

IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO. *G0159*  
of 2013

BETWEEN:

THE QUEEN:

THE ATTORNEY GENERAL OF THE CAYMAN ISLANDS

As representative of the Cayman Islands Government, Minister of  
District Administration, Works, Land and Agriculture (Department of  
Environmental Health) and the Premier

AND

PETER CAMPBELL



APPLICANT



APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

To the Clerk of the Court, Law Courts, George Town, Grand Cayman

Name, address and description of applicant	Peter Campbell PO Box 32218 Omega Drive, No.3 Prospect Grand Cayman KY1-1208  "Aggrieved person"
Judgment, order, decision or other proceedings in respect of which relief is sought	Decision of the Cayman Islands Government (by the Minister of District Administration, Works, Land and Agriculture and/or the Premier and/or Cabinet or such other person as may be appropriate) to cease negotiations with Wheelabrator Technologies In the successful tenderer for the provision of Waste Management Facilities under the CTC's Request for Proposal 10 - 11/DEHOIO, and to award the contract for those services to a third party associated with DECCO and/or The ForCayman Alliance and/or Dart Group ("the Decision")

**Reliefs Sought:**

1. An Order of Certiorari in respect of the Decision.
2. An Order of for Mandamus, requiring the Minister to conduct a further tender process for the provision of Waste Management Services in compliance with the provisions of the Public Management and Finance Law and the Principles governing public procurement issued in November 26, 2012.
3. Constitutional redress by way of a declaration that the Decision of the Respondents in awarding the contract to DECCO or its servants and/or agents or associated entities was in breach of Article 19 of the Bill of Rights, Freedoms and Responsibilities as it was unlawful, irrational and procedurally unfair.
4. A Declaration that as a matter of law the Respondents had and continues to have a duty to deal fairly and with integrity and transparency with the Applicant.
5. A Declaration that the Applicant had a legitimate expectation that a License Agreement would have been granted to Wheelabrator to operate the CSWDM & WTEF for a period of twenty-five (25) years, with renewal options, and if selected they would execute a Service Agreement Contract, which expectations arose from the representations made in the Request for Proposal by the Respondents and that the legitimate expectation was contravened by the Respondent.
6. Damages for loss of opportunity and/or for reliance losses.
7. An award of Exemplary Damages for the oppressive, arbitrary or unconstitutional actions by the Responded who was at all material times a servants of the governmental and was at the material time exercising governmental power.
8. Any such extension of time for making this application as may be necessary (the date of the Decision being unknown)
9. Costs
10. Such further or other relief as his Honourable Court thinks it.

The Applicant requests an urgent *ex parte* hearing of this application.

Name and address of the Applicant's attorneys

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Signed:   
 Peter Campbell

Dated: 15 May 2013

## GROUNDNS ON WHICH THE RELIEF IS SOUGHT:

### Background

1. By a revised Request for Proposals (CTC no. 10-11/DEH010) ("the RFP") dated 30<sup>th</sup> September 2010, Ministry of District Administration, Works, Lands and Agriculture ("CIG"), through the Department of Environmental Health ("DEH"), CIG solicited competitive Proposals from firms to build, design, finance, construct, own, and operate a Comprehensive Solid Waste Disposal Management and Waste-to-Energy Facility ("CSWDM" and "WTEF") to manage all existing land-filled solid waste and all newly generated solid waste on Grand Cayman Islands and proposals for future waste management options for the Sister Islands of Cayman Brae and Little Cayman.
2. The Central Tenders Committee ("CTC") examined and evaluated all tenders received in response to the RFP, and, by a Memo dated 17th December 2010, recommended to CIG that further negotiations should be carried on with Wheelabrator Technologies Inc. ("WTI"), a specialist waste management corporation based in New Hampshire, United States.
3. DECCO a local applicant also submitted a response to the RFP, but its proposal was ranked either last or second to last in desirability by the CTC.

### **Irrationality, Unfairness and Legitimate Expectation:**

4. Notwithstanding the recommendation of the CTC, the CIG commenced negotiations with DECCO and/or other members of the Dart Group for the provision of remediation of the George Town Landfill and the Waste Management Facility. The Applicant and WTI were lead to believe that the commencement of negotiations with DECCO and/or other members of the Dart Group were for no other reason than that WTI had not yet formally notified CIG as WTI's Cayman Islands local partner.
5. Accordingly, by a letter dated 16<sup>th</sup> May 2011, from WTI to Mr. Canover Watson, as agent and/or consultant to CIG, and at the request of CIG, WTI identified Mr. Peter Campbell, the owner and shareholder of the Applicant, as its Cayman Islands' partner for the project.

At all material times prior to being nominated as its Cayman Islands local partner, the Applicant was an intermediary and had initially contacted WTI and brought the RFP to their attention.

6. Notwithstanding the above, CIG did not negotiate with WTI and, during the course of June 2011, it became public knowledge that CIG intended to award the contract to DECCO and/or Dart Group and/or an affiliate of those organizations.

7. There was publication by the Premier that the contract was awarded to DECCO.

8. Section 3.1 of the RFP explicitly states that "*The intent is that the Government's designated Regulatory Agency will grant a License Agreement to the successful Proposer to operate the CSWDM & WTEF for a period of twenty-five (25) years, with renewal options.*" Section 5.1 of the RFP states that if selected to perform the work, the Proposer shall execute a Service Agreement Contract which incorporates the negotiated contract principles and terms. Based on these assertions made in the RFP the Applicant expected that WTI would have received a license and entered into negotiations to sign the Service Agreement Contract having been awarded the Tender.

The Applicant being the local partner company of WTI, formed the view that WTI and its local partner had been awarded the tender as the CTC published that fact on their website at

[http://www.centralenders.gov.ky/portal/page?\\_page\\_id=2122.5094103&\\_dad=portal&\\_schema=PORTAL](http://www.centralenders.gov.ky/portal/page?_page_id=2122.5094103&_dad=portal&_schema=PORTAL)

9. Subsequently, in or about November 2011, the ForCayman Alliance began its activities by entering into an agreement with the National Roads Authority for the re-routing of the West Bay Road. To the best of the Applicant's knowledge, no works have commenced in relation to the remediation of the George Town Landfill and the Waste Management Facility although there has been considerable publicity generated in respect of those projects.

10. None of the matters quoted from the Website above in relation to the George Town Landfill and the proposed Waste Management Facility were referred to in the RFP.

## Unlawfulness of the Decision

11. The Decision is unlawful, ultra vires and illegal and should be set aside, because, in making it, CIG has failed to comply with the provisions of Part IX of the Financial Regulations (2010 Revision) ("the Regulations") made pursuant to section 35(h) of the Public Management and Finance Law (2010 Revision) ("the PMFL").

12. Part IX of the Financial Regulations provides as follows:

### PART IX - Procurement

36. Preference to local suppliers  
Subject to an overriding requirement-
  - (a) to ensure value for money; and
  - (b) to ensure that the price and quality of goods and services is no more than overseas procurement.a prescribed entity, statutory authority or government company shall give preference to procuring goods and services from suppliers trading, carrying on business or operating within the Islands

Requirement to  
tender

37.

(1) Subject to paragraphs (2), (3) and (4), a prescribed entity, statutory authority or government company is required to offer for public tender

(a) any contract for the purchase of supplies, services and assets over fifty thousand dollars; and  
(b) the sale of assets with a book value of fifty thousand dollars or more.

(2) In the case of a contract for the purchase of supplies, services and assets over twenty thousand dollars, where, in the opinion of the chief officer of a prescribed entity statutory authority or government company, only one supplier can provide the supplies, services or assets, the chief officer is not required to offer for public tender such contract but -

(a) he shall comply with regulation 41; and  
(b) he shall be subject to an overriding requirement to ensure value for money.

(3) Without prejudice to paragraph (2), where a state of emergency is proclaimed under the Emergency Powers Law (2006 Revision) or an exceptional circumstance occurs, a prescribed entity, where it is impractical to do so, is not required to offer for public tender -

(a) any contract for the purchase of supplies, services or assets; or  
(b) the sale of any assets.

and the chief officer of a prescribed entity may enter into any contract for the purpose of the restoration of the Islands, using rates established by him subject to an overriding requirement to ensure value for money.

(4) Where a chief officer enters into a contract pursuant to paragraph (3), a copy of the contract shall be provided to the Director of Internal Audit and the Auditor General.

38.

The requirement to use a public tender applies to both entity financial transactions and executive financial transactions

Application to  
all transactions

40.

(1) The prescribed tendering process shall be used in respect of any contract required by this Part to be offered for public tender.

Tendering  
Process

(2) A pre-qualifying tender process shall not be used in respect of a contract with a value of less than two hundred and fifty thousand dollars.

(3) A pre-qualifying tender process may be used for a contract with a value of two hundred and fifty thousand dollars or more.

(4) In the evaluation of a tender, whether in the prescribed tendering process or a pre-qualifying tender process, any price quoted or indicated in the tender shall be considered, but the least expensive tender is not, by virtue of that fact alone, entitled to succeed.

41.

41. (1) Tenders submitted for any contract with a value of less than two hundred and fifty thousand dollars shall be evaluated by a tenders committee established by the chief officer of the purchasing prescribed entity, statutory authority or Government Company.

Evaluation of  
Tenders

(2) Tenders submitted for any contract with a value of two hundred

and fifty thousand dollars or more shall be evaluated by a Central Tenders Committee comprising -

- (a) the chief officer (Public Finance) of the Ministry (or his nominee) as chairman; and
- (b) such other persons as may be appointed, from time to time, by the Financial Secretary.
- (3) Sub regulation (2) shall not apply to a pre-qualifying tender process, but applies to a prescribed tendering process to which any such pre-qualifying tender process was a preliminary.

13. The Regulations define a "prescribed tender process" as:

Definitions 2. .... a process consisting of the following steps-

- (a) the offer of a contract for tender shall be advertised nationally (and internationally, if appropriate) in a newspaper or other appropriate medium;
- (b) the offer shall specify details of the criteria that will be used to evaluate tenders and to select the successful bidder;
- (c) the tenders shall be evaluated, and the successful bidder shall be selected, in accordance with the specified criteria; and
- (d) the prescribed entity, statutory authority or government company offering the contract shall notify all those who tendered of the successful bidder;

14. Whilst the RFP and the subsequent evaluation of the tenders submitted, appears to have complied with the Regulations, and did lead to the selection of WTI, and a legitimate expectation that WTI would be permitted to negotiate in good faith with CIIG for the award of the contract for the CSWDM" and "WTEF, the process which lead to the formation of the ForCaymanAlliance, incorporating the proposals referred to above, in relation to remediation of the George Town Landfill and the Waste Management Facility, were not the subject of any such procedures and, accordingly, the decision to award the tender For Cayman Alliance to ability to carry out those projects is in breach the Regulations.

- (a) Regulation 37(1)(a) (and perhaps (b) if it involves the disposal of CIIG assets).
- (b) Regulation 40; and
- (c) Regulation 41(2).

15. Accordingly:

(a) That part of the Decision which relates to the failure to negotiate with WTI is unlawful, since the decision maker failed to take into account, as required to, the recommendation of the CTC to negotiate; thereby denying WTI's legitimate expectation that it would be offered the opportunity to negotiate for the contract for Waste Management Facilities with CIG in good faith (and, likely, obtain that contract in due course) and

(b) That part of the Decision which relates to the formation of the ForCaymanAlliance, and the consequent rolling into that agreement the remediation of the George Town Landfill and the Waste Management Facility, is unlawful since the decision maker failed to take into account, as he or she was required to, that the provisions of Part IX of the Regulations had not been complied with and that, accordingly, CIG was acting in breach of those regulations and *prima facie* unlawfully.

16. Such decisions were so unreasonable that no reasonable public authority could or would have made them. In particular, the decisions made wholly circumvent the statutory policy put in place by section 35(h) of the PMFL and Part IX of the Regulations, which are to promote fair and open competition for government contracts so as to ensure best practice in government procurement, best solutions for public projects, value for money and the prevention (or prevention of the perception) of corruption in the award of such contracts.

17. For the avoidance of doubt, no allegations of corruption are made but it is alleged that the manner in which the arrangements have been made could give rise to the perception of corruption in reasonable objective observers.

18. The Applicant reserves the right to amend and/or amplify these grounds following disclosure.

19. The Applicant, as WTI's nominated local partner, has suffered loss and damage in that:
- (a) Mr. Campbell, expended considerable time, effort and expense (including legal fees, external consultant's fees and fees for services provided to WTI) in reliance upon the legitimate expectation that WTI would be offered a fair chance to negotiate with CIG and
  - (b) A loss of opportunity to participate as the local partner of WTI throughout the life of the Waste Management Facility project, thereby suffering loss of profits.

**Delay**

20. To date save for reports that are made in the media we are not aware of the date when a decision was made to award DECCO the contract that was put out to tender by way of a Request for Proposal (CTC no. 10-11/DEH010 on the 30th day of September 2010.

Having become concerned about the tender process and the award of the contract, contact was made with the Attorney General's Chambers to get further clarity on the situation and to negotiate an amicable settlement if deemed necessary. During these discussions it was orally agreed with the Attorney General's chambers that the Applicant would not file his form 53 Application and the Attorney General would not object to leave for judicial review on the ground of delay with a view to facilitating the discussions and saving judicial time and costs. This agreement was confirmed in writing by letter dated March 26, 2012 from the Applicant Attorney to the Attorney General's Chambers.

To demonstrate the seriousness of the Applicant in pursuing Judicial Review prior to that on March 16, 2012 a copy of the draft pleadings were sent to the Attorney General's office as a courtesy so that they could receive the appropriate instructions as it was the stated intention of the Applicant to file the Application for leave by March 30, 2012. These discussions however were never formally ended.

Having not filed the application for leave based on the agreement with the Attorney General's Chambers and coupled with not knowing when the decision that we are

challenging was made, leave of this Court is now sought to extend time to file the application for leave.

The Respondent will not suffer any prejudice if the Court were to grant this application.

More importantly this is a matter of national interest with touches and concern the administration of government contracts and in light of the new policy direction of the government to be more transparent it is important for this Court to make a determination in this matter to assist the Government in how matters of this nature are to be dealt with.

Further it is important that this court lend confidence to our international investors that the rule of law prevails and there is some certainty and recourse when doing business with the government and invest in our Country.

### **Decisions being challenged**

21. The Decision of the Cayman Island Government (by the Minister of District Administration, Works, Land and Agriculture and/or the Premier and/or Cabinet or such other person as may be appropriate) to:
  - (a) cease negotiations with Wheelabrator Technologies Inc., the successful Proposer for the provision of Waste Management Facilities under the CTC's Request for Proposal 10-11/DEHOIO, and
  - (b) award the contract for those services to a third party associated with DECCO and/or the ForCaymanAlliance and/or Dart Group ("the Decision")

### **Relief Sought**

22. The Applicant seeks:
  1. Order of Certiorari in respect of the Decisions.
  2. An Order of Mandamus, requiring the Minister to conduct a further tender process for the provision of Waste Management Services in compliance with the provisions of the Public Management and Finance Law and the Principles governing public procurement issued in November 26, 2012.
  3. Constitutional redress by way of a declaration that the Decision of the Respondent in awarding the contract to DECCO or his servants and/or agents or associated entities contravened article 19 of the Bill of Rights, Freedoms and Responsibilities as it was unlawful, irrational and procedurally unfair.

4. A Declaration that as a matter of law the Applicant had and continues to have a duty to deal fairly, with integrity and transparency with all the Proposers.
5. A Declaration that the Applicant had a legitimate expectation that a License Agreement would have been granted to Wheelabrator to operate the CSWDM & WTEF for a period of twenty-five (25) years, with renewal options, and if selected they would execute a Service Agreement Contract, which expectations arose from the representations made in the Request for Proposal by the Respondents and that the legitimate expectation was contravened by.
6. Damages for loss of opportunity and/or for reliance losses.
7. An award of Exemplary Damages for the oppressive, arbitrary or unconstitutional actions by the Respondent who was at all material times a servant of the government and was at the material time exercising governmental power.
8. Any such extension of time for making this application as may be necessary (the date of the Decision being unknown).
9. Costs.
10. Such further or other relief as this Honourable Court thinks fit.