

Shell Co. v. Palau Pub. Utils. Corp., 15 ROP 158 (Tr. Div. 2008)
SHELL COMPANY (PACIFIC ISLANDS), LTD.,
Plaintiff,

v.

PALAU PUBLIC UTILITIES CORPORATION,
Defendant.

CIVIL ACTION NO. 08-018

Supreme Court, Trial Division
Republic of Palau

Decided: January 24, 2008

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Counsel for Plaintiff: Rachel Dimitruk, Siefried Nakamura

Counsel for Defendant: Johnson Toribiong

ARTHUR NGIRAKLSONG, Chief Justice:

Shell Company (Pacific Islands), Ltd., (“Shell”) is the plaintiff in this matter. The Palau Public Utility Corporation (“PPUC”), a public corporation, is the defendant.

PPUC, on August 1, 2007, issued a Request for Proposals No. PPUC07-167 (“Request”). That Request invited competitive bids to supply defendant fuels at different sites. At issue in this case is Package B, which requested proposals to supply diesel fuel to the Malakal Power Plant for a three (3) year term. Also included in the Package was the requirement to supply two (2) new fuel tanker trucks, each with a minimum capacity of 5,000.00 gallons.

Shell, Mobil, Palau Inc., (“Mobil”), and two others submitted bids in response to the Request. However, defendant on September 19, 2007, opened the four bids, which included those from Shell and Mobil, but did not make any award. Instead, defendant basically rejected all bids (section 12 of PPUC’s procurement regulation) and began competitive negotiation with Shell and Mobil. In its negotiations with both Shell and Mobil, the same proposals were discussed, like the bid including the two trucks and one without the two trucks. On December 14, 2007, after its negotiations with Shell and Mobil, defendant concluded that the latter was the lowest responsible offeror. Consequently, defendant selected Mobil to be the contractor for Package B. The result of these competitive negotiations eliminated the two trucks from the original invitation for bids.

Shell files this action alleging that it was the lowest responsible bidder and that existing rules and procedures on the confidentiality of bid proposals should be set aside so it can determine if indeed it was the lowest responsible bidder.

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Factors the Court considers when deciding whether or not to grant a preliminary injunction are well known. They are:

1. that plaintiff has a *substantial likelihood of success on the merits*;
2. that a substantial threat exists that plaintiff will suffer irreparable injury if the injunction is not granted;
3. that threatened injury to the plaintiff outweighs threatened harm the injunction will cause the defendant; and
4. where public interest lies.

Gibbons v. Etpison, 5 ROP Intrm. 273, 276 (Tr. Div. 1992) (emphasis added).

First, defendant stated that Mobil was the lowest responsible offeror. Factors for determining who is the lowest responsible bidder or offeror are broad and allow some discretion. Sections 30 and 31 of the PPUC Spending Authority and Procurement Procedure read:

Section 30. Awards

A contract shall be awarded to the lowest responsible offeror or bidder whose proposal or bid is reasonably determined in writing by the General Manager to be most advantageous to the PPUC, taking into consideration price and other evaluation factors set forth in the request for proposals. No factors or criteria other than those listed in the proposals shall be considered during the evaluation process.

Notice of an award shall be made by the presentation to the offeror of a contract signed by the General Manager.

Section 31. Responsible Bidders and Offerors

Awards shall only be made to responsible bidders and offerors. Criteria for determining the responsibility of bidders and offerors include, *but are not limited to*, the following:

- A. The financial resources available to perform the contract or the ability to immediately obtain the resources; and
- B. Ability to comply with required delivery times or performance schedules; and
- C. The necessary organization, experience and skills required to perform the contract or have the ability to obtain them; and

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D. The necessary production, construction and technical equipment facilities or the ability to obtain them; and

E. Any other criteria required by the invitation forbid *or request for proposal*.

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Prior to award, the General Manager shall obtain information from the bidder or offeror necessary to make a determination of responsibility. The General Manager shall make a written and substantiated determination of responsibility for all contracts.

(emphasis added)

Plaintiff has failed to show that Mobil is not the lowest responsible bidder or offeror under any of the criteria set forth in the above two sections. Without presenting one iota of evidence, plaintiff alleges that “Shell is doubtful whether Mobil could have provided the lowest possible (sic) bid for Package B.” Compl. 5; Brief for Preliminary Injunction 9.

Failing to show that plaintiff has a likelihood of succeeding on the merits, plaintiff next argues that if it can inspect Mobil’s bid, it will then be able to determine if Mobil was the lowest responsible bidder.

In response, defendant argues that an existing regulation protects the confidentiality of Mobil’s bid. Section 22 of PPUC’s regulations states, “[p]roposals maybe made available for public inspection only after the contract award and a prior written consent from the award recipient.”

Plaintiff counterargues that the Procurement Statute, 40 PNCA Chapter 6, which exempts PPUC from its applicability, nevertheless requires PPUC to adopt its own procurement “regulations substantially similar to 40 PNCA Chapter 6,” 40 PNCA § 603 (note), and that Section 22 of PPUC’s regulations is at variance with 40 PNCA § 620, which states “[a]ll bids and the summary shall be open for public inspection.”

The Court does not read the note to the statute as requiring that all regulations of the PPUC on procurement are to be substantially similar to all sections of 40 PNCA Chapter 6. If this was intended, it would have been necessary to say so. Hence, the reasonable reading of the requirement for “substantially similar” is that all of PPUC’s regulations in the aggregate shall be substantially similar to 40 PNCA Chapter 6 as a whole. Therefore, certain PPUC regulations may be dissimilar or may even be absent, but if on the whole there exists substantial similarity between PPUC’s procurement regulations and 40 PNCA Chapter 6, the Procurement Statute has not been violated. Thus, section 22 of PPUC’s regulation does not violate the Procurement Statute.

Plaintiff’s counsel also argues that section 22 of PPUC’s regulation violates Article IV,

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section 12 of the Palau Constitution. That section reads: “A citizen has the right to examine any government document and to observe the official deliberations of any agency of the government.” Defendant’s counsel did not respond to this constitutional issue.

The Court declines to address this constitutional issue until it is presented squarely before the Court with a precise and sufficient set of facts. It is never a good idea to formulate rules on constitutional law without a precise set of facts and the issue thoroughly researched. *Gibbons v. Seventh Koror State Legislature*, 13 ROP 156, 166-67 (2006) (Ngiraklsong, C.J., concurring). ¶162 To summarize, plaintiff is asking the Court to enjoin the defendant from awarding the disputed award to Mobil because plaintiff has “doubts” that Mobil was the lowest responsible bidder. Plaintiff would know if Mobil was the lowest responsible bidder if the Court set aside existing rules protecting confidentiality of proposals by the winning bidder.

Defendant has asserted that its competitive negotiations with both Shell and Mobil were fair and “equal,” that the selection of Mobil over Shell was based on the factors under the regulations, and that Mobil was the lowest responsible offeror.

In contrast, plaintiff has failed to produce any evidence to contradict the defendant’s above assertions. Plaintiff is essentially asking for a preliminary injunction because it has a “hunch” that Mobil was not the lowest responsible offeror. The Court will not grant a preliminary injunction based on the applicant’s suspicion that a wrong may have been committed.

Plaintiff’s application for preliminary injunction is denied.