

## **INDEPENDENT REVIEW PANEL**

**In the matter of:**

**H. Padiachy Contractor Ltd**

**(Applicant)**

**v/s**

**Wastewater Management Authority**

**(Respondent)**

**(Cause No. 02/08/IRP)**

### **Decision**

#### **A. Background**

On 29 February 2008, the General Manager of Wastewater Management Authority notified the Managing Director of H. Padiachy Contractor Ltd that in respect of contract WW151Z for House Connections and Maintenance Works at Plaines Wilhems the successful bidder is Ups and Downs Tech Materials Ltd.

On 03 March 2008, H. Padiachy Contractor Ltd dissatisfied with the decision of the Wastewater Management Authority challenged the procurement proceedings on the prescribed form. In reply to the application for challenge, on 17 March 2008, the General Manager of the Wastewater Management Authority informed the Managing Director of H. Padiachy Contractor Ltd that the letter of intent was issued following the decision of the Central Procurement Board "to the effect that the said contract should be awarded to Ups and Downs Tech Materials Ltd at the rates quoted by the latter".

On 19 March 2008, H. Padiachy Contractor Ltd which was still not satisfied with the reasons given by Wastewater Management Authority made an application to the Independent Review Panel to review the decision of the Wastewater Management Authority.

## **B. Grounds for Review**

The grounds for review are as follows:

- “1. *Failure to investigate fully an allegation of misrepresentation in respect of Tender WW 150Z, which, if proven, should have led to the disqualification of Ups and Down Tech Materials Ltd in Tender WWW 151Z.*
2. *Failure to disqualify Ups and Down Tech Materials Ltd on the grounds of non-responsiveness of its tender, in respect of adequacy of equipment and key personnel, and experience of the Contractor. It is well known that:*
  - a. *Ups and Down Tech Materials Ltd do not have the relevant experience as main contractor in the construction of pipe laying/sewerage works over the last 10 years as stipulated by Clause 4.5(b) of the Instructions to Bidders.*
  - b. *Ups and Downs Tech Materials Ltd may not have the ability to mobilize the required essential equipment for the project as per Clause 4.5(c) of the Instructions to Bidders.*
3. *Failure to request Ups and Down Tech Materials Ltd to provide evidence that key personnel proposed are in its employment, whereas it was to the knowledge of the Wastewater Management Authority that those key personnel proposed were at the material time in the employment of Consultants who were themselves involved in the supervision works for the Authority.*
4. *Failure to disqualify Ups and Down Tech Materials Ltd for lack of evidence of availability of financial resources, and failure to consider the following:*
  - a. *Failure by Ups and Down Tech Materials Ltd to meet the minimum qualifying criteria of 2 Million MUR as far as the liquid assets and/or credit facilities, net of other contractual commitments are concerned.*
  - b. *Ups and Down Tech Materials Ltd does not have a minimum annual volume of construction work for 10 Million MUR in any of the last five years.*

5. *The Authority and/or the Central Procurement Board have been too lenient to Ups and Down Tech Materials Ltd in the evaluation exercise.*
6. *The Authority and/or the Central Procurement Board have taken into account irrelevant factors in their assessment.*
7. *The Authority and/or the Central Procurement Board have failed to take into account relevant criteria in their assessment.*
8. *The Central Procurement Board has failed to discharge its duties under Section 11(2)(a)-(f) of the Public Procurement Act 2006.*
9. *Although Contracts WW150Z and WW151Z are independent of each other, the Tender exercise for both Contracts was carried out simultaneously. All Tenderers had to divide their human resources between the two Tenders. Thus any misrepresentation made by any Tenderer in respect of key personnel in one of the Tenders would allow him to allocate more and better Human Resources to the other Tender. It is therefore essential to investigate fully any allegation of misrepresentation in any one Tender, for such misrepresentation, if proven, has a bearing on the other tender.”*

### **C. The Evaluation Process**

In its report dated 16 August 2007, the evaluation team of the Wastewater Management Authority recommended that Ups and Downs Tech Materials Ltd be awarded the contract for the Design and Construction of Sewer Reticulation and House Connections and Maintenance Works – Plaines Wilhems Contract WW151Z subject to the Wastewater Management Authority obtaining satisfaction by the replacement of James Eddy Seenjen, Mr Prameshwar Rughoobar and Mr Takesh Bucktowar by alternative personnel having required experience.

As far as the evidence of adequacy of working capital is concerned, the Wastewater Management Authority sought advice from the then Central Tender Board in respect of the discrepancies noted in the letter of Mauritius Post and Cooperative Bank which are not consistent with the requirements laid down in Clause 4.5 of the Bidding Data. The then Central Tender Board held that despite these discrepancies, Ups and Downs Tech Materials Ltd is responsive, most probably due to the fact that it has submitted a financial standing from the same bank to the effect that it has the financial guarantee and resources for the proper execution of the contract.

In November 2007, a new evaluation committee which was set up to review the previous assessment made for the two contracts WW150Z and WW151Z submitted its recommendations. In respect of contract WW150Z, one of the conditions to qualify for award is to provide the services of a Contract Manager. The Ups and Downs Tech Materials Ltd having failed to satisfy this requirement within the prescribed time, the new evaluation committee found that its offer is not substantially responsive.

As far as the contract WW151Z is concerned, it is significant to note that the request for clarifications in respect of their proposed personnel were sent to all bidders. After a re-assessment of the qualifications and experience of the key personnel, it was found that the key personnel proposed by Ups and Downs Tech Materials Ltd fulfilled the requirements. On the basis of the findings of both the first evaluation report and the review committee report, the offer from Ups and Downs Tech Materials Ltd was found to be the best evaluated offer.

#### **D. Submissions and Findings**

We do not intend to examine all the grounds for review. We are satisfied that most of the complaints have been dealt with fairly by the review committee. We had in mind the representations made in respect of qualifications and experience of the key personnel.

We shall therefore restrict our examination on documentary evidence and submission of Counsel in respect of two issues namely; the integrity issue and evidence of the financial requirements.

##### **1. The integrity issue**

Before proceeding further, it is useful to recollect that in fact two tenders were launched on 10 July 2007 namely contracts (WW150Z and WW151Z). The nature of works under both contracts (WW150Z and WW151Z) are similar with the main exception that contract WW150Z covers the area of Port Louis, Baie du Tombeau and Grand Baie whereas contract WW151Z covers the Plaines Wilhems District. The first contract WW150Z has already been awarded to Pad & Co. on 15 January 2008, upon disqualification of Ups and Downs Tech Materials Ltd due to belated replacement of Mr Patrick Lan Hing Po by Mr Santchurn. On 28 August 2007, Mr P. Lan Hing Po informed the Wastewater Management Authority that his name and curriculum vitae have been used by Ups

and Downs Tech Materials Ltd maliciously and without his consent to perform as Contract Manager for contract WW150Z. In a *Mise en Demeure* dated 07 September 2007 and served on Ups and Downs Tech Materials Ltd, the Wastewater Management Authority, the then Central Tender Board, he repeated his complaints and requested that Ups and Downs Tech Materials Ltd not to use his name in the said project failing which he would claim damages from Ups and Downs Tech Materials Ltd and its Directors jointly and in solido in the sum of Rs1 million suffered by him as a result of the wrongful acts and doings of Ups and Downs Tech Materials Ltd and its Directors.

In its reply, Ups and Downs Tech Materials Ltd in turn served a *mise en demeure* with two supporting affidavits from Mr Li Yi Min Pin Yuen, a Civil Engineer/Design Engineer and Mrs S. Ramkaun, Director of Ups and Downs Tech Materials Ltd. Mrs S. Ramkaun explained that she contacted Mr Li Yi Min Pin Yuen and asked him to recommend a Contract Manager for contract WW150Z to which he responded positively by submitting the name of Mr P. Lan Hing Po together with his Curriculum Vitae. For his part, Mr Li Yi Min Pin Yuen averred that he contacted Mr P. Lan Hing Po who agreed to act as the Contract Manager of the project contract WW150Z.

It is with this background that we shall now consider the stand of the Wastewater Management Authority and that of the then Central Tender Board and the Central Procurement Board. It has always been the stand of Mr R. Peeroo, Counsel for the Wastewater Management Authority that as a general principle, any bidder should satisfy, *inter alia*, the test of integrity. He had also referred us to a letter dated 20 December 2007 from the then Central Tender Board “which considers that the award of contracts for the two projects WW150Z and WW151Z should be made simultaneously”. For this reason, he was adamant that Ups and Downs Tech Materials Ltd having failed the test of integrity on tender process for contract WW150Z could not be awarded tender for contract WW151Z. This view is neither shared by the then Central Tender Board nor by the Central Procurement Board. For the then Central Tender Board, the fact that Ups and Downs Tech Materials Ltd is having recourse to illicit means for securing sensitive and confidential information and is therefore guilty of misrepresentation and has failed the test of integrity may be difficult to prove. Such an allegation according to the then Central Tender Board will not stand in a Court of Law which led it to conclude that Ups and Downs Tech Materials Ltd cannot be denied award of contract for WW151Z on the ground that it has failed the test of integrity.

The Central Procurement Board reached the same conclusion but after having considered the following:

- “(a) *the legal adviser’s opinion is based after ‘he perused the letter dated 28 August 2007 sent to the General Manager (Ref 07/ADM/PL/L/786)’;*
- (b) *on the basis of that only, he formed his opinion that the company Ups and Down Tech Materials Ltd is guilty of serious misrepresentation;*
- (c) *that advice was tendered by letter dated 31 August 2007;*
- (d) *at no time was company Ups and Down Tech Materials Ltd given an opportunity of stating what it had to say about the allegations made against it.”*
- (e) *At the suit and instance of Mr P. K. P. Lan Hing Po, a notice Mise en Demeure dated 17 September 2007 was served upon Ups and Down Tech Materials Ltd, Wastewater Management Authority and Central Tender Board;*
- (f) *In reply to the Mise en demeure of Mr P. K. P. Lan Hing Po, a notice Mise en Demeure dated 28 September 2007 was served by Ups and Down Tech Materials Ltd upon Mr P. K. P. Lan Hing Po, Wastewater Management Authority and Central Tender Board. To this Mise en Demeure were annexed two affidavits, one from Li Yin Min Li Pin Yuen, a Civil Engineer/Design Engineer and another from Sunita Ramkaun, a company director of Ups and Down Tech Materials Ltd.*

True it is that the advice of Mr P. Peeroo basing himself solely upon allegation made by Mr P. Lan Hing Po albeit by means of a mise en demeure to reach a conclusion that Ups and Downs Tech Materials Ltd has failed the test of integrity appears unfair, the moreso that Ups and Downs Tech Materials Ltd has in reply served a mise en demeure enclosing two affidavits. However, as rightly pointed out by him, Sections 53 of the Procurement Act provides for suspension or debarment of a potential bidder or supplier from participation in procurement on the ground of supplying false information in the process of submitting a bid or pre-qualification application. Indeed the Regulations under the Public Procurement Act 2008 (Suspension and Debarment) indicate for the various procedures to follow in case the public body is contemplating suspension and debarment. It is significant at this stage to note that there should be in the first instance a proposal for debarment from the public body to the Director of Procurement Policy Office.

If the public body in our present application is minded to institute such proceedings, it may do so under the prevailing legislation. But we do not share the view of the then Central Tender Board that the alleged misrepresentation of a key personnel, in a tender document is a matter which does not deserve probing further due to the fact that it will be

difficult to prove and/or such statement will not stand in a Court of Law. For our part, we consider that the allegation of Mr P. Lan Hing Po constitutes a serious interference with the bidding process which warrants a thorough enquiry conducted by the Procurement Policy Office. There might be several reasons which can prompt a key personnel to withdraw, or allege that his name is being used against his will. If we agree with the Central Procurement Board, that the Wastewater Management Authority was wrong to conclude that Ups and Downs Tech Materials Ltd has failed the test of integrity upon mere allegation of Mr P. Lan Hing Po without giving an opportunity to Ups and Downs Tech Materials Ltd to reply, we do not share its view that there is no valid reason not to award contract to Ups and Downs Tech Materials Ltd. We say so for the following reasons:

- (i) Such serious allegations cannot be dealt by mere scrutiny of the contents of the mise en demeure and affidavits enclosed.
- (ii) The legislator in its wisdom has provided a specific procedure to cater for such allegations.
- (iii) Mr Peeroo has referred specifically to the appropriate section of the Act but if it is not clear whether the Wastewater Management Authority was minded to follow such procedures.

For all these reasons and in fairness to all the bidders, we hold that the Wastewater Management Authority should be given an opportunity if it so wishes, to contemplate proceedings under section 53 and 54 of the Public Procurement Act.

## **2. Lack of Financial Resources**

The second complaint which deserves our consideration, is the alleged failure on the part of Wastewater Management Authority to disqualify Ups and Downs Tech Materials Ltd for lack of evidence of availability of financial resources that is, the failure by Ups and Downs Tech Materials Ltd to meet the minimum qualifying criteria of Rs2 million as far as the liquid assets and/or credit facilities net of other commitments.

Mr R. Unnuth of Counsel for the Applicant contended that Ups and Downs Tech Materials Ltd failed to meet the minimum qualifying criteria by submitting a letter from the Mauritius Post & Cooperative Bank stating that “we hereby certify that if the above contracts are allocated to it. We shall consider your request for 2 overdraft limits of Rs1.5 million each”. On that score, Mr R. Peeroo Counsel for the Wastewater Management Authority conceded that the non compliance with the

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requirement of Rs2 million for each contract was fatal for Ups and Downs Tech Materials Ltd and he was surprised by the advice tendered by the then Central Tender Board, to the effect that the offer from Ups and Downs Tech Materials Ltd is still responsive.

In our view, the advice in respect of the above is wrong for the following reasons:

1. Each contract should be dealt with separately in respect of each requirement. For example it is clearly indicated that a different key personnel should be deployed in case of award of both contracts to the same bidder. In the same manner, it would be wrong to accept a Bank's certificate indicating clearly that the Bank had in mind the award of both contracts to one bidder simultaneously.
2. Clause 4.5 of the Bidding Data requires that a minimum amount of liquid assets and/or credit facilities net of other contractual commitments of the successful bidder shall be Rs2 million. It is clearly understood that such requirement is in respect of each contract. Most probably, it is because of such an obvious and significant deviation that the public body sought advice in the first instance from the then Central Tender Board. In the light of the clear terms and figures mentioned above, the then Central Tender Board concluded that still, Ups and Downs Tech Materials Ltd is responsive on that score.
3. The certificate of the Bank suffers also of the conditional terms contained therein which is in our view most inconsistent with the specific requirement laid down in Clause 4.5 of the Bidding Data. To meet the qualifying criteria, the contents of the certificate should be clearly and precisely reflect the amount sought for in the Bidding Data.
4. In these circumstances, the certificate represents an absolute non-compliance of the mandatory requirements set in Clause 4.5 of the Bidding Data. We have also considered the fact that Ups and Downs Tech Materials Ltd has also produced a certificate from the same Bank, stating that it has the financial guarantee and resources for the proper execution of the said contract. We hold that it cannot assist to overcome the major deviation contained in the first certificate of the Bank.



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It would be most unfair and prejudicial to other bidders, if one bidder is allowed to submit a Bank certificate the contents of which are in contradiction to what has been asked for. Such a practice will have definitely an impact of the integrity of the procurement proceedings.

For all these reasons, we find that there is merit in the application and recommend review of the decision of the Wastewater Management Authority intending to award the contract WW151Z to Ups and Downs Tech Materials Ltd on the following grounds;

- a. The contents of the Bank certificate produced by Ups and Downs Tech Materials Ltd for reasons highlighted above, should be declared not in compliance with the requirements of the Biding Data.
- b. The allegation of Mr P. Lan Hing Po should be investigated into as per procedures set by Public Procurement Act and its regulations. The mere examination of the allegations and replies of the parties by way of mise en demeure to reach a conclusion in favour of one side or another is insufficient. It will impair the integrity of public procurement proceedings and affect the credibility of the institutions set under the Public Procurement Act, if such allegations are not attended to seriously.

**(H. D. Vellien)**  
***Designated Chairman***

**(Mrs E. Hanoomanee)**  
***Member***

**Dated this 30<sup>th</sup> of June 2008**