Decision No. 04/11

INDEPENDENT REVIEW PANEL

In the matter of:

Patel Engineering Ltd

(Applicant)

v/s

Road Development Authority

(Respondent)

(Cause No. 32/10/IRP)

Decision

A. Background

1. On 24 March 2010, the Road Development Authority invited interested bidders to submit request for qualification for the Design, Construction, Operation as a Toll Road, Maintenance and Financing of a Road Decongestion Program through a Public Private Partnership (CPB/33/2010). The closing date was initially scheduled to 22 April 2010, but afterwards was extended to 19 May 2010 up to 13.30 hrs.

2. On 19 May 2010 at the public opening, 11 applications for pre-qualification were received namely:
   - Soma Enterprise (India) Ltd
   - Madhucon Projects Ltd
   - Vinci S.A
   - China International Water & Electric Corp/CEG Co. Ltd
   - Patel Engineering Ltd
   - China Harbour Engineering Company Ltd
   - Bouygues Travaux Public/Aveng (Africa) Limited/Egis Projects/African Infrastructure Investment Managers (AIIM)

- Gammon Infrastructure Projects Ltd
- Group Five/Strabag Consortium
- Beijing Construction Engineering Group Co. Ltd
- IL and FS Transportation Network Ltd

3. On 10 June 2010 the Central Procurement Board after having carried out evaluation of these applications, informed the Road Development Authority that it has approved the qualification of the following:

- Group Five/Strabag Consortium
- Bouygues Travaux Public/Aveng (Africa) Limited/Egis Projects/African Infrastructure Investment Managers (AIIM)
- China Harbour Engineering Company Ltd

4. On 29 October 2010, the Public Body notified all applicants of the names of the selected prequalified bidders. On 08 November 2010, The Public Body received a letter from Patel Engineering Ltd informing the Authority that they would like to challenge the exercise and to appeal.

5. On 22 November 2010, the applicant lodged a challenge to the Public Body, through its Attorney O. Bahemia. On 03 December 2010, the Public body replied to the said challenge. Consequently on 17 December 2010 the Applicant, not satisfied with the reply to the challenge filed an application for review before the Independent Review Panel.

6. On 04 January 2011 the Road Development Authority submitted to the Panel a certificate pursuant to Section 45(5) of the Public Procurement Act of 2006 to the effect that urgent public interest considerations warrant the procurement proceedings to proceed. On the same day the Independent Review Panel informed the Road Development Authority that the suspension has been waived.

B. Grounds for Review

The Grounds for Review are as follows:

"1. The Applicant is not satisfied with the decision of the Road Development Authority inasmuch as it had prepared a full and thorough bid in order to prequalify for the bid of the abovementioned project. That bid was comprehensive and fulfilled all the requirements which were demanded in order to

prequalify for bidding purposes. In the circumstances the decision no tot prequalify it is unreasonable.

2. *The Applicant understood fully the goals and challenges set out for that exercise and addressed all the key issues mentioned therein.*

3. *The score allocated to the Applicant is incorrect and the Applicant contends that it has been incorrectly marked.*

4. *The Applicant had challenged by virtue of Section 43 of the Public procurement Act the decision of the Central Tender Board and is herewith annexing a copy of the challenge together with the response dated 03 December 2010 but received by the undersigned on 06 December 2010."*

At this stage, the Panel will not examine the merits of the application, being in presence of a preliminary objection raised by the Public Body for the untimely filing of the challenge by the Applicant, which needs to be determined in the first instance.

D. Submissions and Findings

In a letter dated 27 December 2010, the Public Body stated that the application for review is devoid of merits because amongst other reasons, it could not be entertained by the Panel inasmuch as the challenge preceding the application for review has not been lodged within the statutory delay and the Public Body has moved that the application be dismissed. Before going on the merits of the application itself, the Panel intends to proceed pursuant to Section 55(3) and 56 of Regulations made under Section 61 of the Public Procurement Act 2006 to the determination of the said motion for dismissal.

For such determination, it is significant to note the following undisputed facts:

(a) On 29 September 2010, the Applicant wrote to the Public Body informing the latter that if "they are not prequalified they would definitely and mandatory challenge the exercise and go on appeal.

(b) On 29 October 2010, notice of pre-selection was issued to all bidders including the aggrieved party.

(c) By a letter dated 08 November 2010, the aggrieved bidder informed the Respondent that they would like to challenge the exercise and go on appeal.

(d) On 22 November 2010, Attorney O. Bahemia submitted a challenge against the decision of the Public Body in the prescribed form.

In support of his motion, Mr P. Lallah, Counsel for the Public body referred to Section 43(3) of the Public Procurement Act of 2006 and Regulation 48 made under the said Act. He submitted that the challenge has been filed on 22 November 2010 whereas the notice of selection was issued on 29 October 2010. According to him in virtue of Regulation 56, the application for review should be dismissed for failure to comply with any of the requirement of Sections 43 and 45 of the Act and the Regulations specifically in the present matter because the challenge had been filed in an untimely manner.

In his reply, Mr R. Ramburn of Counsel for the Applicant submitted that the computation of the delay should start as from the time the aggrieved bidder would have been notified. Since the address of the Applicant is in India the relevant time would start running at the time of reception of the notice in India.

He further submitted that in order to examine the significance of a prescribed delay one has to distinguish between a requirement laid down in specific primary legislation namely Acts of parliaments and a requirement laid down in subsidiary legislation i.e. Regulations made under the main Act. According to him, the requirement made under the Act is mandatory whereas it is only discretionary when it is provided by a Regulation made by the Minister. In the present matter since the delay prescribed is laid down in the Regulation, the Panel retains a discretion based on circumstances of the case to allow appeal lodged outside the prescribed delay. He stated that the Applicant being abroad, received the notification on 03 November 2010 and submitted its challenge on 22 November 2010. He added that even upon the assumption that the Applicant has filed the application late by some 4 to 5 days, the provision of the relevant legislation allows the Panel using its discretion to entertain the application. In the present matter he conceded that the application has been filed outside the prescribed delay, but insisted on the fact that it is a fit and proper case for the Panel using its discretion to entertain this appeal.

We have considered the submissions of both Counsel and we have reached the conclusion that the preliminary point of objection in relation to prescribed delay for lodging the challenge raised by Counsel for the Respondent should succeed. We say so for the following reasons:

(a) Section 45 2(a) of the Act provides as follows:
An application for review under subsection (1) shall be made within such time as may be prescribed.
The Panel is also aware of Regulation 56 made under the Act which provides as follows:

"56 Dismissal of application for review
An application for review may be dismissed for –
(a) failure to comply with any of the requirements of Sections 43 to 45 of the Act, and these Regulations;
(c) having been filed in an untimely manner, either at the initial level of review by the public body, or with respect to deadlines for filing an application for review by the Review Panel."

An examination of both the provisions of the main Act and Regulation 56, made under the said Act leads the Panel to conclude that first the discretionary power vested upon the Panel to entertain appeal outside the prescribed delay is not specifically provided, secondly it is the legislator's wish to provide mandatory compliance in respect of such delays

(b) The guiding principles relating to the said issue of lodging appeal within the prescribed delay are laid down in several decisions of the Supreme Court.
In the case of Lagesse and Consolidated Investment of Enterprises Ltd v Commissioner of Income Tax (1991 MR 46, 1991 SCJ 150). The Supreme Court held that for appeals lodged outside delay to be entertained, it should be established that non compliance is not due to the acts or more frequently the omissions of the Applicant or its legal advisers but rather resulting from faults and/or defects of the Public Body or the Panel.

In the present case there is no indication that the Public Body, the Panel or their staff in one way or another contributes be it to some extent to the non observance of the delay. On the other hand there is ample evidence to show that since the start, the Applicant was fully aware of the two

stage procedure of challenge and appeal which obviously allows the Panel to infer that they were also alive to the prescribed delays for challenge and appeal. In our view, the fact that its registered office is found abroad is a lame excuse to explain the failure to lodge the challenge within the prescribed delay.

Furthermore, the decision of the Supreme Court lays much emphasis on the nature and character of the procedural requirements rather than on the status of their legislation creating them. For example, to be consistent with the principle of finality, the delay provided for lodging appeal irrespective of whether it is provided by statute or subsidiary legislation is much more significant and needs to be complied with strictly. On the other hand, the observance of the prescribed delay for filing skeleton argument or notice of evidence required either by Law or Regulations would be less important.

For these reasons the motion for dismissal of the application is granted and in virtue of Regulation 56(a) of the Public Procurement Act, the application for review is accordingly dismissed.

(Dr. M. Allybokus)
Chairperson

(H. D. Vellien)
Member

(Mrs. E. Hanoomanjee)
Member

Dated 24 March 2011

25 March 2011

Mr S. C. Lallah
Senior Counsel
108-109 Chancery House
Lislet Geoffroy Street
Port Louis

Sir,

CORRIGENDUM

Patel Engineering Ltd v/s Road Development Authority
CN 32/10/IRP

With reference to your letter dated 25 March 2011, I am directed by the Chairman of the Independent Review Panel to thank you for having drawn our attention on the typing error in the second paragraph of page 4 of the determination in respect of the above case and wish to bring to the attention of all parties the following **corrigendum**:

The first sentence in the second paragraph of page 4 should read **'In support of his motion, Mr S. C. Lallah, Senior Counsel'** instead of 'In support of his motion Mr P. Lallah, Counsel' as initially typed through error.

Yours faithfully,

L. Sumoreeah (Mrs)
for Secretary

Copy :
1. Patel Engineering Ltd
2. Road Development Authority
3. Mr N. Ramburn – Barrister
4. Director, Procurement Policy Office
5. Chairman, Central Procurement Board