

2024.11.12

3.4 Deputy H.L. Jeune of St. John, St. Lawrence and Trinity of H.M. Attorney General regarding potential legal action against Jersey by Brittany Ferries or DFDS: (OQ.220/2024)

What are the grounds on which Brittany Ferries or DFDS could take legal action against Jersey given the outcome of the joint tender process?

M.H. Temple K.C., H.M. Attorney General:

A decision or determination of a public body, which includes a Minister, may be susceptible to a claim for judicial review. The possibility of a decision to abandon or terminate the joint tender process was provided for in paragraphs 3.2 and 10.5 of the invitation to tender document, or I.T.T., which form the basis of the joint tender process. In brief, clause 3.2, its relevant parts, provided for the avoidance of doubt the States, which is Jersey and Guernsey, reserve the right to alter the timings at any stage of this procurement process, to withdraw the procurement at any time, terminate the procurement and, where appropriate, to be able to readvertise, withdraw from the procurement process in its entirety at any time without liability to the bidders, which have participated in the process. Paragraph 10.5 provided the States reserve the right not to follow up this I.T.T. in any way and/or to cancel the procurement process and no expense incurred by any person in responding to the I.T.T. will be reimbursed and neither the States nor their advisers nor any third party will be liable to the bidder. The States reserve the right not to award a contract. Beyond that, it would not be appropriate for me to comment further.

3.4.1 Deputy H.L. Jeune:

Are there precedents in Jersey law where similar procurement challenges have led to compensation or reversal of a decision in the past?

The Attorney General:

I am not aware of any specifically in relation to procurement, but obviously that answer is given off the top of my head without searching all the judgments of the Jersey courts.

3.4.2 Deputy P.F.C. Ozouf of St. Saviour:

I would like to ask the Attorney General, the question is being posed in this Assembly and there is this convention or reality of parliamentary immunity from prosecution or a civil action, I think. The Minister is, as the Attorney General is, being very cautious in what is being actually said. Islanders and Members are in difficulty because they do not know what is going on. Is there a way that the Attorney General can advise of what is possible to be stated about the negotiations, which is raising huge concern for Islanders but they do not know and there is no confidence in the decision making because of the absence of the ability to say anything; what can be said and cannot be said, in short?

The Attorney General:

In short, parliamentary privilege is an absolute form of privilege and it does protect anything that is said or written in relation to the States procedures, States debates. However, just because that there is parliamentary privilege does not necessarily mean that it is advisable for a Minister or for a backbencher to comment in relation to a live procurement process because there are sensitivities around negotiations which, it is right, do not enter the public domain. Beyond that, I cannot comment further.

3.4.3 Deputy P.F.C. Ozouf:

I appreciate the spirit in which the Attorney General has answered the question. However, the Minister is trying, as no doubt the legal officers and the Minister's advisers, is dealing with what is known to be a debt pile and a financial unsustainable situation, but it cannot be spelt out. Why cannot the facts be spelt out in terms that the public can understand and be reassured that the Minister is making the right decisions or not?

The Attorney General:

The responsibility is with the Minister. It is obviously not with the public. The public are not the decision makers. The Minister is the decision maker. I repeat my previous answer, just because parliamentary privilege is an absolute privilege, it does not necessarily mean that it is appropriate to spell out the contents of confidential negotiations in a public forum.

3.4.4 Deputy J. Renouf of St. Brelade:

The Attorney General mentioned in his first answer the clauses in the tender document, which appeared to give wide immunity to the Government. Is it nevertheless the case that an unhappy, unsuccessful bidder might have a legal claim for damages against Jersey were there to be deficiencies alleged within the process of awarding the contract?

The Attorney General:

I am simply not going to comment further, as I said in my first answer. These are confidential negotiations and it does not help, frankly, to be asked these sorts of questions in a public forum.

3.4.5 Deputy J. Renouf:

It is an interesting answer. I mean, it does not help, perhaps, for Ministers, but I think the public are very, very keen to understand more about what is at risk here. The Minister has referred to legal issues. I am simply trying to find out whether, in principle, it is possible that an unsuccessful bidder might have, in any circumstances, theoretical circumstances, a claim against the Government for deficiencies within the process?

The Attorney General:

As I said in my first answer, there is a potential for a claim for judicial review in certain circumstances. The traditional remedies on a claim for judicial review are basically to quash a decision and invite the decision maker to consider the decision again. It is possible, I think, in very rare circumstances, for a claim for damages to be made in judicial review, but the circumstances in which that is available are restricted. Beyond that, I am afraid I simply cannot comment further.

3.4.6 Deputy H.L. Jeune of St. John, St. Lawrence and Trinity:

That was an interesting answer that the Attorney General gave to Deputy Ozouf, saying that it was a live tender process, but I would have thought that it was not a live tender process anymore because the joint tender process has been finished because Guernsey decided to not go with a joint tender process. In fact, the discussion and the questions we have been asking the Attorney General was related to something that now is no longer because it is not a joint tender process anymore and therefore ready for analysis and transparency and understanding that particular process because it is no longer live.

The Bailiff:

Do you have a question?

Deputy H.L. Jeune:

But my question would be: what are the potential long-term implications for future tender processes, including now I suppose, the single processes that we and Guernsey are now under in Jersey, and I suppose in Guernsey, if Brittany Ferries or DFDS are successful in any challenges that they could bring regarding the now closed joint tender process?

The Bailiff:

You mean potential legal consequences, long-term consequences rather than any other consequences?

Deputy H.L. Jeune:

Yes, sorry.

The Attorney General:

That is quite a broad question; potential legal consequences. It is rather difficult for me to speculate on that because that could include, for example, this Assembly passing some legislation in relation to processes for procurement. I think it is an impossible question for me to answer, but in relation to the language that I used, I did say it is an ongoing discussion, not an ongoing joint tender process. The answer that I gave was in relation to the Deputy's original question. My answer should be read in relation to the Deputy's original question.