

INDEPENDENT REVIEW PANEL

In the matter of:

**Joint Venture Sotravic/BWI-C2010/77, a joint venture between
Sotravic Ltee and Berlinwasser International**
(Applicant)

v/s

Central Water Authority

(Respondent)

(Cause No. 25/12/IRP)

Decision

A. Background

1. The Central Water Authority in February 2011 invited bids from eligible local/international bidders for design-build/turnkey and to operate the “Upgraded Pailles Treatment Plant”. The original deadline for the submission of bids of 26 April 2011 at 13.30 hrs and was subsequently revised to 17 May 2011 at 13.30 hrs. The bids were to be valid up to 13 September 2011. Six addenda were issued following queries received from prospective bidders, during the period 28 February 2011 – 29 April 2011. Ten prospective bidders purchased the bidding documents.

The works were estimated at MUR 429M for Option 1 (i.e. Lamellar Clarifier Units) and MUR 450M for Option 2 (Granular Gravity Filter) at January 2011. The estimates are inclusive of 15% VAT.

2. The list of bidders as read out at the public opening of bids on 17 May 2011 at 14.00 hrs is as follows:

<i>Bidder No.</i>	<i>Bidder</i>	<i>Bid Securing Declaration (BSD) Form</i>
<i>1</i>	<i>Joint Venture OTV France/REHM-Grinaker Construction Co. ltd (OTV/RG)</i>	<i>N/A</i>
<i>2</i>	<i>Joint Venture Sotravac Ltee/Berlinwasser International AG (Sot/Berl)</i>	<i>N/A</i>
<i>3</i>	<i>China International Water & Electric Corp. (CWE)</i>	<i>N/A</i>
<i>4</i>	<i>Sinohydro Corporation Limited (SCL)</i>	<i>N/A</i>

The Central Procurement Board then appointed a four-member Bid Evaluation Committee to evaluate the four bids received. The Committee held 51 meetings during the period 23 May 2011 and 27 July 2011 and seven of these meetings (nos. 34 to 40) were attended by Foreign Expert Consultants. The Bid Evaluation Committee submitted its technical evaluation report on 27 July 2011.

3. Two of the bidders:

- *Joint Venture OTV France/REHM-Grinaker Construction Co. Ltd*
- *Joint Venture Sotravac Ltee/Berlinwasser International AG*

were determined to be substantially responsive to the bid requirements subject to their confirming/clarifying issues raised during the technical evaluation.

The Bid Evaluation Committee submitted a second report on 08 October 2011 after examining the clarifications received from the two bidders and recommended that the price proposals of the two substantially technically responsive bidders be opened for further evaluation. The Central Procurement Board approved the recommendations of the Bid Evaluation Committee on 28 October 2011 and scheduled the financial openings for 03 November 2011.

4. Following a detailed examination of the financial proposals of the two bidders the Bid Evaluation Committee in its report dated 05 December 2011 considered that the offers were above the updated cost estimates. The Bid Evaluation Committee then went on to recommend two scenarios – negotiations or fresh bidding exercise following cancellation of the on-going one. The Central Procurement Board approved negotiations with the lowest bidder

Joint Venture Sotravac/BWI, a joint venture between Sotravac Ltee and Berlinwasser International on 05 January 2012 and on 09 January 2012 informed the Central Water Authority accordingly. The Central Procurement Board on 16 January 2012 informed the Central Water Authority that the updated estimated cost by the Bid Evaluation Committee was Rs600.7M. Directives were also given to the Public Body with respects to the composition of the Negotiating Panel. The Negotiating Panel submitted its report to the Central Procurement Board on 01 March 2012.

5. The Central Procurement Board informed the Central Water Authority, on 14 March 2012, that the negotiated price was substantially above the estimated cost. The board considered that the bid did not represent value for money and did not approve the award of the contract. The Public Body informed all bidders on 01 June 2012 that the public procurement proceedings had been cancelled as the lowest evaluated bid was substantially above updated cost estimate.
6. The Joint Venture Sotravac/BWI as an aggrieved bidder challenged the decision of the Public Body on 12 June 2012. Following consultation with the Central Procurement Board and the Procurement Policy Office the Public Body replied to the challenge on 27 June 2012. The aggrieved bidder, still dissatisfied with the decision of the Public Body, submitted an application for review to the Panel on 09 July 2012. The Panel requested information on the application for review from the Public Body on 10 July 2012. The Public Body provided the required information on 19 July 2012 and on 26 September 2012 respectively.

B. Grounds for Review

The Grounds for Review are as follows:

“As per additional details provided in annexes 1 and 2 tot his schedule and application:

- (a) The Applicant avers that it has submitted a technical proposal which is fully responsive to all requirements of the Public Body as listed in the bidding documents for the Contract,*
- (b) The Applicant avers that it has submitted a highly competitive bid,*

- (c) *The Applicant states that the initial estimates of the contract made by the Public body was wrong and do not reflect the works that is described in the requirements of the bid documents,*
- (d) *The works described in the scope of works of the contract are still required by the Public Body,*
- (e) *In case the decision to cancel the procurement proceedings/bid is maintained and fresh proposals requested the price of bids will increase due increase in basic prices.”*

C. The Evaluation Process

1. The Central Procurement Board appointed a four-member Bid Evaluation Committee to evaluate the four bids received by the deadline for the submission of bids. The Bid Evaluation Committee submitted a first technical evaluation report on 27 July 2011. Bidder Sinohydro Corporation Limited failed to meet a key qualification criteria related to specific experience and was considered to be non-responsive. The bidder was not retained for detailed technical evaluation.
2. The detailed technical evaluation of the offers of the bidders was carried out by two experts from the Consultant, GIBB Mtius Ltd. The experts were:

Mr Paul Harvey (Process Expert); and
Mr Dennis Goodlad (Electrical/Mechanical Expert)

Following their technical evaluation they concluded in their report dated 12 July 2011 that:

Subject to satisfactory clarification of the pre-contract clarifications detailed in Section 6.0 the following submissions are considered technically compliant:

- *Joint Venture OTV France/REHM-Grinaker Construction Co. Ltd*
- *Joint Venture Sotravac Ltee/Berlinwasser International AG*

The following submissions are considered non-compliant:

- *China International Water & Electric Corp. (CWE)*

- *Sinohydro Corporation Limited*

3. On 15 September 2011, the Central Procurement Board requested the confirmation/clarifications from the two bidders by 26 September 2011. The bidders provided the requested information by the deadline. The Bid Evaluation Committee recommended at paragraph 8 pg 12 of its report that:

“Based on the detailed technical analysis and the examination of the clarification issued to the substantially technically responsive bidders, the Bid Evaluation Committee recommends that the price proposals of Joint Venture OTV France/REHM-Grinaker Construction Co. Ltd. (OTV/RG) and Joint venture Sotravic Ltee/Berlinwasser International AG (Sot/Berl) be opened for further evaluation.”

The Central Procurement Board approved the above recommendations of the Bid Evaluation Committee and scheduled the financial openings of price proposals of the two bidders for 03 November 2011.

4. The price proposals of the two responsive bidders at opening were as follows:

<i>SN</i>	<i>Bidder</i>		<i>Bid Amount after discount (Rs) (inclusive of 10% Contingencies & 15% VAT)</i>
1	<i>Joint Venture OTV France/REHM-Grinaker Construction Co. Ltd (OTV/RG)</i>	<i>Option 1</i>	947,432,510.93
		<i>Option 2</i>	1,031,938,057.98
		<i>Alternative</i>	755,469,136.53
2	<i>Joint Venture Sotravic Ltee/Berlinwasser International AG (Sot/Berl)</i>	<i>Option 1</i>	749,007,164.95
		<i>Option 2</i>	909,138,393.62
		<i>Alternative</i>	692,618,662.39

The Consultant, in its technical evaluation report, recommended the base option 1 as being the most technically sound. The Bid Evaluation Committee, consequently restricted its price proposal evaluation to Option 1 only.

5. The Bid Evaluation Committee amended the January 2011 estimate of the Consultant from Rs429M to Rs483M (inclusive of 10% contingencies and 15% VAT) to account for:

- (i) 15% VAT on the contingency item, and
- (ii) Rs9M to account for addendum no. 3.

The Consultant's estimate was based on the initial conceptual design but the procurement was based on design-build. To correct for this mis-match the Consultant, in the BOQ, provided for "*any additional item not mentioned above but required as per the Contractor's design*". Thus, over and above the bill items detailed by the Consultant, both bidders have quoted for several items and included same under these "additional items".

The sum total for the additional items for the two bidders are as follows:

JV OTV/RG Rs69,969,763.64 (excl. VAT)

JV Sotravic/BWI Rs99,924,096.96 (excl. VAT)

6. The Bid Evaluation Committee loaded these prices on the updated base estimate of the Consultant, Rs382,062,950 (excluding 10% contingency and 15% VAT) and concluded that the % difference with respect to the updated base cost estimate was as follows:

JV OTV/RG 68.15

JV Sotravic/BWI 22.84

The recommendation of the Bid Evaluation Committee at paragraph 8 (pg23) was as follows:

"After detailed examination of the Price Proposals and reviewing the technical evaluation, the BEC recommends that the Public Body be apprised of the different Scenarios available, that is:

- *Scenario A – Proceed with the procurement exercise following negotiation exercise; and*
- *Scenario B – Cancel the procurement exercise on grounds of the quoted prices and carry out fresh bidding exercise*

and an informed decision be taken in a broader context so that the course of action represent value for money together with fulfilling the Employer's Requirement".

The Central procurement Board endorsed the recommendation to proceed with negotiations with the lowest bidder, i.e. the JV Sotravic/BWI on 05 January 2012.

7. The Four-Member Negotiating Panel, assisted by the Consultant, updated the cost estimate of the project to Rs670M. This was based on adjustments relevant to additional items in the BOQ, not estimated originally by the Consultant, and qualified as *"Any Additional Item required for the Contractor's Design"*.

The Negotiating Panel submitted its report to the Central Procurement Board on 01 March 2012. The main outcome was that the bidder JV Sotravic/BWI reduced its bid price by Rs300,000. The Central Procurement Board informed the Public Body on 14 March 2012 that it had not approved the award and "Notice of Cancellation of Public Procurement Proceedings" was issued to all bidders on 01 June 2012 by the Public Body.

D. Submissions and Findings

1. Before examining the application on its merits, the Panel wishes to consider the preliminary objection raised by Mr R. Pursem, Counsel for the Central Water Authority.

Indeed, Mr R. Pursem submitted that the present provisions of Public Procurement Act of 2006 have not conferred power on the Independent Review Panel to review cost estimate, reached by a Public Body. He referred to Section 39(1)(b) of the Public Procurement Act 2006 and submitted that the Independent Review Panel has the power to review the decision of the Public Bodies, including a power to entertain a review in respect of a cancellation of bids, but the Independent Review Panel has no jurisdiction to review estimates effected by the Public Body. According to him, the grounds of appeal of the Applicant as drafted tend to indicate that the Independent Review Panel is being invited to determine whether the initial estimates of the contract made by the Public Body was wrong. The Law does not empower the Independent

Review Panel to take a view to review and/or to say whether it was a reasonable or unreasonable estimate.

2. In his reply, Mr G. Glover, referred to Section 39(1)(b) of the Public procurement Act of 2006 and submitted that this application for review would not entail a review of the estimate, but rather a review of the decision making process, in line with Section 39(1)(b) of the Public procurement Act of 2006. The Panel has jurisdiction to decide whether the decision of the Public Body was correct in Law or not. It has to decide whether:
 - (a) the Appellant was the lowest evaluated bidder
 - (b) there was an applicable updated estimate
 - (c) the difference between those two figures was substantial

According to him, the Panel's role is not to review but rather to decide on the procedure adopted by the Public Body to reach conclusion and whether it has performed its duties properly under the Law.

3. The Panel has heard both Counsel. It is not disputed that the Panel has jurisdiction to determine on a cancellation made under Section 39 of the Act. However, according to Mr R. Pursem, the Panel cannot review an updated cost estimate. True it is that the Law does not specifically allow the Panel to review the estimate. However, as rightly pointed by Mr G. Glover, the Panel is empowered to examine the factors taken into consideration to reach the applicable updated cost estimate. In carrying that exercise the Panel would scrutinize whether all factors and statutory principles of accounting have been taken into account. Obviously, the Panel would not decide on factors specific to a party when it has to examine whether the applicable updated cost was reached in compliance with section 39 (1)(b).
4. But the Public Body would fail in its duty to reach a figure for applicable updated cost estimate if it has committed a blatant omission by failing to take into account a well established accounting principle for example Provisional and General Costs (P&G) when computing the applicable updated cost. Indeed there is ample and un rebutted evidence on record to indicate that the Public Body has failed to take into account the P&G. In these circumstances the Panel holds that it has jurisdiction to consider that the criteria and procedures followed by the Public Body to reach the updated estimate cost. The Panel finds that the P&G,

which is a significant component of the cost estimate for any project has not been taken into consideration.

5. Mr G. Glover has also informed the Panel that his client has extended its bid in order to proceed with the application before the Panel. Being given that the proceedings are still pending before us, the Panel considers that there is no legal predicament in that course of action.
6. Circular No. 7 of 2010 issued by the Procurement Policy Office on 22 June 2010 defines the special circumstances for negotiation as follows:

“The lowest evaluated substantially responsive bid exceeds the updated estimated cost of the works by more than 15%”.

The initial estimated costs of the base design for option 1 was Rs429M inclusive of VAT. However, according to the Bid Evaluation Committee there were short-comings in that estimate.

- (i) Addendum No. 3 issued during the bidding period included two items with estimated price as follows:

Bill Item 10.9.1: water	- Rs1.0M
Bill Item 10.9.3: Electricity	- Rs8.0M

These two items had to be included in the cost estimates.

- (ii) The estimate prepared by the Consultant included a 10% provision for contingencies – Rs37,306,295. However, when calculating the VAT component of the cost estimate for the project, the Consultant did not include 15% VAT on the contingencies.

When these major short-comings are corrected by the Bid Evaluation Committee the updated cost estimate of the base design (option 1) of the Consultant increases to Rs483,309,631.75.

7. The Consultant had included 45 bill items in the bidding document to cater for the Contractor’s design and are not included in the Engineer’s BOQ. These items had to be accounted for to arrive at an updated cost estimate for the design of option 1.

The Bid Evaluation Committee indicates at pg14 of its *“Price Proposals Evaluation Report* *“that the sum total of the additional items (excluding VAT) are Rs69,969,763.64 (approximately Rs70M)*

and Rs99,924,096.96 (approximately Rs100M) for Joint Venture OTV France/REHM-Grinaker Construction Co. Ltd (OTV/RG) and Joint Venture Sotravic Ltee/Berlinwasser International AG (Sot/Berl) respectively”.

8. The Negotiating Panel has used the information generated by the Bid Evaluation Committee and has amended the new cost estimates as calculated by the Bid Evaluation Committee.

The total bill items as estimated by the Engineer, excluding 15% VAT and 10% contingencies is Rs373,062,950.00 (Base Design of option 1). If the Rs9M and 30% Provisional and General costs (P&G) is added to account for Addendum No. 3, the total bill items will amount to Rs384,762,950.

	Rs
Base bid price for option 1 (excluding 10% contingencies and 15% VAT)	384,762,950
10% contingencies	38,476,295
Sub total	423,239,245
15% VAT	485,886.75
Updated estimated cost of base design + additional items	486,725,131.80

The Bid Evaluation Committee then went on to load the estimates of the Engineer as follows:

	JV OTV/RG (Rs)	JV Sot/BWI (Rs)
Base bid price for option 1 (excluding 10% contingencies and 15% VAT)	382,062,950	382,062,950
Base price of additional items	69,969,763	99,924,096
Sub-total 1	452,032,713	481,987,046
10% contingencies	45,203,271	48,198,704
	497,235,984	530,185,750
15% VAT	74,585,397	79,527,862
Updated estimated cost of base design + additional items	571,821,381	609,713,613

The bid price of JV OTV/RG was Rs948,759,574 and that of JV Sot/BWI was Rs748,968,443.

The bid price of JV Sot/BWI was according to the Bid Evaluation Committee some 22.8% above the updated estimated costs and in-line with circular no. 7 of 2010 recommended negotiations with the JV Sot/BWI.

9. The Central Procurement Board accepted the approach proposed by the Bid Evaluation Committee and informed the Central Water Authority on 16 January 2012 that the updated estimated cost by the Bid Evaluation Committee was Rs600.7M. The bid price of JV Sot/BWI at Rs748,968,443 is some 24.7% above that updated estimated cost. However, the Four-Member Negotiating Panel, assisted by the Consultant, updated the cost estimate of the project to Rs670M. This information was communicated to the Independent Review Panel by the Central Water Authority in a letter dated 26 September 2012. The bid price of the JV Sot/BWI is some 11% above the updated estimated cost according to the Joint Negotiating Panel.

10. At the hearing held on 15 January 2012 the aggrieved bidder generally agreed with the methodology used by the Bid Evaluation Committee. However, it considered that the Bid Evaluation Committee had erred as it had not increased the P&G items when loading the cost estimates of the Engineer with the cost of the additional items. The Panel has calculated the P&G items of the Engineer at 31.5% of the total bill items. The Panel considers that if P&G items are increased the updated cost of the Engineer will be as follows:

	Rs
Base bid price for option 1 (excluding 10% contingencies and 15% VAT)	373,062,950
Bill items (10.9.1 and 10.9.3)	9,000,000
Base price of additional items	99,924,096
P&G on additional items @30%	32,677,228
Sub total (1)	514,664,274
10% contingencies	51,466,427
Sub total (2)	566,130,701
15% VAT	84,919,605
Updated estimated cost of base design + additional items	651,050,306

The bid price of JV Sot/BWI at Rs748,968,443 is some 15% above that updated estimated cost.

11. The Panel concurs with the Bid Evaluation Committee and the Central Procurement Board that as it was a “Design and Built Tender” the initial Engineer’s estimate could only be based on the base conceptual design. Two options were proposed as follows:

- (i) Option 1
Lamellar Clarifier Units – estimated cost Rs429M (VAT inclusive)
- (ii) Option 2
Granular Gravity Filter – estimated cost Rs450M (VAT inclusive)

In a letter dated 17 January 2012 the Consultant informed the Public Body that it had re-assessed the cost estimates of January 2011 prior to the floating of tenders. The revised total cost, exclusive of 10% contingency and 15% VAT was estimated at MUR411,062,950. The Consultant goes on to add that this figure would need to be further adjusted upwards, based on the contractor’s tender, to cater for the forty five bill items, which were left unpriced at the time of preparation of the cost estimate. In addition, according to the Consultant P&G costs for the above items, estimated at 30% of the works value, should also be added. On the basis of the contents of the Consultant’s letter of 17 January 2012 the updated cost estimate for option 1 would be as follows:

	Rs
Base bid price for option 1	411,062,950
Price of additional items	99,924,096
30% P&G on additional items	29,977,228
Sub total (1)	540,964,274
10% contingencies	54,096,427
Sub total (2)	595,060,701
15% VAT	89,259,105
Updated estimated costs of base design + additional items	684,319,806

The bid price of JV Sot/BWI at Rs748,968,443 is some 9.5% above that updated estimated cost.

12. The invitations for bids launched in February 2011 clearly indicated that it was for “design-build/turnkey and to operate the upgraded Pailles Treatment Plant”. The BOQ contained 45 bill items, left unpriced at the time of preparation of the cost estimate, to cater for the contractor’s design. This is in-line with the practice adopted for Design and Build tenders. The documents examined by the Panel indicates that all those involved with the evaluation process – Bid Evaluation Committee, Central Procurement Board and JNP – concurred that the initial Engineer’s estimate, based on the base conceptual design, had to be updated. The percentage difference between bid price of JV Sot/BWI and the various estimates are indicated in the table below:

Estimate by	Updated cost estimate (MUR)	Bid price of Sot/BWI (MUR)	% Difference with updated cost estimate
BEC (27.07.11)	609,713,613	748,968,443	22.8
CPB (16.01.12)	600,700,000	748,968,443	24.7
Consultant (17.01.12)	684,319,806	748,968,443	9.5
JNP (01.03.12)	670,000,000	748,968,443	11
Modified BEC Following IRP’s Hearing	651,050,306	748,968,443	15

13. The Bid Evaluation Committee in a letter dated 09 June 2011 to the Central Procurement Board requested expert input of the Consultant for the technical evaluation. The two experts appointed submitted their report on 12 July 2011 and in a covering memo they clearly indicate the following: *“Please find herewith enclosed Technical Evaluation Report for the C2010/77 Upgrading of Pailles Water Treatment Plant Submissions as per our mandate”*. They concluded that *“the technical Appraisal finds that only the OTV and Berlinwasser submissions are compliant, subject to discussion on minor technical details”*. There is no dispute from any party involved with the evaluation process on the appropriateness of the technical design proposed by the JV Sot/BWI or on the technical evaluation of the two experts.
14. The fundamental question that remains unanswered after examining all documents submitted to the Panel is the reasonableness of the rates quoted by the bidders for the additional items. The Panel considers that the Term of Reference of the two experts of the Consultants should have been widened to include a financial evaluation also. Thus, it would have been

ascertained that the bid price of bidders, especially for the additional items, were fair and reasonable.

The updated cost estimates of the Consultant of 17 January 2012 should in the opinion of the Panel be discarded. It was prepared after the financial evaluation of the bids had been carried out by the Bid Evaluation Committee and accepting it now and acting upon it would set up a dangerous precedent. When issuing addenda/clarifications during the bidding process the Consultant should have assessed their input on the estimated base bid price and the attention of the client drawn accordingly.

15. Preliminary and General Costs (P&G's) are defined as these expenses which are incurred before work in producing the project deliverable commences, together with those costs that are non-specific to a particular Bill or Activity list item. P&G cost therefore represents those costs which cannot be reasonably allocated to any specific identified activity on a project.

In the price schedule (Section 7) of the Bidding Documents, Schedule 1 details the "Preliminaries and General items" and it is specified that *"the total of this Schedule 1 should not exceed 30% of the Tender sum excluding provisional sums"*.

The Panel considers that the estimate of the Bid Evaluation Committee of 27 July 2011 should be privileged. However, the Panel concurs with the Consultant that P&G costs should be added to the costs of the forty five additional items included in the BOQ to cater for the contractor's design.

16. Thus, according to the Panel the updated cost estimate of the project as calculated by the Bid Evaluation Committee on 27 July 2011 should be modified to MUR 651,050,306. The bid price of the JV Sot/BWI at MUR748,968,443 is some 15% higher than the updated cost estimate.
17. The Panel considers that the Bid Evaluation Committee and the two expert evaluators have done a thorough exercise. The evaluation report produced is comprehensive and the analysis rigorous. However, the cost estimates of the forty-five additional items should also have been assessed by the experts to ascertain their reasonableness. The Panel understands the stand of the Central Procurement Board in not approving the award of the contract after the negotiations in the light of the conflicting price estimates. According to the Panel if the P&G costs of the

additional items, estimated at 30% of the works value, is added to the updated cost estimate of the Bid Evaluation Committee than the bid price of the JV Sot/BWI would be some 15% higher than the updated cost estimate. Thus, the bid price would be within the limit prescribed by in Procurement Policy Office Circular No. 7 of 2010. However, the argumentation hinges on the reasonableness of the rates quoted by the bidder for the additional items.

On the basis of all the above and taking into consideration the observations made by the Bid Evaluation Committee in its report the Panel finds merit in the application and pursuant to Section 45(10)(b)(c) recommends the annulment of the decision to cancel the bidding exercise and a re-evaluation of the bids.

(Dr. M. Allybokus)
Chairperson

(H. D. Vellien)
Member

(Mrs. E. Hanoomanjee)
Member

Dated 08 February 2013