Decision No. 08/15

INDEPENDENT REVIEW PANEL

In the matter of:

Mauritius Telecom

(Applicant)

v/s

Ministry of Information & Communication Technology

(Respondent)

(Cause No. 42/14/IRP)

Decision

A. History of the case

This project consists of deploying a school wide area network based on fiber optic or alternative technologies. The network will connect all secondary schools including public libraries and the Mauritius Institute of Education to the Government Online Centre.

The objectives of the project are:

- *To enhance teacher-student and student-student interactions*
- *To improve students learning by providing them with anytime, anywhere opportunities to become independent learners through technology.*
- *To induce a paradigm shift in the teaching and learning process at secondary level by increasing accessibility to pedagogy through multimedia tools.*

The Ministry of Information and Communication Technology has solicited quotes for a Turnkey Solution. Tenders were invited through Open International Bidding method with closing date for submission of bids on 30 September 2014.

Four bids were received and they are as follows:

(i) Data Communications Ltd (DCL)
(ii) Emtel Ltd
(iii) China International Telecommunication Construction Corporation (CITCC)
(iv) Mauritius Telecom (MT)

B. Evaluation

The Bid Evaluation Committee was chaired by Mrs D. D. Ramlowat, Lecturer at Université des Mascareignes. The Bid Evaluation Report along with the recommendation for award of contract was submitted on 31 October 2014.

The Bid Evaluation Committee concluded that the proposal of Bidder No. 1 – Data Communications Ltd, as the lowest evaluated substantially responsive bid.

C. Notification of award

The notification to unsuccessful bidders under Section 40(3) of the Public Procurement Act was made on 28 November 2014 through a letter from the Ministry of Information & Communication Technology. The particulars of the successful bidder were as follows:

Name of Bidder	***Address***	***Contract Price***
Data Communications Ltd	*1st Floor, Cnr MGR Gonin & Lislet Geoffroy Streets, Port Louis*	*Rs122,457,992.00 VAT inclusive*

The Ministry of Information and Communication Technology informed the Chief Executive Officer of Mauritius Telecom on 28 November 2014, that it was found that their bid was not retained for award after the evaluation of the bids.

The applicant by way of letter dated 04 December 2014 informed the Public Body, that its aforesaid notification under reference MCT/579 V2, and pursuant to Section 43 of the Public Procurement Act 2006, it is challenging the proceedings and evaluation methodology, which have led to the proposed award. The challenge as per the Second Schedule under Regulation 48 letter is dated 05 December 2014.

D. The Challenge

On 05 December 2014, the Applicant challenged the award on the following grounds:

"(a) ***Tender Evaluation Methodology:***
This financial evaluation as per ITB 37.3 (d) has been carried out on a period of 20 months for monthly rental costs and five years for the costs of equipment. Mauritius Telecom (MT) believes that this project is of national interest for the future of Education and Digital Schools in the Republic of Mauritius. MT is of the opinion that such strategic project should be evaluated on a Total Cost of Ownership method for a period of at least 10 years for the following reasons:

(i) The current project caters for connectivity and WIFI coverage for two schooling years in Secondary Schools (Form IV and V classes). To be coherent, the project needs to be extended to provide the same facility for the remaining schooling years in Secondary Education.
(ii) The implementation of the current project has been split in three phases over a time period of 12 months.
(iii) The extension of the project to provide same facilities in the remaining schooling years in Secondary Schools will require even more time and resources.

Mauritius Telecom, therefore, believes that the evaluation of this project over a time period of 20 months is incorrect and prejudicial to its bid as well as to public interest for the following reasons:

1. *Mauritius Telecom has proposed a solution based on a full fiber optic connectivity, which can be seamlessly upgraded to 100 Mbps and beyond and therefore caters for additional bandwidth requirement.*
2. *The lifetime of a fiber optic access networks is at least 20 years.*
3. *DCL has proposed a solution based on a Wireless Access technology, which will require additional investment to provide higher bandwidth and for replacement of equipment after their lifetime (around 5 years). MT draws attention to the fact that the telecom industry and operators considers WIMAX to be an obsolete technology, which has reached the end of its economic life. All operators are migrating towards fiber so as to derive the*

obvious economic advantages thereof, which are highlighted under point C hereunder.

(b) Credibility and experience:

We believe that the sub-contractor Mint Smart Mauritius Ltd, teaming up with DCL, has neither tangible experience nor any reference on the local market to support such huge project. Mint Smart Mauritius Ltd appears to be a broker rather than a proven vendor. In the circumstances the evaluation did not have adequate regards to the criteria set out under ITB (S.37.3 d)-3(b).

(c) Choice of Access Technology and security issues:

Mauritius Telecom Proposal

Mauritius Telecom has submitted a bid based on fiber connectivity for all school sites. Telecom Operators worldwide are deploying fiber optic in their backbone networks as well as access networks to provide connectivity to end customers. Fiber optic connectivity provides the following benefits:

- *It is easily scalable to provide bandwidth of 100 Mbps and beyond.*
- *It is highly reliable and provides a guaranteed Quality of Service in terms of security, throughput and latency.*
- *The lifetime of a fiber optic network is at least 20 years and provides a TCO, which is lower compared with a wireless access network over the long term.*

DCL Proposal

DCL's proposal is based on a Wireless Access technology. Wireless technologies has the following limitations:

- *It is significantly slower than fiber optic and requires upgrades and replacement of its infrastructure to provide higher capacity and speed.*
- *It is prone to interference from other devices especially if provided over the unlicensed frequency band. It makes use of radio signals which can blocked by buildings, trees and other objects. It is also prone to weather conditions.*
- *Wireless networks are more expensive and are more difficult to secure as compared to wired networks. Wireless networks are vulnerable to hacking, identity theft and unauthorised surveillance of users.*
- *Wireless networks often entail the installation of towers and intrusive wireless facilities and have adverse impact on the environment.*
- *Wireless technologies require continuous upgrade and modification in the long term."*

E. The Reply to challenge

By letter dated 15 December 2014, the Public Body made the following reply to the challenge:

"It is noted that the covering letter transmitting your challenge is dated 04 December 2014, whereas the challenge itself is dated 05 December 2014. Moreover, the challenge has been received at the Ministry on 05 December 2014.

In view of the foregoing, I am directed by the Central Procurement Board to inform you that the challenge cannot be entertained as it has been received after the statutory period of 7 days as per Section 43(3)(a) of the Public Procurement Act 2006."

F. Grounds for Review

On 16 December 2014, the Applicant seized the Independent Review Panel for review on the following grounds:

"(1) Applicant challenged the decision of the public body on 05 December 2014 under Section 43 of the Public Procurement Act 2006. The decision of the Chief Executive Officer of the public body further to the Applicant's Challenge was issued on 15 December 2014 being more than 7 days from filing of the Applicant's Challenge, thereby contravening Section 48(3) of Public Procurement Regulations.

(2) The above decision of the public body is in its substance contrary to Section 38(b) of the Interpretation and General Clauses Act. Under that provision which relates to the calculation the number between two events, the day of the first event (the notice dated 28 November 2014 from the public body) and the day of second event (the challenge of Mauritius Telecom filed on 05 December 2014) should have been excluded from the calculation of the number of days.

(3) The above decision by the public body based only on calculation of time has deprived the public body of the opportunity to consider and assess to what extent the grounds of challenge as expressed in the Form of Challenge filed by the Applicant were justified or not.

(4) The above grounds of challenge which raise a strong public interest issue require to be examined."

G. The Hearing

It is admitted by the Applicant that the challenge was lodged outside the statutory delay at the level of the Public Body. However, at the hearing of 16 January 2014, there was no formal objection from the Public Body. Counsel appearing for the Applicant was allowed to offer argument in addition to the skeleton argument he had already filed. He referred the Panel to the provisions of Law in relation to the time limit within which the challenge had to be lodged. He argued that owing to the complexity of the tender, certain documents were received late, the technicality of the project, the pre-election period, those were the reasons why the challenge was not made in a timely manner. He has made reference to several case law.

After having heard those submissions, the Panel elected to let the case proceed on the merits without at that stage ruling on the point of law.

Counsel appearing for the Public Body argued that a right of review would arise if, and only if, the precondition laid down under Section 43(3) of the Act were satisfied. Counsel accordingly submitted that, in this particular case, the precondition has not been complied with as the challenge was made outside the statutory time limit of seven days, in contravention with Section 40(4) of the Act.

Counsel appearing for the parties were invited by the Panel to address the latter on a point of law: what would be the effect of lodging the challenge after the statutory delay of seven days. Counsel for the Applicant submitted that the Panel may, in certain exceptional circumstances, exercise its discretion to entertain appeal even outside the statutory time frame.

Arguments were offered in an able way by both of Counsel.

H. Decision

The Panel is of the view that before reaching the stage of <u>application for review</u>, any Applicant should first exhaust the first step which is called an <u>application for challenge</u> and the latter is under no obligation to await the outcome of the reply to challenge to lodge its application for review before the Panel. The Public Procurement Act makes it clear under Section 43(3)(a) thereof that all challenges should be made within a delay of seven days.

It is the Panel's view that this statutory delay should be strictly observed by any Applicant and such failure is fatal to any application.

The precondition having not been satisfied, and the Public Body having decided not to entertain the challenge, the Panel is precluded from exercising any discretion at the time of review. The application is accordingly dismissed.

(Said Toorbuth)
Chairperson

(Siv Potayya)
Member

(Jacques C. Nauvel)
Member

Dated 25 February 2015