

## INDEPENDENT REVIEW PANEL

**In the matter of:**

**I. M. Bawamia Co. Ltd**

**(Applicant)**

**v/s**

**Central Water Authority**

**(Respondent)**

**(Cause No. 28/14/IRP)**

### **Decision**

#### **A. History of the case**

The Central Water Authority invited bids for the supply of pipes, fittings and accessories to be incorporated in the pipe laying works undertaken by the P&D Division and utilized repair works.

Invitation to bid was made through open advertised bidding in local newspapers. The closing date was 25 June 2014.

The Bid Evaluation Committee was chaired by Mr R. Gobin, Principal Engineer. Six bids were received and five bidders were eligible to proceed in the evaluation exercise. The Bid Evaluation Committee submitted its report on 02 September 2014.

## **B. Notification**

By letter dated 18 September 2014, the Public Body informed the Applicant that “in line with Section 39(2) of the Public Procurement Act”, the procurement proceedings are “cancelled”, in accordance with Section 39(1) of the Public Procurement Act 2006.

## **C. The Challenge**

On 22 September 2014, the Applicant challenged the award on the following grounds:

*“Evaluation Criteria (ITB 37.3 (d))*

*3 – Post-qualification Requirements (ITB 39.2)*

*After determining the lowest-evaluated bid in accordance with ITB Sub-Clause 39.1, the Purchaser shall carry out the post-qualification of the Bidder in accordance with ITB Clause 39, using only the requirements specified. Requirements not included in the test below shall not be used in the evaluation of the Bidder’s qualifications.*

*(a) Financial Capability*

*The Bidder shall furnish documentary evidence that it meets the following financial requirement(s): [list the requirements(s)]*

*(b) Qualification requirements; (to be considered by Purchaser)*

*(i) The bidder/manufacture must have at least ..... years of experience in manufacturing a similar type of good for which the Invitation of Bids is issued.*

*Where the bidder is a trader proposing goods duly authorised by the manufacturer and for which there is no requirement for local after sale service, the bidder should have experience in handling orders of similar value and providing support back-up from manufacturers of the goods.*

*Section 39: Post-qualification of the Bidder*

*39.1 The Purchaser shall determine to its satisfaction whether the Bidder that is selected as having submitted the lowest evaluated and substantially responsive bid is qualified to perform the Contract satisfactorily.*

*We feel aggrieved by your decision to cancel the Procurement Proceedings for CWA/C2013/109 based on section 39(1)(a) implying that we do not have the financial capability to execute this order after our bid has been selected to be the most competitive responsive one. Can we emphasize that between 1/01/2013 and today we have successfully executed orders of over MUR 100M for the Government of Mauritius among other a contract for the CEB for over 50MUR and consisting of Factory Assistance Test and Training. Our Financial capacity cannot be questioned by the CWA being given that you are yourself indebted to the sum of approx. MUR 10M for the supply of water meters. Furthermore this has not curtailed our financial capacity to proceed with another order for approximately 10M MUR for the CWA.*

*We hereby invite you to review your decision within the prescribed period failing which we will file an appeal to the Independent Review Panel to redress this unfair situation.”*

#### **D. The Reply to challenge**

On 01 October 2014, the Central Water Authority replied to the challenge as follows:

*“Section 38 of the Public Procurement Act 2006 relating to post-qualification stipulates that:*

- 1. Where there was no prequalification procedure, the qualification of the lowest evaluated substantially responsive bidder shall be checked against the criteria specified in the bidding documents.*
- 2. Where the bid fails to conform to those criteria, the bid shall be rejected and the same check shall be applied to the next ranked bid.*

*The requirements of Clause 20.1(c) of the bid document specifies that the documentary evidence of the Bidder’s qualifications to perform the contract if its bid is accepted shall establish to the Purchaser’s satisfaction that the Bidder meets each of the qualification criterion specified in Section III – Evaluation and Qualification Criteria of the bid document.*

*Sub-clauses 39.1, 39.2 and 39.3 relating to post-qualification of the Bidder, read as follows:*

*Sub-clause 39.1: The Purchaser shall determine to its satisfaction whether the Bidder that is selected as having submitted the lowest evaluated and substantially responsive bid is qualified to perform the Contract satisfactorily.*

*Sub-clause 39.2: The determination shall be based upon an examination of the documentary evidence of the Bidder's qualifications submitted by the Bidder, pursuant to ITB Clause 20.*

*Sub-clause 39.3: An affirmative determination shall be a pre-requisite for the award of the Contract to the Bidder. A negative determination shall result in the disqualification of the bid in which event the Purchaser shall proceed to the next lowest evaluated bid to make a similar determination of that Bidder's capabilities to perform satisfactorily.*

*Sub-section 3 of the Post Qualification Requirement – Paragraph (a) of Section III: Evaluation Criteria pertaining to financial capability specifies that the Bidder shall furnish Financial Statement for each of the past two years to confirm its financial capacity.*

*In line with your submission of the Company's Financial Statements for the years ended 31 December 2012 and 2013 respectively and from the Purchaser's financial analysis based on liquidity and debt perspective, the financial indicators relating to the foregoing indicated that your Company does not have the financial capacity to perform the Contract under reference in terms of, inter-alia,*

- (i) Low liquidity ratios debt proportion;*
- (ii) Negative working capital in each of the financial years i.e 2012 & 2013*
- (iii) Substantial increase in Bank overdraft from 2012 to 2013.*

*Moreover, under Paragraph 3 Post Qualifications Requirements (ITB 39.2) of Section III – Evaluation Criteria it is stipulated that requirements not included in the text below shall not to be used in the evaluation of the Bidder's qualifications viz, not included in Sub-Sections (a), (b), (c), (d) of Paragraph 3 – Post Qualifications Requirements (ITB 39.2).*

*Pursuant to Sub-clause 39.3 of the ITB, a negative determination was, therefore, arrived at on your financial capability to perform the Contract satisfactorily in accordance with the Provisions of Public Procurement Act 2006 as subsequently amended."*

## **E. Grounds for Review**

On 03 October 2014, the Applicant seized the Independent Review Panel for review on the following grounds:

*“The Applicant, as a longstanding and reliable supplier to the CWA, and incidentally to other statal/parastatal bodies and state owned companies, feels aggrieved by the decision of the purchaser to cancel the bidding procedures on the following grounds:*

- (i) The Purchaser was wrong to have cancelled the procurement proceedings as per letter ref: CWA/C2013/109-HO received on 22 September 2014 in as much as, to all intents and purposes, the applicant was a responsive bidder, the more so, as the purchaser had requested (letter dated 11/08/2014 – Annex ii) and obtained from the applicant clarifications, for the correction of arithmetical errors among others.*
- (ii) The Purchaser was wrong to have based itself on clause 20.1(c) of the bid document in its “response to challenge”, to justify its decision to cancel the procurement proceedings in as much as:
  - (a) Subclauses 39.1, 39.2 and 39.3, relate to post-qualification of the bidder, that is, after the bidder has been found responsive; and*
  - (b) The Purchaser has, in its financial analysis, confined itself to a superficial and restrictive approach and has not taken into consideration other relevant and pertinent factors which would have disclosed a more faithful and accurate picture of the applicant’s financial capability. The purchaser’s approach could probably be applicable to a contract for works.”**

**F. The Hearing**

1. At the very start of the hearing, Mr R. Unnuth, who appeared for the Respondent, raised a preliminary objection to the effect that the Panel has no jurisdiction to hear the above matter in as much as, according to him, the Public Body having decided to cancel the procurement proceedings, in accordance with Section 39 of the Public Procurement Act, there were no longer any live procurement proceedings to be looked into for review purposes.
2. The Panel decided to proceed with the hearing of the complaint reserving its ruling in its final determination.
3. Mr N. Bheekhun called Mr I. M. Bawamia, representative of I. M. Bawamia Co. Ltd, who gave evidence to the following effect:

- 3.1 The Applicant has been a regular supplier to the Respondent for the past 20 years, without any complaint against it in the discharge of its obligations as a supplier.
- 3.2 At the time the Respondent decided to cancel the bidding proceedings, it was itself indebted towards the Respondent in the sum of Rs10M.
- 3.3 During the same period Applicant supplied to the Central Electricity Board 50,000 meter readers for the sum of Rs55M.
- 3.4 A bank statement, per se, is not indicative of the financial capability of a business concern.
- 3.5 He disputes the contention of the Respondent that Applicant has no financial capability to meet its obligations spelt out in the bidding documents.
- 3.6 He produced a banker's testimonial to that effect.
- 3.7 According to the witness, Applicant is fully responsive to all the conditions laid down in the bidding document.
- 3.8 There was no justification in the cancellation of the bidding exercise.
- 3.9 According to him, the cancellation was motivated by the bad faith of the Respondent.
- 4.0 Under cross-examination, the witness gave the following replies.
- 4.1 The cancellation of the bidding exercise and the ensuing disqualification of the Applicant was highly prejudicial to the Applicant as to its credibility vis-à-vis its supplier.
- 4.2 He maintained that Applicant had the financial capability, which cannot be assessed on the basis of a bank statement alone.
- 4.3 He maintained that, at the time he submitted his bank statement, the Applicant was the beneficiary of a contract of Rs55M with the Central Electricity Board.
- 4.4 He considered that the cancellation of the procurement proceeding was a harassment, given the long standing work relationship between the Applicant and the Respondent.

- 4.5 Applicant was recently awarded an emergency contract by the Respondent.
- 5.0 Mr R. Unnuth then called Mr S. Rahiman, Accountant for the Respondent, who gave evidence to the effect.
- 5.1 For the assessment of the financial capability of Applicant, the financial statement for the last two years was required which according to him is enough to assess the financial capability.
- 5.2 He assessed the financial capability of the Respondent by compulsing its liquidity ratio which he described in the following terms 'liquidity c'est li reflecté banne ability ene compagnie pou capave meet so banne short term obligation, so banne liability qui li capave payer, par rapport a casse qui li ena. Current asset banne liquid assets, pour nous recevables, inventories et cash et bank balance'.
- 5.3 Working capital includes facilities for overdraft, and in the case of the Applicant, its overdraft rose from Rs710,000 in 2012 to read Rs5.9M in 2013.

**G. Submissions**

- 1.0 In his written submissions which he communicated to the Panel, Mr R. Unnuth reiterates his preliminary objection that the Independent Review Panel has no jurisdiction to hear the present appeal.
- 1.1 In support of his preliminary objection, Mr R. Unnuth, Counsel for the Public Body, relied particularly on Clause 40.1, Section Instructions to Bidders, and Sections 39(2), 43(1), 43(4), 45(1) and 45(4) of the Public Procurement Act to conclude that "once a public procurement proceeding is cancelled, the whole process dies a natural death and the Independent Review Panel has accordingly no jurisdiction to entertain the application".
- 1.2 On the merits, Mr R. Unnuth relied on the evidence of Mr S. Rahiman, Financial Accountant and one of the members of the Bid Evaluation Committee, and submitted that, on the basis of the financial analysis prepared by the Financial Accountant, "the proceedings had to be cancelled" as the Applicant, although technically compliant, had no financial capability to perform the contract satisfactorily.

- 2.0 In his written submissions, Mr N. Bheekhun, Counsel for the Applicant, relied on Sections 43, 44, 45 of the Public Procurement Act, as subsequently amended, and submitted that “the cancellation of procurement proceedings under Section 39 of the Act, does not oust the jurisdiction of the Panel, as was conceded by Counsel then appearing for the same Public Body, in the case of **Berlinwasser v/s Central Water Authority (CN 25/12/IRP)**.”
- 2.1 Referring to page 5 of the report submitted by the Financial Accountant of the Public Body, Mr N. Bheekhun argued that the latter had implicitly admitted that the assessment of financial capability cannot be limited to a mere analysis of the financial statements.
- 2.2 In accordance with Clause 30 of the ITB, under the item “Clarification of Bids”, the Public Body was empowered to seek clarification which it failed to do., so argued Mr N. Bheekhun.
- 2.3 The assessment of financial capability cannot be limited to a mere analysis of financial statements, and added that, in compliance with ITB 30, the Applicant could not, without a prior request, adduce evidence in support of the adequacy of his capital and financial capacity, although he was in possession of the relevant documents at the material time.
- 2.4 Mr N. Bheekhun further argued that “on the strength of a financial statement given by the banker as at 30 June 2014, the long history of business relation between the Applicant and the Respondent as well as its successful business relation with other Public Body “the Applicant had established his financial capability”.
- 2.5 In his conclusion, Mr N. Bheekhun submitted that here was no justification for the cancellation of Applicant’s bid.

## **H. Discussions and Findings**

- 1.0 In view of the complexity of the issues raised in the course of the hearing, where the jurisdiction of the Panel is being challenged, we have taken relatively more than usual time to enable us to go deeper into the numerous interesting points raised by the parties, through their respective Counsel, and we are thankful to them for their contribution towards assisting the Panel, in its determination.



- 1.1 In relation to the preliminary objection raised by Counsel for the Public Body, there seems to be a confusion between the term “jurisdiction” and the expression “procedural propriety”. In our view, a clear distinction imposes itself between “jurisdiction” and “procedural propriety”, as was suggested by the law Lords of the Judicial Committee of the Privy Council in the case of **“Fun World v/s Municipal Council of Quatre Bornes (2008 PRV 461)”**.
- 1.2 The Panel, which is established under Section 44 of the Public Procurement Act, derives its power from Section 45(4) of the Act, and is bound, in accordance with Section 45(8) thereof to decide upon the complaint of an aggrieved party, along the line laid down under Section 45(10) of the Act.
- 1.3 We therefore hold that we have jurisdiction to entertain the present application, and accordingly set aside the preliminary objection raised on behalf of the Public Body.
- 2.0 Having decided to look into the complaint of the Applicant, we must now endeavour, to answer the following question, which arises as a matter of course: having regard to the fact that the Public Body had “cancelled the procurement proceedings”, **was it open to the Applicant to challenge the decision of the Public Body and seize the Panel for review?**
- 2.1 In our view, the “procurement proceedings”, which started well before the closing date of 25 June 2014, are still on, as the object thereof is being pursued. The proceedings will ultimately materialise with the “entry into force of the procurement contract” (Section 43(1) of the Act).
- 2.2 We are therefore unable to agree with the contention of the Public Body that the “procurement proceedings” were “cancelled” in accordance with Section 39(1) paragraph (a) of the Act. The better view would be that the Applicant’s bid was rejected.
- 2.3 We are of the further view that procurement proceedings can only be cancelled if any of the conditions listed under regulation 36(1) of the Public Procurement (Regulations 2008) is satisfied, which is not the case in the present application.
- 2.4 Even assuming, for the sake of argument, that all the bids were non-responsive, the Public Body, in our view, was wrong to have relied on Section 39(1)(a) to “cancel” the procurement proceedings.

- 2.5 In the circumstances, it is our view that the Applicant was perfectly entitled to rely on Section 43(1) of the Act to challenge the decision of the Public Body, “rejecting” its bid.
- 3.0 The second question which arises is as to whether the Applicant was non-responsive, as claimed by the Public Body.
- 3.1 On the admitted facts that:
- (i) Applicant was technically responsive
  - (ii) It had a long history of successful working relationship with the Public Body
  - (iii) At the material time, the Public Body itself, was indebted to the Applicant in the sum of Rs10M.
  - (iv) At the material time the Central Electricity Board, another Public Body was indebted to the Applicant in the sum of Rs55M.
  - (v) The Applicant produced in the course of the hearing a favourable banker’s testimonial as to its financial capability, we are of opinion that the Public Body was wrong, on the basis of a financial report produced by its Financial Accountant to conclude that the Applicant did not have the required financial capability.
- 3.2 Even, assuming that, at the time the financial responsiveness of the Applicant was being assessed, there was no sufficient evidence to assess positively the financial capability of applicant, it was incumbent on the Public Body to call for clarification in accordance with the provision of ITB 30.1, relevant extract of which is, for ease of reference, being reproduced hereunder:
- “To assist in the examination, evaluation, comparison and post-qualification of the bids, the Purchaser may, at its discretion, ask any Bidder for a clarification of its Bid. Any clarification submitted by a bidder in respect to its Bid and that is not in response to a request by the Purchaser shall not be considered. The purchaser’s request for clarification and the response shall be in writing.”*
- 3.3 In the circumstances, we are in agreement with Counsel for the Applicant, that when a Public Body, such as the Respondent launches a procurement process, it intends to conclude it with the granting of the contract in order to obtain the supply of the required goods, provided the technical requirements are met, as is the case in the present matter.

- 3.4 The duty imposed upon a Public Body is not to eliminate a substantially responsive bidder, as is the case with the present Applicant, but to ensure, by all legal means, within the powers conferred upon it under the Act, that the procurement exercise be brought to its logical conclusion as early as possible.
- 3.5 Bearing in mind that the object of the procurement is still a felt need in a highly sensitive sector, it becomes a matter of utmost urgency, and, by extension, a matter of public interest, that the exercise be completed as quickly as possible. Delaying the implementation of the project amounts to an unnecessary waste of time and money in addition to the social costs that such delay may entail.
- 3.6 We are, therefore, of the view that, in the given circumstances of this case, as discussed above, the Public Body was ill advised to “cancel” the procurement proceedings.

## **I. Decision**

In the light of our findings, as discussed hereinabove, we conclude that there is merit in the application, and therefore recommend the annulment of the decision of the Public Body and the re-evaluation of the Applicant’s bid for an award.

**(Said Toorbuth)**  
***Chairperson***

**(Siv Potayya)**  
***Member***

**(Jacques C. Nauvel)**  
***Member***

**Dated 29 January 2015**