

## INDEPENDENT REVIEW PANEL

**In the matter of:**

**A. & J. Maurel Construction Ltee**

**(Applicant)**

**v/s**

**Road Development Authority**

**(Respondent)**

**(Cause No. 10/08/IRP)**

### **Decision**

#### **A. Background**

On the 10<sup>th</sup> June 2008, A. & J. Maurel Construction Ltee feeling itself unsatisfied by the intention of the Road Development Authority to award the contract of the construction of a new access Road to Tianli Industrial Development at Riche Terre to Trio Development Ltd challenged the procurement proceedings as per follows:

#### **Notice of Challenge**

- 1. Name of Bidder: A. & J. Maurel Construction Ltee*
- 2. Address of Bidder: Richelieu Branch Road, Petite Riviere, Mauritius*
- 3. Name of Representative of Bidder: Mr Manuel Carpraux*
- 4. Tel. No./E-mail: (230) 233 1300/ [direction@ajmc-colas.com](mailto:direction@ajmc-colas.com)*
- 5. Name of Public Body: Road Development Authority*

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6. *Procurement Reference: Construction of a New Access Road to Tianli Industrial Development at Riche Terre*

7. *Specific Act or Omission in relation to the procurement:*

*We request to look at the evaluation report of the project*

8. *Bidder's grounds for challenge:*

*We request to look at the evaluation report of the project*

On 25 June 2008, the Officer in Charge of the Road Development Authority, in a letter addressed to the Managing Director of A. & J. Maurel Construction Ltee acknowledged receipt of the Notice of Challenge dated 11 June 2008. He further explained that the matter has been referred to the Central Procurement Board for consideration and the Applicant would be informed of the outcome in due course and before the issue of the letter of acceptance.

On 30 June 2008, the Applicant submitted its application for Review under Section 45 of the Public Procurement Act 2006 as follows:

*Name of Applicant: A. & J. Maurel Construction Ltee*

*Name of Representative: Mr Manuel Carpraux*

*Address of Applicant: Richelieu Branch Road, Petite Riviere, Mauritius*

*Tel. No./E-mail: (230) 233 1300/ [carpraux@ajmc-colas.com](mailto:carpraux@ajmc-colas.com)*

*Public Body: Road Development Authority*

*Solicitation/Contract reference No.: Construction of a New Access Road  
to Tianli Industrial Development at  
Riche Terre*

*Date of decision of Public Body: 10 June 2008*

*Date of filling of challenge: 11 June 2008*

*Applicant's grounds for review: We request to look at the evaluation  
report of the project. We have not  
received a satisfactory reply from the  
RDA (letter from RDA enclosed)*

*Enclosure: Annex 1 – Letter from RDA regarding our challenge*

*Annex 2 – Our challenge letter dated 11 June 2008*

*Annex 3 – Bank guarantee*

**B. Notice of Objections**

The Road Development Authority has filed a notice of objections which read as follows:

- “(a) The independent Review Panel does not have jurisdiction to entertain the present application inasmuch as the ground invoked by the Applicant in support of the said application is not one as expressly provided for under the Public Procurement Act.*
- (b) The ground invoked in support of the application (i) does not disclose any breach of any duty imposed on the Road Development Authority in the discharge of its functions and further (ii) does not disclose any claim for actual or likely loss or injury suffered by the Applicant as a result of the alleged breach of duty by the Road Development Authority.*
- (c) The Application is further an abuse of process inasmuch as the request to consult the evaluation report of the project is in the nature of a fishing expedition all the more so as the Applicant is not entitled by law to communication of the same.*
- (d) In the circumstances, the said application is frivolous and devoid of merits and it is moved that same be dismissed and/or set aside.”*

**C. Submissions and Findings**

It is the contention of Mr P. Lallah, Attorney at Law for the Respondent that the Applicant has failed to disclose any breach of duty on the part of the Respondent in the discharge of its functions and that because of such alleged breach of duty, the Applicant has suffered actual or is likely to suffer loss or injury. Such failure on the part of the Applicant is fatal to its application for challenge because pursuant to Section 43(2) the challenge should identify the specific act or omission alleged to contravene the Act. He further submitted that the rejection of the request of the Applicant to consult the evaluation report which is more in the nature of a fishing expedition could not constitute a breach of duty nor would the non communication of the evaluation report to the Applicant amount to a breach of duty, warranting a reason for an application for review.

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Finally, he conceded that in fact it is for the Panel to reach a finding whether the application is frivolous and devoid of merits. He added that he would not insist on that ground of objection but he would move purely and simply that the application be dismissed.

In his reply, Mr G. Glover of Counsel for the Applicant, submitted that the present application for review is made under Section 45 of the Public Procurement Act 2006. He referred to Section 40 of the Act which provides for disclosure to all the bidders about the identity of the successful bidder and whether the bid which won the award was the lowest bidder. He submitted that in relation to an application for challenge, the unsuccessful bidder should aver a breach of duty on the part of the Public Body or the Board, but there are no means provided by Law to allow unsuccessful bidders to become aware of such breaches.

According to him, the Law does not give an opportunity to the bidders to know the criteria used by the Central Procurement Board to reach its decision after taking cognisance of the report of the Evaluation Committee. The ground for the application for review is based on the fact that no decision has been taken upon challenge made by the Applicant to the Respondent. It is difficult to challenge the award of the Central Procurement Board without knowing what the latter did with the evaluation report.

We have considered the submissions of both parties. The Public Procurement Act provides for a two-tier challenge and appeal system.

**(a) Challenge**

The first system is in respect of challenges which are brought to the Head of the Public Body for consideration. Section 43 of the Act allows a bidder who claims to have suffered or to be likely to suffer, loss or injury due to a breach of a duty imposed on a Public Body or the Board to challenge the procurement proceedings at any time before the entry into force of the Procurement Contract. Further in Subsection (2) it provides that the challenge shall be submitted to the Chief Executive Officer of the Public Body concerned and identify the specific act or omission alleged to contravene the Act.

**(b) Review**

Our reading of Section 45 of the Public Procurement Act under the heading Right of Review, leads us to conclude that the unsatisfied bidder

has two possibilities after having made the challenge to the Chief Executive Officer of the Public Body. But there is a third possibility in Section 45(1)(c) which relates to possible direct application for review to the Panel when the value of a contract is above the prescribed threshold and the bidder is not satisfied with the procurement proceedings on a ground specified in Section 43(1) of the Act i.e. breach of a duty of a Public Body or the Board.

It is clear that the application for review should in all the three possibilities mentioned above in one stage or another refer to alleged breaches of duty, be it an act or omission which contravenes the Act. The application for review may also be prompted by a decision of the Chief Executive Officer of the Public Body which does not satisfy the bidder but still, it should be as a result of a challenge made to the Public Body.

The procedures to be followed in case of challenge or appeal should comply with the provisions of the Law. Indeed, Regulations 48 and 49 provide that a challenge and an application for review shall be made in the forms set in the Second and Third Schedule respectively. A scrutiny of the challenge and review forms submitted by the Applicant reveals the following:

- (a) Under paragraph 7 and paragraph 8 in relation to the specific act or omission and the Bidder's grounds for challenge, the applicant mentioned in both paragraphs "we request to look at the evaluation report of the project".
- (b) In the application for review prescribed form, the date of decision of Public Body is 10 June 2008 and the date of filling the challenge is 11 June 2008.
- (c) The other parts of the application have remained unfilled and the application is neither dated nor signed. Most probably regarding the date of decision the application for review is in relation to the letter of 25 June 2008 from the Road Development Authority informing the applicant that the matter has been referred to the Central Procurement Board for consideration.
- (d) Finally in the application for review besides the request of Applicant to look at the evaluation report of the project, it is also mentioned that "we have not received a satisfactory reply from the Road Development Authority".

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As highlighted above, the Applicant has failed to comply with the requirements of Section 43(2) of the Act and Regulations 48 and 49. The grounds for challenge do not even amount to allegation of breach of duty by the Public Body or the Board but merely a request to have a look at the Evaluation report.

It is also the contention of the Applicant that this application for review is made solely under Section 45 and that a scrutiny of the challenge process under Section 43 is not relevant. We do not agree for the following reasons:

- The procedures laid down for challenge and application for review should be examined together and not in isolation. Regulation 56 under the heading “Dismissal of application for review” provides that an application may be dismissed for failure to comply with any of the requirement of Sections 43 to 45 of the Act. Since Sections 43 to 45 relate to Part VI – challenge and appeal, it is clear in our view that the procedures followed by the Applicant for the challenge can also be examined by the Panel.
- There is a duty under Section 43(2) in respect of challenge for the Applicant to identify the specific act or omission alleged to contravene this Act. The Applicant has failed to allege such act or omission instead, in the form of challenge as well as in application for review, there is a mere request to look at the evaluation report.
- If the Applicant’s case relies on the letter of 25 June 2008 which according to Counsel for Applicant amounts to a non decision, this implies that a challenge has been made whose procedures ultimately fall within the purview of the Public Procurement Act and its Regulations.

Far from the Panel from stating that an application for review should always be preceded by an application for challenge, but once the challenge procedure has been adopted and it has preceded an application for review, the Panel should examine whether both procedures at challenge and review level have been followed in accordance with the prevailing legislation.

For these reasons, we find that the requirements laid down by the Public Procurement Act and its Regulations have not been complied with and we therefore dismiss the application.

The Applicant has also raised an objection to the fact that the application is frivolous and devoid of merits. However at submission

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stage, Mr P. Lallah did not insist on the said objection. For the Panel, the application raises some novel points in Law which need to be canvassed and determined in the interest of those concerned with the present legislation on procurement proceedings. Being given the novelty and significance of the legal issues raised by both sides in the present application, we are not prepared to say that it is frivolous.

Finally, we would like to make the following observations about the present state of Law.

The present Legislation imposes on the potential bidder who wishes to challenge the procurement proceedings a duty to identify a specific act or omission which has been committed in contravention of the Act. Mr G. Glover stressed on the fact that the provisions of the Public Procurement Act and its Regulations do not allow a bidder to have access to information which would assist him to identify the specific or omission contemplated by Section 43(2) of the Act.

On this issue Mr P. Lallah drew our attention to the provisions of Section 41 of the Act which provides for a debriefing session where the unsuccessful bidder will be informed of the reasons for which its bid was unsuccessful. Unfortunately, the request for such information at a debriefing session can only be made in accordance with Sections 40(7) and 41 of the Act after the publication of the procurement award which in our view cannot assist the unsuccessful bidder. On the contrary, the debriefing session would assist an unsuccessful bidder if it was held at the stage of notification of all bidders of the identity of the proposed successful bidder as provided by Section 40(3) of the Act.

We strongly feel that the point raised by Mr G. Glover and the ineffectiveness of the debriefing session to assist the unsuccessful bidder wishing to challenge the procurements proceedings deserve to be looked into by the authorities concerned.

**(Dr. M. Allybokus)**  
***Chairperson***

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**(H. D. Vellien)**  
***Member***

**(Mrs E. Hanoomanjee)**  
***Member***

**Dated this 17th of September 2008**