UAE Supreme Court ruled tender committee liable for contractor's rejected bids of 65 million Dirhams

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In the late nineties, a contractor sued a government tender committee for AED 65,467,250 in compensation for losses and lost earnings as a result of not being awarded five tenders related to construction and maintenance works that the contractor had bid for.

The contractor argued that its five bids contained the lowest prices and fulfilled all the conditions of the tenders. Both the primary court and the appeals court rejected the claim.

The Federal Supreme Court, however, overturned the lower court judgments and found the tender committee to be administratively liable towards the contractor for the five rejected bids.

The case was brought forth on grounds of contravening Abu Dhabi Law No. 4/1977 On Tenders, Auctions and Warehouses in the Emirate of Abu Dhabi – particularly on the basis that Article 21 of the said law states that:

"The preference between the tenderers shall be according to the selection of the tenderer presenting the lowest total price, should the bid thereof be consistent with the tender conditions. However, the tenderer presenting a higher price may be chosen should the lower prices be unreasonably low and not assuring proper work progress."

The Federal Supreme Court ruled that it was evident from the statutes regulating contracting by way of tender, that the legislator has subjected public tenders to basic principles of openness, equality, freedom of competition and the mechanism for awarding the tender, and obligates the administrative authority (i.e. the tender committee) to disclose the reasons for rejection of a bid.

The Court's rationale was that this is to ensure that the administrative authority follows a decreed path in order to reach the appointment of the best bidders in accordance with the law. The contracting procedures are organized by way of tender, so that it takes place in two stages, the first of which includes preliminary work and the second in which the contract is concluded.

Continuing, the Court stated that the preliminary tender processes consist of setting the conditions for the tender, announcing it, receiving bids, fulfilling the conditions of the tender, and then separating between the bids. These were considered by the Court to be internal organizational rules that are the prerogative of the tender committee. Nonetheless, the Court opined that the provisions that are set by the legislator are for the benefit of the administrative authority (i.e. the tender committee) and private persons alike, with the aim of ensuring the impartiality of the bidding processes and respecting the principle of equality among all bidders.

In interpreting the law, the Federal Supreme Court noted that the bidder with the lowest price is originally the owner of the right to the award whenever the bid is consistent with the terms of the tender, and with the exception of this principle, the administrative authority may award the tender that was submitted at a higher price if the lower price was unreasonably reduced, as there may be concerns regarding good performance, and this exception was a violation of the basic principle that governs public tendering procedures, which is the mechanism for awarding the tender.

In its judgment, the Federal Supreme Court found the tender committee to be administratively liable.

The significance of this case is not only that a contractor had succeeded in an action against an administrative decision issued by an administrative authority (i.e. the tender committee), but that the Federal Supreme Court found the committee to be liable for its decision.

In other words, the Court did not only invalidate the decision, but also found that liability arose against the contractor's claim of AED 65,467,250.

One of the rarely commented upon competencies under Emirati law is administrative law and administrative decisions; the law that governs the relations between government agencies, and government agencies and the private sector, and the decision taken by government agencies.

There is no single administrative legislative text in the UAE, rather, the corpus of administrative law is comprised of scattered provisions in various pieces of legislation – but mainly the Constitution and Article 84 (bis) of the Civil Procedures Law – and also scholarly works and jurisprudence.

As a matter of fact, Article 84 (bis) was only added to the Civil Procedures Law in 2014.

In 2019, there were almost 1,130 administrative cases filed before the various stages of the Federal Courts. Not to mention the myriad other administrative cases that are domestic respective of domestic administrative authorities in Emirates that have independent judicial authorities (i.e. Abu Dhabi, Dubai, RAKI, DIFC, and ADGM).

Most administrative disputes revolve around invalidating an administrative decision – in other words – cancelling the administrative decision and its consequence. The discussion surrounding forms and procedures of administrative disputes is

quite broad and has its own respective nuances such as the effects of administrative decision *in rem* and those *in personam*, and whether effects can be retrospective, or whether there can be a monetary value attached to an administrative decision and its invalidation.

However, with all that said, it is extremely rare for a Court to find an administrative authority liable for an administrative decision – particularly where the plaintiff is claiming compensation for losses and lost earnings.

Generally, the Courts either uphold the administrative decision, or invalidate it, or invalidate it *and* replace it with a quasi-judicial/administrative decision – but rarely does a Court find the administrative authority liable.

This particular case in this article is what one may refer to as an 'orphan' case. It occurred in an exceptional instance, and it is unclear if there are other similar judgments, or whether the Federal Supreme Court may repeat such a judgment.

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