

INDEPENDENT REVIEW PANEL

In the matter of:

Burmeister & Wain Scandinavian Contractor A/S

(Applicant)

v/s

Central Electricity Board

(Respondent)

(Cause No. 40/14/IRP)

Majority Decision

A. History of the case

This case was “inherited” by the present Panel on its assumption of duty, and as such did not have to decide at the outset whether or not a case where there has not been any notification of award could rightly be reviewed by the Panel. The latter did decide, however, to start hearings anew and take all reasonable steps so as not to be influenced by the decisions of the previous Panel.

The whole history of the case is as follows:

- ❖ Following receipt of the bidding documents from the Respondent on 24th June 2014, by letter dated 25th September 2014, the Applicant submitted its proposal for the Redevelopment of Saint Louis Power Station - Design, Supply, Installation and Commissioning of 4 x 15 MW Diesel Generating Sets - Tender No. CPB/22/2014.
- ❖ On the 25th September 2014, the Applicant submitted its tender in response to the aforesaid invitation to tender.
- ❖ By letter dated 25th November 2014, the Applicant was informed by the Respondent that the bidding exercise had been cancelled as the only bid received was non-responsive to the requirements laid down in the bidding documents.
- ❖ On the 1st December 2014, the Applicant challenged the decision of the Respondent and filed its challenge under s.43 of the PPA in the prescribed format in accordance with the Second Schedule.
- ❖ Following the challenge, on 4th December 2014, the Applicant received from the Respondent its response to the said challenge. The Respondent informed the Applicant that its challenge could not be

entertained as the bidding exercise had been cancelled due to non-responsiveness of the only bid received, and no notification for award had been issued.

- ❖ On the 9th December 2014, the Applicant submitted its Application for review before the Independent Review Panel.
- ❖ By letter dated 30th December 2014, the Panel informed the Applicant that its Application for Review would be heard on 13th January 2015 at 13.30 hours.
- ❖ By letter dated 31st December 2014, the Respondent communicated to the Panel and to the Applicant the comments of the Central Procurement Board on the Application for Review.
- ❖ On the 9th January 2015, the Applicant received a copy of the Skeleton Arguments of the Respondent. The Respondent took a preliminary objection to the effect that the IRP had no jurisdiction to hear application, as there is no provision in the Public Procurement Act 2006 (PPA) for challenge or application of a review of a decision to cancel a bidding exercise.
- ❖ At the hearing of the 16th January 2015, Counsel for the Respondent informed the IRP that it would not press the preliminary objection on the issue of jurisdiction. The case was fixed for hearing on the merits on the 23rd January 2015.
- ❖ By letter dated 28th January 2015, the Respondent communicated to the IRP with copy to the Applicant the comments it received from the CPB. The BEC had found that
 - (i) the bid of the Applicant was not compliant with the mandatory requirements of the bidding documents where it has a number of material deviations with respect to technical

requirements, commercial terms as well as on Particular Conditions of Contract and

(ii) the Applicant had included in its bid, a cover letter in which it is stated that the cover letter takes precedence over the Letter of Bid, which is not acceptable and as such it is considered that the Applicant submitted a conditional bid.

- ❖ The hearings took place on the 10th February and 2nd March 2015.
- ❖ During the proceedings of 2nd March 2015, Counsel for the Applicant informed the Panel that the bid validity of the bid of the Applicant would expire on the 23rd March 2015.
- ❖ By letter dated 18th March 2015, the Applicant informed the CPB of the extension of the validity of its bid and that of its bid bond.
- ❖ By letter dated 23rd March 2015, the CPB informed the Applicant that its bid and its bid bond could not be extended on the ground that the Respondent had cancelled the bidding exercise and that it could not accept an unsolicited extension.
- ❖ By letter dated 25th March 2015, the Applicant contested the decision of the Public Body not to extend the bid validity.
- ❖ On Friday 27 March 2015 in the afternoon, the members of the Panel who initially heard the said Application for Review were revoked.
- ❖ By letter dated 31st March 2015, the newly constituted Panel informed the Parties that it would hear the Application for Review anew on the 2nd April 2015.
- ❖ At the hearing of 2 April 2015, the Respondent informed the Panel that the Respondent would be proceeding with a re-tender exercise with amended specifications as recommended by the African Development Bank, which is the funding agency and that said re-tendering exercise

was in the public interest; the Respondent was called upon to officially inform the Applicant of the said retendering exercise; and the Applicant was requested to take a stand thereon. The matter was adjourned to the 8th April 2015.

- ❖ By letter dated 6 April 2015, the Respondent informed the Panel and the Applicant that it would be in the public interest to proceed with a re-launch of the tender for Saint Louis Redevelopment Project, and invited the Panel to discontinue the proceedings in the circumstances.
- ❖ On the 20th April 2015, the Applicant lodged an application for Judicial Review before the Supreme Court of Mauritius and prayed as follows:

(i) For leave to apply for an Order of Certiorari directing the Respondents to bring up before the Supreme Court of Mauritius all the documents/files/papers relating to their decision to cancel the bid exercise bearing reference OAB/CPB/22/2014 in order to have the said decision quashed and/or set aside and/or otherwise dealt with as the Supreme Court shall think on the grounds that the said decision was unfair, biased, discriminatory, arbitrary, illegal, and Wednesbury unreasonable;

(ii) For leave to apply for an Order of Certiorari directing the Respondents to bring up before the Supreme Court of Mauritius all its papers/files/documents relating to their decision to call for a re-tendering exercise for the redevelopment of Saint Louis Power Station in order to have the said decision quashed and/or set aside and/or otherwise dealt as the Supreme Court shall think fit on the ground the said decision was unfair, biased, arbitrary, illegal, and Wednesbury unreasonable;

(iii) For leave to apply for an Order of Mandamus directing the Co-Respondent (IRP) to proceed with the hearing and the determination of the application for review lodged by the

Applicant on the ground that the bid of the Applicant was responsive;

(iv) For an Interim order in the nature of an injunction restraining and prohibiting the Respondents from proceeding with the re-tendering exercise for the redevelopment of Saint Louis Power Station pending the final determination of the present application; and

(v) For such other order or orders that the Supreme Court of Mauritius may deem fit and reasonable to make in the circumstances of this application.

- ❖ After first granting the interim injunction prayed for at (iv), the Supreme Court later lifted the said injunction.
- ❖ On the 11th May 2015, the Panel requested written submission from both Parties instead of an oral hearing.

B. Evaluation

The Tender opening was carried out by the Central Procurement Board on 25 September 2014 at 14.00 hrs. Only one bid was received from bidder Burmeister & Wain Scandinavian Contractor A/S.

The Bid Evaluation Committee was comprised of:

- Mr B. Dhunnoo, Manager Technical Services as Chairperson
- Mr M. K. Jahajeeah, Principal Engineer as Member
- Mrs R. Gooljar, Accountant, Treasury as Member
- Mr R. Dhununjoy, Ag. Senior Engineer as Secretary
- Mr Y. Appasamy, Principal Engineer as Technical Expert
- Mr A. Thacoor, Senior Civil Engineer as Technical Expert

The Bid Evaluation Committee was assisted by Mr Fergal Collins (Consultant) from Mott MacDonald (Ireland).

The Committee submitted its report on 18th October 2014 and concluded as follows:

“The BEC made an assessment of the Bidder’s responsiveness based on the Evaluation and Qualification Criteria stipulated in the Standard Bidding Document. A detailed examination was carried out by the BEC and all identified items of the Employer’s Requirements were evaluated for compliance with the criteria and methodologies defined in Section III, Evaluation and Qualification Criteria.

Based on the foregoing assessment and the detailed Evaluation and Qualification Criteria, the BEC has determined that the Bid from the Bidder Burmeister & Wain Scandinavian Contractor A/S – Denmark is not complying with all the mandatory requirements and also has material deviations on the technical requirements and commercial terms and conditions of the tender. Hence, the BEC concluded that the bid is not responsive and should be rejected”.

C. Letter of Cancellation

On 25 November 2014, the Central Electricity Board informed the Applicant that the bidding exercise has been cancelled and the only bid received has been found to be non-responsive to the requirements laid down in the bidding documents.

D. The Challenge

On 01 December 2014, the Applicant challenged the cancellation on the following grounds:

- “(i) The Applicant has submitted a bid which complies with all mandatory requirements of the prequalification and Bidding Documents and contains no material deviations, reservations or omissions.*
- (ii) The evaluation of the Applicant’s bid was erroneous and has led the Public Body to erroneously decide to cancel the bidding process.*

(iii) *Since the bid of the Applicant was responsive and the only bid received, the Applicant should have been awarded the contract.”*

E. The Reply to challenge

On 04 December 2014, the Public Body made the following reply to the challenge:

“We therefore regret to inform you that your challenge cannot be entertained as the bidding exercise has been cancelled due to non-responsiveness of the only bid received, and no notification for award has been issued.”

F. Grounds for Review

On 09 December 2014, the Applicant seized the Independent Review Panel for review on the following grounds:

- (i) *The Applicant has submitted a bid which complies with all mandatory requirements of the prequalification and Bidding Documents and contains no material deviations, reservations or omissions;*
- (ii) *The evaluation of the Applicant’s bid was erroneous and has led the Public body to erroneously decide to cancel the bidding process;*
- (iii) *Since the bid of the Applicant was responsive and the only bid received, the Applicant should have been awarded the contract;*
- (iv) *The reply to the challenge by the Public body is wrong in law in as much as any unsuccessful bidder has an inherent right of appeal/challenge in respect of a decision finding its bid unresponsive.”*

G. The Hearings

Hearings were held on 02 April, 08 April, 17 April, 11 May, 26 May and 09 June 2015, and the respective parties made written submissions on 25th of May and 05th of June 2015.

H. Supreme Court Case

It is incumbent on the Panel to address the following issue before proceeding to a decision.

On the 20th April 2015, the Applicant lodged an application for Judicial Review before the Supreme Court of Mauritius and prayed *inter alia* as follows:

(iii) For leave to apply for an Order of Mandamus directing the Co-Respondent (IRP) to proceed with the hearing and the determination of the application for review lodged by the Applicant on the ground that the bid of the Applicant was responsive;

This case involves the same litigants and the same subject matter, except that the IRP is now a Co-Respondent. The question arises therefore, whether it would be proper for the Panel to issue this Decision in view of the pending Supreme Court case.

It is one of the prayers of the Applicant that the Panel should continue its hearings, and proceed with the determination of this case, and the latter has signified its no-objection to this prayer. The Respondent, after first contesting the jurisdiction of the Panel to conduct these hearings, afterwards removed his objections as to jurisdiction; this is further discussed below. Indeed, both Applicant and Respondent have participated fully in hearings and have submitted all evidence, arguments etc. requested of them, and hearings were held without objection from either party (except for the letter of 6th April 2015 from the Officer in Charge of the CEB, as reproduced below). The logical conclusion to hearings is a decision.

The Panel is of the opinion that there is no impediment to the issue of this Decision. This Decision is therefore being issued in the full knowledge that, (a) like all other decisions of the Panel, it may be subject to Judicial Review, and (b) it cannot be acted upon by either party if the Supreme Court case

represents a legal impediment to the implementation of actions implied in the Decision.

On the other hand, the Panel is bound to issue a Decision under Section 45(8) of the Public Procurement Act and Section 57A of the Regulations made under the Act.

I. Findings

The issues which IRP has to determine are:

- ❖ Since there has been no notification of award, can the Applicant apply for review before the Panel? Can the cancellation be subject matter of an application for review before the Panel?
- ❖ Whether a new tender is a continuation of the same tender exercise or a new one?
- ❖ Whether the public body was right to reject the application for an extension of the bid validity period?
- ❖ Whether the Applicant's bid was non-responsive or not?

We shall address these in the order they are presented

(i) Since there has been no notification of award, can the Applicant apply for review before the Panel? Can the cancellation be subject matter of an application for review before the Panel?

Section 39 (1) (a) of the PPA 2006 provides that:

“Cancellation of bidding process

(1) A public body may, at any time prior to the acceptance of a bid, reject all bids, or cancel the public procurement proceedings where -

(a) all the bids are non-responsive;”

Initially, in its reply to the challenge and to the application for review, the CEB invoked only this reason for the cancellation of the tender exercise. The only inference from this is that the exercise would not have been cancelled if the only bid received had been responsive.

Furthermore, Section 43 (1) of the same Act to the effect that

“43. Challenge

(1) A bidder who claims to have suffered, or to be likely to suffer, loss or injury due to a breach of a duty imposed on a public body or the Board by this Act may, subject to subsections (2) and (3), challenge the procurement proceedings before the entry into force of the procurement contract.”

cannot, by any stretch of the imagination, be taken to mean that a challenge has necessarily to be followed by the “*entry into force of the procurement contract*” to be accepted. The event “*entry into force of the procurement contract*” provides only a time boundary beyond which the challenge cannot be accepted. If that time boundary ceases to exist, or is shown to be unable to exist, that should not affect the validity of the challenge.

An alternative interpretation is that for a challenge to be accepted, there has to be set in motion a train of events which, unless suspended, would logically lead to an *entry into force of the procurement contract*. This interpretation is not borne out by the wording of the Section 43 which does not specify any other event after which a challenge may be accepted.

The CEB’s stand is that the *procurement proceedings* cannot be challenged, as they have ceased to exist by virtue of the cancellation. To hold that view would be to declare the cancellation irreversible.

The tender exercise was cancelled only because the only bid received was considered unresponsive, and the cancellation therefore was dependent on whether the bid was or was not unresponsive. The Applicant considered that

it was not. If there had been more than one tenderer, and at least one other bid was found responsive, then it would be obvious that the unsuccessful lowest bidder whose tender, to his chagrin, was found unresponsive, would have the right of challenge and appeal. Why, then, should the Applicant not have the same rights, simply because he was the sole bidder?

It is our considered opinion therefore, that the Panel, as previously constituted, was right to initiate these Review proceedings, and that a cancellation as one of the possible outcomes of a tender exercise may be subject to review.

(ii) Whether a new tender is a continuation of the same tender exercise or a new one?

As a result of the cancellation, the Respondent decided to proceed with a re-launch of the tender exercise, without awaiting the decision of the Panel as to the responsiveness of the only bid received, and therefore as to the validity of the cancellation.

As a result of this decision to re-launch, the avenues for redress, should the Applicant be proved right, would be seriously restricted, and it became necessary for the Panel to address this issue.

Had the CEB maintained that the only reason for the cancellation was the unresponsiveness of the only bid received, the decision to re-launch could have been seriously questioned. However, on the 6th April 2015, in a letter to the Panel copied to the Applicant, the Officer in Charge of the CEB stated that:

“The Central Electricity Board (CEB) wishes to inform the Panel that in the public interest it has become necessary to proceed with a re-launch of the tender for Saint Louis Redevelopment Project in line with Section 36(1) of the Public Procurement Act 2006 (Regulations 2008). To this effect, the CEB is humbly requesting the Panel to discontinue the proceedings in the above mentioned case.

The tender will be re-launched with revised specifications and/or critical aspects of the conditions of contract as recommended by the AFDB, the funding agency.

Yours faithfully

SK Thannoo

Officer-in-Charge”

Section 36(1) of the Regulations made under the PPA reads as follows:

“36. Cancellation of procurement proceedings after opening of bids

(1) A public body may at any time cancel the procurement proceedings where –

(a) the object of the procurement is no longer required;

(b) it has become necessary, in the public interest, to modify the specifications or critical aspects of the conditions of the contract; or...”

The CEB now introduces another reason for the cancellation of the bidding exercise, namely that *it has become necessary, in the public interest, to modify the specifications or critical aspects of the conditions of the contract.*

Section 53 (3) of the same Regulations provide that:

“53. Disclosure by public body

.....

(3) The Review Panel may request or allow the submission of additional statements by the parties and by other parties not participating in the application for review as may be necessary for the fair resolution of the application for review.”

The Panel therefore accepts that there was an additional reason for the cancellation of the tender exercise, but deplores the fact of its late disclosure. Had this been made known before, the decision of the Applicant

to request a review, or that of the Panel to entertain this request may have been otherwise.

In truth, it would have been surprising, to say the least, had the CEB not found it necessary to make profound changes to the specifications and/or conditions of contract in view of the fact that out of 5 prequalified bidders only one bothered to tender, and his tender was considered unresponsive. If the CEB had persisted in maintaining that the sole reason for cancellation of the bidding process was the non-responsiveness of the only bid received, they could have re-launched the tender with the same specifications and same conditions of contract, as per Section 39 (3) of the PPA.

“39. Cancellation of bidding process

(1) A public body may, at any time prior to the acceptance of a bid, reject all bids, or cancel the public procurement proceedings where -

(a) all the bids are non-responsive;

(b) the lowest evaluated bid is substantially above the applicable updated cost estimate;

(c) the goods, works or services are no longer required; or

(d) it has been established that there has been collusion among the bidders.

(2) Written notice of the rejection of all bids, or cancellation of the public procurement proceedings, shall be given to all bidders that submitted bids.

*(3) There shall be no invitation to re-bid for the procurement on the same specifications and contract conditions **unless the rejection of all bids or cancellation of procurement proceeding is made on a ground specified in subsection (1)(a) or (b).**”*

The Panel considers therefore that a re-launch on fresh specifications and/or conditions of contract following a cancellation under 36(1)(b) of the

Regulations is a fresh tender exercise and cannot be said to be a continuation of the same exercise.

(iii) Whether the public body was right to reject the application for an extension of the bid validity period?

To be consistent with its stand, the CEB could not extend the validity of the bid from the Applicant. As the decision to cancel the bidding process was made *inter alia* on the need to review both specifications and conditions of contract, it is now, in the particular circumstances of this tender exercise, irreversible, and it is no longer open for the Panel to recommend an annulment of the decision and an award to the Applicant. Other avenues for redress would still be available to the Applicant. This is therefore a non-issue.

(iv) Whether the Applicant's bid was non-responsive or not?

There are in fact several items in which the Public Body considered that the Applicant's bid was unresponsive. We shall address them in two groups.

- The Cover Letter: along with his bid, the Applicant submitted a "cover letter" which *inter alia* stated that "*This letter shall take precedence over the Letter of Bid*".

The Respondent has argued that the mere inclusion of this phrase in any letter accompanying the bid makes the latter a conditional bid.

The Applicant's arguments rest on the fact that the "cover letter" was not really part of the Bid, that it was surplus to the requirements of the Tender, and that therefore the Applicant expected the Respondent to ignore the letter.

After careful consideration of submissions on both sides, and study of the said "cover letter" the Panel has come to the following conclusions:

The Applicant has failed to show that the “cover letter” does not contain any additional or contradictory condition to the Letter of Bid. Indeed, the “cover letter” does express the wish that conditions of contract be renegotiated.

The Panel does not believe that one would draft an unrequested 8-page letter to include with the Tender expecting it to be ignored.

The Panel is of the opinion that the “cover letter” does make the bid of the Applicant a conditional one. The fact that this kind of letter had been used and accepted in the past is immaterial.

- Material Deviations: The Respondent has communicated to the Applicant a vast list of more than 200 deviations of which about 80 were considered major deviations.

The Respondent has not attempted to address those individually. Rather he has attempted to show that the nature and complexity of this design and supply project makes it almost impossible to avoid deviations. He has even pointed out one instance where there is a contradiction between the specifications and the requirements of the project.

The Applicant is right in saying that a design and build project cannot be assorted with very detailed specifications that limit all tenderers in their design. The proper procedure would have been for tenderers to draw the attention of the Employer to such constraints and contradictions BEFORE the submission of the tender, instead of which the Applicant has chosen to deliberately deviate from the specifications. Other invited prequalified firms chose not to submit a tender.

What the Applicant has shown in fact is that there is something very wrong with the specifications and that, in fact, *it has become*

necessary, in the public interest, to modify the specifications or critical aspects of the conditions of the contract and re-launch a fresh tender.

The Applicant has also relied on an undated Report allegedly prepared by Messrs G Jawaheer, HV Jadav, and S Soodaye of which he has submitted a copy to the Panel and to the Respondent. Contrary to what was stated by the Applicant, the Panel does not have a signed copy of this report in its files, but only another unsigned identical document.

The Respondent has consistently denied any knowledge of the report. Since the latter is unsigned, there is no indication whether it is an early draft or the final version. Also, the Panel has not been informed as to who commissioned the report, for what purpose, and what were the Terms of Reference of the above named. Finally, if there was a final version of the report submitted to the CPB, the latter has obviously rejected its conclusions and recommendations, as it has played no part in the final decision to cancel the bidding process.

For these reasons, the Panel cannot give any consideration to the contents of the said report.

The Panel therefore is of the opinion that there were numerous material deviations in the Applicant's tender which could not be resolved through clarifications, and the removal of any of those deviations from the tender would constitute a substantial change to the tender. The fact that there were no other tenders has no bearing on the principle that no material change can be brought to a tender after its submission. If other invited bidders had been made aware that such change was possible, or that the specifications could be changed on request, that could have influenced their decision not to tender.

- Disinterest of other bidders: None of the parties has discussed this issue, but if this review exercise is to be meaningful, the Panel has to mention that it is a matter for concern that firms which took the

trouble to request prequalification, and were thereafter invited to tender chose not to. The tender exercise had to be cancelled because there was no responsive bid. It is hoped that proper investigations will be carried out to prevent recurrence of such situations which lead to a general lack of competition and to delays.

J. Decision

Even though the procurement exercise under discussion was a Design and Build project, bidders were expected to make offers that remained within the parameters of the specifications and proposed conditions of contract. If any of the latter imposed constraints incompatible or contradictory to the requirements of the project, the proper procedure would be to draw the attention of the Employer before the date of tender. If such constraints were not discovered in time, then along with the tender, the bidder should submit a list of comments detailing such incompatible constraints. In all cases, the bidder should submit a bid conforming exactly to the (altered or not) specifications and conditions of contract, albeit faulty, and then submit his own alternatives. If no conforming tender is submitted, tender analysis and comparisons become impossible, and the only outcome of the tender process should be a cancellation.

We therefore find that there is no merit in the Application.

(R. Laulloo)
Chairperson

(V. Mulloo)
Member

Dated 03rd July 2015

Independent Review Panel – Decision No. 11/15