

## INDEPENDENT REVIEW PANEL

**In the matter of:**

**Sotravic Ltée**

**(Applicant)**

**v/s**

**Mauritius Sugar Authority**

**(Respondent)**

**(Cause No. 22/09/IRP)**

### **Ruling**

#### **Background**

On 20 July 2009, in respect of an irrigation project, the Mauritius Sugar Authority invited sealed quotations from some manufacturers of equipment for the supply of materials and their installation. The Applicant informed the Respondent, on 28 July 2009, that it would respond to the invitation to quote for the irrigation project.

However, after several correspondences exchanged between the Applicant and the Public Body in respect of some clarification sought by the Applicant, the latter wrote to the Respondent to state inter alia:

*“Despite our efforts to prepare a competitive bid for the project, we have not been able to complete our offer by the deadline specified in your aforesaid invitation as our suppliers were unable to reply to our request for quotation due to the annual holiday period in some countries.”*

Unsatisfied with the reply made by the Respondent in respect of the clarifications as well as the time and information available to submit

the bid, the Applicant submitted a challenge to the Executive Director of the Mauritius Sugar Authority on 13 August 2009. On the same day, the latter replied to the Applicant stating that the challenge could not be entertained in as much as the latter's letter is not in compliance with Public Procurement Regulations 2009.

On 27 August 2009, the Applicant lodged an application for Review before the Independent Review Panel on the following grounds:

**Grounds for Review**

The Grounds for Review are as follows:

- “(i) *The bidding process do not conform to part IV and V of the Public Procurement Act 2006 (hereinafter referred to as the act) as:*
- (a) *representative of public body mentioned during site visit that bidding is carried out under a request sealed quotations as detailed in section 20 of the act and that there will be no negotiation with lowest bidder. From experience and scope of the works, the threshold for this procurement method may have been exceeded and there cannot be alteration or negotiation under this procurement procedure. Furthermore, the requirements of the public body in terms of quality and quantity of service and or service to be provided is highly insufficient for a fair bidding procedure.*
- (b) *In case a restricted bidding procedure has been used and due to the fact that it is known from information provided by the representative of the public body during the site visit that the Public Body may be willing to split the award of the different sections of the quotation. It is possible that the public body has not received the minimum number of bids for each section of the quotation as required in the section 19 of the act.*
- (ii) *From the above it may be demonstrated that the information provided for bidding and time allowed for bidding is not enough for a fair and reasonable bidding procedure.*
- (iii) *Not satisfied with decision of public body dated 13 August 2009.”*

**Submission and Finding**

By way of a letter dated 02 September 2009, the Mauritius Sugar Authority wrote to the Independent Review Panel to inform the Chairman that:

- *“We wish to inform the IRP that Sotravic Ltd did not submit any bid in relation to the Procurement Exercise under consideration. Please find a copy at Annex 1 of the letter from Sotravic Ltd to that effect.*
- *In the circumstances, it is the considered view of the MSA that Sotravic Ltd has no locus standii to challenge this procurement exercise, and move that the “Challenge” be dismissed.”*

On 04 September 2009, Mr O. B. Madhub, Deputy Solicitor General, moved by way of letter that the application for review made by Sotravic Ltee be dismissed for the following reasons:

- *“Sotravic Ltee has no locus standi to make such an application in view of the fact that Section 45 of the Public Procurement Act applies only to an “unsatisfied bidder” and by virtue of its own action Sotravic Ltee has disqualified itself from the possibility of availing itself of that provision of the law; and*
- *Sotravic Ltee has failed to comply with the provision of Section 45 of the Public Procurement Act 2006.”*

The Panel held a first meeting on 30 September 2009 and Mr O. B. Madhub renewed his motion for dismissal. He submitted that the Applicant is not an “unsatisfied bidder” being given that it did not submit a bid. According to him, the Applicant can only challenge the procurement proceedings under Section 43 of the Public Procurement Act 2006. In case of failure of its challenge, the only remaining recourse is to seize the Supreme Court by way of Judicial Review. For Mr O. B. Madhub an “unsatisfied bidder” is a bidder who is not satisfied after having submitted its bid i.e. a bidder not satisfied at the stage of award of the bid. The Applicant for all intents and purposes is, according to him, a potential bidder, which does not have the locus standi to seek remedy by way of an application for review before the Independent Review Panel under Section 45 of the Public Procurement Act.

In his reply, Mr G. Glover of Counsel for the Applicant submitted the Applicant is a potential bidder as contemplated by the definition of the word bidder in Section 2 of the Public Procurement Act 2006. He

also contended that the legislator has deliberately widened the definition of the bidder with a view to allow bidders, not satisfied at every stage of the procurement proceedings to seek remedy by way challenge and ultimately application for review.

According to him, it is highly unlikely that the legislator would have contemplated two jurisdictions of review, depending of the stage the bidder has reached as contended by Counsel for the Respondent.

The Panel has heard the submissions of both Counsel and does not agree with the submission of Mr O. B. Madhub for the following reasons:

- (i) The definition of the word “bidder” in the Act clearly indicates that the “potential bidder” should be considered for all intents and purposes as a bidder, entitled to all remedies provided by the Public Procurement Act 2006.
- (ii) Various stages of the bidding process are contemplated in the Act for example the opening and closing of the bid. A person may be aggrieved even at the opening stage of the bid and/or at the closing stage of the bid, without necessarily proceeding further to the submission of the bid.
- (iii) Admittedly in a letter dated 14 August 2009, the Applicant stated that he did to have proper time to bid. But there is also clear evidence that it was interested in the bid and sought clarifications in respect of the said project.

For reasons highlighted above, the Panel holds that the motion of Counsel for the Respondent for dismissal of the application for review, as grounded, is misconceived in law and is accordingly set aside.

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

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

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

**Dated this ..... of October 2009**