender will replace the existing contract for services currently supplied by the plaintiff to the Power and Water Corporation.
- [8] The Tender is subject to Industry Accreditation. It is a compulsory requirement of the Request for Tender that, at the time the Tenderer submits its tender, the Tenderer must be accredited by Contractor Accreditation Limited to a rating that is equal to or higher than the six monthly value of the Tenderer’s tender or the sub-contractors’ work in an applicable CAL category/group/sub-group.
- [9] The plaintiff submitted a tender within time. The tender stated that the plaintiff was CAL accredited and provided a CAL certification number.

However, this was not correct. The plaintiff was not CAL accredited at the time it lodged its tender.

[10] The plaintiff first applied for CAL accreditation on 23 May 2011 and was accredited in November 2011. The plaintiff applied to renew its accreditation on 28 September 2012. However, its application did not contain any financial information. Four requests for financial information did not elicit a response from the plaintiff, and its accreditation expired on 20 November 2012 and had not been renewed at the time the plaintiff lodged its tender.

[11] On 5 September 2013 Ms Chelsea Chin, who is a Tenders Officer in the Northern Territory Department of Corporate and Information Services, wrote to the Chief Executive Officer of the plaintiff, Mr Alan Hudson, advising that the tender was inadmissible and would not be considered further because the plaintiff was not CAL accredited. In her letter she also advised the plaintiff that it could appeal the decision not to consider the plaintiff's tender. She stated:

You may appeal the decision in writing to the Procurement Review Board within two business days of receiving this emailed notification, if you believe you have sufficient grounds.

In order for the Board to assess your appeal you are required to provide comprehensive and detailed justification as to why the tender should be admitted for assessment. Appeals are to be directed to the Secretary of the Procurement Review Board.

[12] On 6 September 2013, by email, the plaintiff appealed against the decision that its tender was inadmissible. The email stated:

We have been advised that our tender for services will not be considered due to the non-currency of our registration with Contractor Accreditation Limited.

We wish to appeal that decision.

Our grounds for appeal are as follows.

At the time for tendering we acted in good faith providing what we believed to be our current CAL certification number.

We are now aware that the advice tendered to myself as CEO by (now) former staff was inaccurate. This advice indicated that outstanding requests for information had been addressed and there was no impediment to the renewal of our registration. Factually, the matters (Financial Statements and Corporate details) had not been provided.

It is the fact that our CAL certification was not renewed:

- for administrative reasons not any breach,
- misconduct,
- lack of financial capacity, or
- failure to complete works in accordance with contracts with the NTG.

On receipt of the advice of non-currency we have immediately moved to address outstanding matters caused by the misinformation provided internally to senior staff.

Whilst we admit that the breakdown of communication occurred within our organisation we believe *we are an eligible organisation for CAL accreditation and that this error should not be fatal to our tender*, especially given there is no barrier to renewal of that accreditation.

Alan Hudson

CEO

Tiwi Islands Shire Council

[13] The email from Mr Hudson did not request more time to lodge further information. Nor is there anything in the email to suggest that the submissions on the appeal are incomplete in anyway. Further, the email did not state that the plaintiff had been providing the services, the subject of the tender to the Power and Water Corporation, for six years and the contract had been recently extended. Nor did it attach the relevant financial documents which had been requested by Contractor Accreditation Limited. Nor did it attach copies of the documents, if any, that it had filed in support of its application to renew its accreditation.

[14] Appeals to the Procurement Review Board are governed by the *Procurement Act* (NT) and Procurement Direction PO6 – Receipt and Admissibility of Quotations, Tenders and Appeals (“Direction PO6”) which is made under s 11 of the *Procurement Act* (NT). Direction PO6, among other things, states:

All Quotations for Tier Three Supplies or Tenders for Tier Four, Tier Five and Tier Six Supplies not meeting mandated requirements of the Conditions of Quoting/Tendering (for example accreditation by

Contractor Accreditation Limited) must not be assessed unless Procurement Review Board approves their admissibility.

[15] The procedure for appeals to the Procurement Review Board is set out in par PO6.12 of Direction PO6. Of relevance to this appeal, par PO6.12 states:

- III. If the Respondent/Tenderer wishes to appeal, *they shall provide to the Procurement Review Board Secretariat documentation, which will enable the Procurement Review Board to consider the appeal*, no later than two (2) business days following notification of Quotation/Tender inadmissibility.
- IV. Once a Respondent/Tenderer has lodged an appeal the Procurement Review Board Secretariat will advise Contract and Procurement Services and the relevant Agency. The Procurement Review Board Secretariat will seek details from Contract and Procurement Services in relation to the determination about the admissibility of the Quotation/Tender.
- V. The Respondent/Tenderer *needs to ensure that the documentation provided in any appeal is sufficiently comprehensive and detailed and provides justification as to why the Quotation/Tender should be admitted for assessment.*
- VI. Once a determination has been made by the Procurement Review Board, the Procurement Review Board Secretariat will ensure the Respondent/Tenderer, Contract and Procurement Services and the relevant Agency are informed in writing of the outcome of the determination.

[16] On 9 September 2013 the Secretariat of the Procurement Review Board acknowledged receipt of the plaintiff's appeal by email to Mr Hudson. The email stated:

Receipt is acknowledged of your emailed appeal of 6 September 2013.

Your appeal is scheduled for consideration at the next Procurement Review Board meeting on 12 September 2013.

You will be advised further once the Board reaches a decision.

Once tenders are closed the Board cannot accept any documentation in regards to a late or incomplete tender submission.

[17] At no stage after receipt of the email dated 9 September 2013 and prior to 12 September 2013 did the plaintiff write to the Procurement Review Board requesting an opportunity to provide further material to the Board, or to be heard at the meeting of the Board.

[18] On 12 September a Memorandum was prepared by Ms Bruni Hapke, the Secretary of the Procurement Review Board, for the Chairperson and Members of the Board. Under the heading 'BACKGROUND' and the heading 'CONCLUSION' the memorandum stated:

BACKGROUND

Tiwi have stated that when they submitted their tender they believed they were accredited. On receipt of their letter of inadmissibility, they have admitted their CAL has not been renewed due to administrative reasons *and have acted immediately to rectify the problem.*

CAL advises that an application to renew was received on 28 September 2012 but no financial data was received. Four requests were sought but no further responses were received from Tiwi. The CAL for Tiwi expired on 30 November 2012.

The Request for Tender documentation stated the tender is subject to Industry Accreditation.

CONCLUSION

The tender submitted by Tiwi as the Respondent did not hold CAL accreditation at the time of tenders closing.

[19] The Procurement Review Board met on 12 September 2013. The minutes of the Board record that the plaintiff's appeal was disallowed. No reasons for the decision are recorded in the minutes. However, as stated above, the Memorandum was signed by the Chairperson of the Board and records that the tender of the plaintiff was inadmissible because Tiwi did not hold CAL accreditation at the time of the tenders closing.

[20] On 12 September 2013 a letter was sent to the plaintiff by the Acting Chairperson of the Procurement Review Board. Among other things, the letter states:

The Procurement Review Board considered the appeal on 12 September 2013 *and it was disallowed*. All information pertaining to this matter, including the information you presented, was carefully considered by the Board when reviewing your appeal.

The requirements for meeting accreditation were detailed in the Request for Tender document and are:

[The letter then set out the provisions of the wrong Request for Tender document. However, there is no issue that tenderers were required to be accredited by Contractor Accreditation Limited]

[21] It appears that the Procurement Review Board determined the appeal on the basis that Contract Procurement Services had correctly determined that the plaintiff was not accredited by Contractor Accreditation Limited. It did so in circumstances where the plaintiff had incorrectly stated in its tender that it

was accredited. However, there was no issue in the appeal about whether the plaintiff was accredited or not. The plaintiff conceded that it was not accredited, but submitted that its tender should be considered because it was eligible for accreditation. I find that the Board did not consider this question when it determined the plaintiff's appeal.

Procedural Fairness

[22] The plaintiff submits that it was denied procedural fairness on a number of grounds. First, the plaintiff was not accorded a proper right to be heard on the appeal. The plaintiff says that it was not informed and did not understand that its appeal would be determined purely on the basis of the appeal notice together with whatever information was supplied to the Procurement Review Board by Contract and Procurement Services without the opportunity to provide submissions or further documents. The notice of its appeal rights was confusing and misleading. The Procurement Review Board only had before it the appeal email sent by the plaintiff and the memorandum prepared by the Secretary of the Procurement Review Board which contained incomplete information. Consequently, the plaintiff submits that it was not given a proper opportunity to provide materials or make submissions to the Procurement Review Board.

[23] The plaintiff made no complaint that its tender document was not placed before the Procurement Review Board.

[24] Second, the Procurement Review Board failed to give reasons for dismissing the plaintiff's appeal.

[25] In my opinion, neither of these submissions of the plaintiff is sustainable.

[26] The plaintiff was accorded a fair and proper right to be heard on the appeal to the Procurement Review Board. The letter of 5 September 2013 makes it abundantly clear that within 2 business days from 5 September 2013, the plaintiff was required to provide, in writing, a comprehensive and detailed justification as to why its tender should be admitted for assessment.

Direction PO6 – Receipt and Admissibility of Quotations, Tenders and Appeals is readily accessible on the internet and provides the same information about the appeal process as the letter dated 5 September 2013. The plaintiff had from 5 September 2013 to 10 September 2013 to provide all of the information on which it sought to rely to the Procurement Review Board. By email dated 9 September 2013 the plaintiff was advised that its appeal was scheduled for consideration by the Procurement Review Board on 12 September 2013. The plaintiff did not file any further information by 10 September 2013, nor did it seek an extension of time to file further information, nor did it seek to be heard on 12 September 2013. I am satisfied that the plaintiff elected to have the appeal dealt with on the basis of its email dated 6 September 2013.

[27] I accept the submission of counsel for the Attorney-General that the plaintiff's email of 6 September 2013 indicates that it was aware of what

was required. The email does more than simply notify the Procurement Review Board of an intention to appeal. It sets out the grounds of appeal and it explains the reasons of non-compliance with the mandatory accreditation requirements. There is no indication that further information would be provided by the plaintiff in further support of its appeal.

[28] Further, I do not accept Mr Hudson's evidence that he did not interpret the email of 9 September 2013 to mean that the plaintiff's appeal would be finalised on 12 September 2013. He does not say what he interpreted the email to mean. The email states that the appeal was scheduled for consideration on 12 September 2013 and the plaintiff would be advised further once the Board reaches a decision.

[29] The plaintiff was provided with sufficient details of the basis on which its tender had been found inadmissible, at first instance, and was given an opportunity to be heard on the appeal. In considering such matters it is important to note the following principles. The opportunity to be heard is subject to the statutory framework in which the relevant decision is made.¹ Further, in addition to the express language of the relevant statute, courts may also consider the context in which the statutory framework is enacted.² In this instance the statutory framework and procurement directions reflect an important policy underpinning the tender process, namely the requirement that tenders should be considered in an efficient and timely

¹ *Kioa v West* (1985) 159 CLR 550 at 583-584.

² *Mobil Oil Australia Pty Ltd v Federal Commissioner of Taxation* (1963) 113 CLR 475 at 504.

manner. This policy seeks to minimise undue delay in the consideration of tenders which could impact on the ability of Government or Government owned corporations to award tenders for the provision of essential services such as the provision of power, water and sewerage. In the circumstances, it is appropriate for a decision making body such as the Procurement Review Board to be invested with appeal procedures that are focused on the expeditious determination of appeals without necessarily infringing natural justice.³

[30] I also have considerable difficulty accepting Mr Hudson's assertion in the email of 6 September 2013 that:

At the time of tendering we acted in good faith providing what we believed to be the current CAL certification Number.

We are now aware that advice tendered to me as CEO by (now) former staff was inaccurate. This advice indicated that outstanding requests for information had been addressed and that there was no impediment to renewal of our registration. Factually the matters (Financial Statements and corporate detail) had not been provided.

....

On receipt of the advice of non-currency we have immediately moved to address the outstanding matters caused by the misinformation provided internally to senior staff.

[31] The information contained in annexures 'C' and 'D' to Ms De Santis's affidavit reveal that: (1) on 22 October 2012 a Final Reminder was faxed to Mr Hudson by Contractor Accreditation Ltd requesting certain information;

³ *R v Chairman of Parole Board; Ex Parte Patterson* (1986) 43 NTR 13 at 19-20.

and (2) on 6 November 2012 an email was sent *to Mr Hudson* by Ms Paula Miller the Deputy Registrar of Contractor Accreditation Limited referring to accreditation certificate application number 15363 stating that the plaintiff's accreditation had been cancelled and that the plaintiff may no longer be eligible to tender for NT Government works and service contracts valued over \$50,000. Nothing then seems to have been done by the plaintiff about re-accreditation until its tender was rejected by the Power and Water Corporation. Mr Hudson does not state what he did after he received the facsimile dated 22 October 2012 or after he received the email dated 6 November 2012 or what due diligence checks he made before he inserted the old accreditation certificate number in the tender document. On 6 November 2012 he certainly must have been aware that the plaintiff's accreditation had been cancelled and was therefore no longer current. Further, his statement that "we are now aware" is very vague and lacking in necessary detail. He does not say what advice was tendered to him, by whom or when the advice was tendered to him. He does not seem to have done anything immediately after 6 November 2012 to address the outstanding matters. Most significantly, he does not say when the plaintiff first applied for re-accreditation after 6 November 2012. Nor does he offer any explanation as to why he did not do anything between 22 October and 6 November 2012.

[32] The Procurement Review Board did give reasons for disallowing the plaintiff's appeal. It is apparent that the Board disallowed the plaintiff's appeal because it was satisfied that it had been verified that the plaintiff did

not hold the required accreditation at the time it lodged its tender and that such accreditation was a mandatory requirement of the Request for Tender. These reasons are adequate reasons so far as they go. However, the reasons reveal that the Board addressed the wrong question.

[33] In any event, in my opinion, there is no requirement for the Procurement Review Board to give reasons for rejecting an appeal. Neither the *Procurement Act* (NT) nor Direction PO6 requires the Board to give reasons for its decision. The decision of the Board was an administrative decision which did not involve the determination of rights between parties.⁴ There is no general rule of common law, or principle of natural justice, that requires reasons to be given for administrative decisions, even decisions which have been made in the exercise of a statutory discretion which may adversely affect the interests, or defeat the legitimate or reasonable expectations of other persons.⁵ There is no statutory right of appeal from a decision of the Procurement Review Board.⁶

[34] While there is no requirement for the Procurement Review Board to give reasons, the Board is not precluded from giving reasons. As a matter of good practice and good decision making the Board should provide short reasons for its decision or, alternatively, succinctly state the grounds for allowing or disallowing an appeal.

⁴ *Campbelltown City Council v Vegan* (2006) 67 NSWLR 372 at 377 and 396; *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245 at 244.

⁵ *Public Service Board of New South Wales v Osmond* (1986) 159 CLR 656 at 670.

⁶ *Attorney-General of NSW & Anor v Kennedy Miller Television Pty Ltd* (1998) 43 NSWLR 729 at 738.

Failure to exercise jurisdiction/failure to ask the right question

[35] The plaintiff submits that “if an administrative tribunal falls into *an error of law* which causes it to identify the wrong question, to ignore relevant material, to rely on irrelevant material or at least, in some circumstances, to make an erroneous finding or to reach a mistaken conclusion, and the tribunal’s exercise or purported exercise of power is thereby affected, it exceeds its authority or powers. Such an error of law is jurisdictional error which will invalidate any order or decision of the tribunal which reflects it.”⁷

[36] The plaintiff submits that the decision of Procurement Review Board disallowing the plaintiff’s appeal to the Board is invalid because the Board asked itself the wrong question. In error, the Board simply asked if the information before it verified the fact that the plaintiff was not accredited by Contractor Accreditation Limited at the time the plaintiff lodged its tender. The Board did not consider whether the plaintiff’s tender should nonetheless be admitted for consideration. The plaintiff conceded that it was not accredited but argued that its tender should be admitted for consideration because the plaintiff was eligible for accreditation but had failed to renew its accreditation due to an administrative failure or oversight.

[37] The plaintiff submits that under r 6(7) of the *Procurement Regulations* the functions of a Procurement Review Board include:

⁷ *Craig v State of South Australia* (1995) 184 CLR 163 at 179.

(aa) to review all proposed procurement activity for tier four, tier five and tier six supplies;

(ba) to give its approval for the acceptance of tenders and public tender recommendations where it thinks appropriate or as directed by the Minister; and

(h) to determine the eligibility of suppliers to enter into contracts with the Territory.

[38] Under Direction PO6, the Procurement Review Board was required to consider whether a non-conforming tender should nonetheless be admitted for assessment. The provisions of Direction PO6 give the Board discretion to approve the admission of tenders that do not comply with the mandatory requirements of the 'Conditions of Quoting/Tendering' for assessment.

[39] Among other things, the preamble to Direction PO6 states:

- All quotations for Tier Three Supplies or Tenders for Tier Four, Tier Five and Tier Six supplies not meeting the mandated requirements of the Conditions of Quoting/Tendering (for example accreditation by Contractor Accreditation Limited) must not be assessed *unless Procurement Review Board approves their admissibility.*
- Respondents for all Tier Three Quotations and Tenderers for Tier Four, Tier Five and Tier Six Tenders, deemed to be ineligible may appeal to the Procurement Review Board.

[40] Likewise, Direction PO6 par PO 6.9 I states:

Quotations/Tenders received that do not comply with the mandatory requirements of the Conditions of Quoting/Tendering (for example does not meet the requirements for accreditation) must not be assessed unless the Procurement Review Board has approved their admissibility.

[41] The Respondent/Tenderer is given a right to appeal against the inadmissibility of their Quotation/Tender and Direction PO6 par PO 6.12 V states:

The Respondent/Tenderer needs to ensure that the documentation provided in any appeal is sufficiently comprehensive and detailed and provides justification as to why the Quotation/Tender should be admitted for assessment.

[42] Accordingly, the plaintiff submitted that, despite its lack of accreditation, the Procurement Review Board was required to consider whether the plaintiff was technically and financially competent to perform the services which are the subject of the request for tender and the Board did not do so.

[43] Counsel for the Attorney-General acknowledged that the Board is granted discretion to determine appeals. This discretion arises from the Board's statutory functions and is regulated by the procurement directions. He conceded that the purpose of this appeal was to consider whether to admit an inadmissible tender, particularly one which did not have accreditation. Counsel for the Attorney-General further submitted that the record of the Board demonstrated that the Board considered the appeal and considered whether to exercise its discretion to admit the plaintiff's tender even though the plaintiff was not accredited at the time it lodged its tender.

[44] In my opinion, in this appeal, the Board was required to determine, on the information before it, whether the plaintiff was technically and financially competent to perform the services which are the subject of the Request for

Tender and the submissions of counsel for the Attorney-General cannot be sustained. The Board did not do so. The record of the Board, which includes the Memorandum from the Secretary of the Board and the letter to the plaintiff dated 12 September 2013, demonstrates that the Board's deliberations only involved a consideration of whether the lack of accreditation had been verified on the information before the Board and the explanation for the lack of accreditation. The Memorandum contains no mention of the submission by the plaintiff that, despite its lack of accreditation, the plaintiff was eligible to be accredited. Neither does the letter of 12 September 2013.

[45] In the circumstances, the plaintiff has established that there was an error of the kind referred to in *Craig v State of South Australia*⁸ for the reasons set out in pars [35] to [45] above.

Orders

[46] I make the following orders:

1. The decision of the Procurement Review Board made on 12 September 2013 disallowing the plaintiff's appeal is quashed.
2. The matter is remitted back to the Procurement Review Board and the Board is ordered to consider the plaintiff's appeal according to law.

[47] I will hear the parties further as to the question of costs.

⁸ (1995) 184 CLR 163 at 179.