

INDEPENDENT REVIEW PANEL

In the matter of:

H. Padiachy Contractor Ltd

(Applicant)

v/s

Wastewater Management Authority

(Respondent)

(Cause Nos. 30/14/IRP)

Decision

A. History of the case

The Wastewater Management Authority (WMA), on behalf of the Ministry of Energy and Public Utilities (MEPU) invited sealed bids through Open Advertised Bidding for Contract WW291W - Upgrading, Rehabilitation, Repairs and Diversion of Existing Sewer Reticulation - Plaines Wilhems.

Contract WW291W is a unit price contract with an estimated budget of MUR 30 million. The Works consist of the replacement of existing public sewers and rising mains in stretches; repairs on existing public sewers and rising mains; diversion of existing public sewers and property house sewers; repair, upgrading and reconstruction of sewer manholes and inspection chambers; and raising of sewer manholes, manhole covers and frame ..

The invitation for bids was launched on 26th June 2014. The closing date for the receipt of bids was set for 06th August 2014.

Further to queries raised by the Bidders, two clarification letters were issued to all the potential Bidders on 09th & 28th July 2014.

It appears that a bidding exercise for the same or a similar project, 'Upgrading, Rehabilitation and Diversion of Existing Sewer Reticulation- Contract WW280W-Plaines Wilhems, for a period of two years' was launched in August 2013, Procurement Reference: Bidding Document IFB WMA/8/13.

The Applicant submitted his bid on 02nd October 2013, which was the lowest bid in the sum of MUR 13, 642, 669.65 inclusive of VAT for the period of two years. At Bid opening, the following quotes were received:

Bidders Name	Amount Quoted (MUR)
H.Padiachy Contractor Ltd	13,642,669.65
Cimix Construction Ltd	14,453,327.80
Onix Construction Ltd	16,961,063.65
Square Deal Multi-Purpose Cooperative Society Limited.	17,820,312.86
Pad & Co Contractors	28,866,558.25
General Constructions Ltd	Not Quoted
Transinvest Ltd	Not Quoted

Square Deal Multi-Purpose Cooperative Society Limited of CEB Road, Goodlands, also submitted its bid in the sum of Rs 17, 820, 312.86, less a discounted sum of Rs 1, 720, 000, which amounted to Rs 16,100,312. The Applicant's bid was lower than that of

Square Deal Multi-Purpose Cooperative Society Limited by a sum of Rs 2,457, 643.00.

On 29th January 2014 the Applicant was informed by way of letter that the bidding exercise had been cancelled due to gaps in the specifications.

In June 2014, the Public Body has invited bids for the same project, '*Upgrading, Rehabilitation and Diversion of Existing Sewer Reticulation-Contract WW291.W Plaines Wilhems*', Bidding Document **IFB/WMA/7/14 & Contract WW 291.W**

The invitation for bids was made through Open Advertised Bidding on 26th June 2014. The advertisement was placed in three newspapers, namely: Le Matinal of 30th June 2014, Mauritius Times of 04th July 2014 and Le Défi Plus of 05th July 2014.

Standard bidding documents issued by the Public Procurement Office for Procurement of works (Recommended for contracts up to a value of Rs 100 Million), was customized and used for this bidding exercise.

The closing date and time for submission of bids was set not later than 13h00 on 06th August 2014 at the WMA. Bids were opened on the same date at the WMA at 13h30 and the following five bids were received:

No.	Bidder	Read-out Bid Price (incl. VAT) (Rs)
1	Trivan & Co Ltd	17,500,642.00
2	Onix Co Ltd	16,032,222.57
3	Square Deal Multi-Purpose Cooperative Society Ltd	8,912,366.65
4	H. Padiachy Contractor Ltd	11,475,102.50
5	PAD & Co Ltd	26,043,938.45

The Applicant submitted its bid in the sum of Rs 11, 475, 102.50 inclusive of VAT for the period of two years.

Square Deal Multi-Purpose Cooperative Society Limited also submitted its bid in the sum of Rs 8,912,366.65 inclusive of VAT for the period of two years.

On 30 September 2014, the Applicant was informed by way of letter that the contract had been awarded to the lowest bidder, Square Deal Multi-Purpose Cooperative Society Limited.

The bid of Square Deal Multi-Purpose Cooperative Society Limited was this time lower than that of the Applicant by a sum of Rs 2,562,735.85.

The Applicant challenged the decision of the Public Body on 03/10/14.

On 06/10/14, the Applicant was informed that the challenge had been set aside.

On 07/10/14, the Applicant applied for a review of the decision of the Public Body.

On the 10th October 2014, the Panel was informed that the WMA Board has decided “to certify that urgent public interest considerations require the procurement proceedings for contract WW291W to proceed on the following ground:-

(i) There are regions where frequent overflow of sewers are being encountered because of damaged sewer pipes and in some cases because of overloading of the sewers. To abate the environmental nuisances being caused, the sewers must be replaced. The Authority is constantly being served notices by the Ministry of Health and Quality of Life to attend to the environmental nuisances being caused and as such has a priority list where works should be carried out urgently.

In light of the above, the Authority is therefore proceeding with the award of Contract WW291W to Square Deal Multi-Purpose Cooperative Society Ltd.”

B. Evaluation

Following the Bid Opening exercise on 06th August 2014, an Evaluation Committee was set up to evaluate and make a recommendation for award of Contract WW291W. The Evaluation Committee comprised the following members:

Mr. A. Rumjaun	Chairperson - Civil Engineer
Mr. T. Dusoruth	Member - Civil Engineer
Mrs. P. Lutchmeah	Member – Accountant

After Evaluation, the BEC concluded as follows:

Bidder	Read-out Bid Price (incl. VAT)	Bid Price after Corrections (incl. VAT)	Bid Amount after Margin of Preference of 10% (incl. VAT)	Ranking
Trivan & Co Ltd	17,500,642.00	18,847,867.50	20,732,654.25	4
Onix Co Ltd	16,032,222.57	16,048,903.26	16,048,903.26	3
Square Deal Multi-Purpose Cooperative Society Ltd	8,912,366.65	8,912,366.66	9,803,603.32	1
H. Padiachy Contractor Ltd	11,475,102.50	11,475,102.50	11,475,102.50	2
PAD & Co Ltd	26,043,938.45	26,043,938.45	26,043,938.45	5

“The best evaluated bid is Square Deal Multi-Purpose Cooperative Society ltd.”

C. Notification of award

The Wastewater Management Authority through a letter dated 30 September 2014, informed the Applicant of the particulars of the successful bidder as follows:

Name of Bidder	Address
Square Deal Multi-purpose Cooperative Society Limited	CEB Road, Goodlands

D. The Challenge

On 03rd October 2014, the Applicant challenged the award on the following grounds:

“Having submitted the lowest responsive bid, and in the absence of any valid reason, the bidder should have been awarded the contract straight away for the upgrading, rehabilitation, repairs and diversion of existing sewer reticulation – Plaines Wilhems.

Square Deal Multi-Purpose Cooperative Society Limited which has been retained for the award of the Contract has submitted an incomplete and non-responsive bid in that:

- a. It has no required experience as stipulated in ITB 6.3 (b) and*
- b. It has no required and qualified personnel as is required in ITB 6.2(e) and ITB 6.3(d).”*

E. The Reply to Challenge

On 06 October 2014, the Wastewater Management Authority made the following reply to the challenge:

“The Authority wishes to inform you that the Wastewater Management Authority Board decided to award the contract to the lowest substantially responsive bidder.”

F. Grounds for Review

On 07 October 2014, the Applicant seized the Independent Review Panel for review on the following grounds:

“Having submitted the lowest responsive bid, and in the absence of any valid reason, the bidder should have been awarded the contract straight away for the upgrading, rehabilitation, repairs and diversion of existing sewer reticulation – Plaines Wilhems.

Square Deal Multi-Purpose Cooperative Society Limited which has been retained for the award of the Contract:

- (a) has submitted an incomplete and non-responsive bid*

- (b) *has no required experience as stipulated in ITB 6.3 (b) and Addendum No. 2 (A.2) where it is clearly mentioned as follows: (Prospective bidders are reminded that they should submit all relevant documents including the works experience as mentioned and as required in the Bidding Document as well as experience in public and private sewer reticulation carried out following the approval of the WMA. These will be taken into consideration at evaluation stage to assess whether the bidder meet responsiveness requirements and have the experience equivalent to the nature and complexity of the works as defined.*
- (c) *has no required and qualified personnel as is required in ITB 6.2 (e) and ITB 6.3 (d).”*

G. The Issues

When the Applicant avers in his request for review that “*Having submitted the lowest responsive bid, and in the absence of any valid reason, the bidder should have been awarded the contract straight away for the upgrading, rehabilitation, repairs and diversion of existing sewer reticulation – Plaines Wilhems*”, he is in fact referring to the first tender exercise “Upgrading, Rehabilitation and Diversion of Existing Sewer Reticulation- **Contract WW 280 W- Plaines Wilhems, Procurement Reference IFB WMA/8/13**, for which he was the lowest bidder, whereas he was not for contract WW 291 W which is the one under discussion. What the Applicant is contesting, in fact, is the cancellation of the first exercise, and the re-launch.

The Applicant also avers that the bid from the successful bidder was non-conforming, incomplete, and that the latter neither has the required experience nor the required personnel to perform the contract.

In his submissions, the Applicant has also contested the issue of the Certificate of Urgency by the WMA, and the award on grounds of public interest to the Successful Bidder. He has also averred that the latter has used the Applicant’s bid in the first tender exercise for contract WW 280 W as a basis for his pricing of the tender for contract WW 291 W.

H. The Hearings

Hearings were held under the present Panel on 28 April, 11 May, 25 May and 10 June 2015. The Applicant was represented by Mr L. Servansingh, Counsel, whereas the Respondent was represented by Mr S. Bheeroo until 11 May 2015, on which date the latter was replaced by Mr Racheed Daureeawoo.

Written submissions were made on 12 May and 05 June 2015 by the Applicant and 22 May and 15 June 2015 by the Respondent respectively.

I. Findings

1. THE CANCELLATION:

Section 39 of the PPA 2006 provides that:

“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)”.

Regulation 36 made under the same Act provides that:

“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

(c) defects or gaps in the specifications have been revealed, which prevent consideration of a substantially less expensive and functionally equivalent item other than the one called for in the bidding documents, or which prevent consideration of all items of cost to the public body in the evaluation process.

(2) No decision to cancel the procurement proceedings shall be taken unless the Chief Executive Officer of the public body concerned has given the approval to the cancellation.”

The Respondent has throughout these proceedings maintained that it has become necessary to cancel the first tender because of “shortcomings” and “gaps” in the specifications. The WMA did not invoke any of the reasons provided under section 36 (1) (a) to (d), nor did it invoke any of the subsections of section 36 of the Regulations, except possibly section 36 (1) (c). The Public Body did invoke public interest later in the proceedings, but not at the time of cancellation, so section 36 (1) (b) of the Regulations does not apply here. Furthermore, it is doubtful whether 36 (1) (c) can apply here, as this section qualifies “defects or gaps in the specifications” as those “which prevent consideration of a substantially less expensive and functionally equivalent item other than the one called for in the bidding documents, or which prevent consideration of all items of cost to the public body in the evaluation process.” The WMA has never attempted to show what those gaps or shortcomings were

that prevented *consideration of a substantially less expensive and functionally equivalent item other than the one called for in the bidding documents.*

However, the Applicant cannot at this late hour, after having bid for and lost the re-tender, contest the cancellation of the first exercise. He did have solid grounds on which to contest the cancellation, if not at the IRP, then by way of Judicial Review, prior to the re-tender. At this time, it is no longer open to the Panel to reverse the cancellation, and no attempt has been made to compare specifications of the first and second tender exercises to find what, if anything, was modified.

The IRP may not be the appropriate forum in which to contest the cancellation and re-tender. The Panel believes, however, that other avenues for redress may still be available to the Applicant.

2. THE AWARD IN PUBLIC INTEREST:

By the same token, it is not within the powers of the Panel to reverse a decision taken in the public interest under section 45 (5) of the Public Procurement Act. We may state nevertheless, that it seems odd that after cancelling one tender exercise, and launching another because of undisclosed *gaps* or *shortcomings* thereby losing several months, the WMA should find it suddenly urgent to award the Contract. The Panel is however not empowered to act on this issue. Here again the Applicant is referred to the appropriate forum to seek redress.

3. THE BID PRICES:

The Panel has thought it interesting to compare the bid prices of the several bidders for the first and second tender exercises. This has been done in the table below. It is to be noted that Cimix did not bid for the second exercise, and Trivian had not bid for the first.

One can immediately see that all bids are substantially the same, except for Square Deal who reduced his price to almost half of the first bid. Padiachy, by his own admission reduced marginally his bid price to prevent other bidders from second guessing his bid price for the second tender. This leads to the inevitable conclusion that the specifications and quantities of the second tender were substantially the same as for the first, and the only result achieved was a substantial reduction in the price of only one bidder.

Bidders Name	First Tender (MUR)	Second Tender (MUR)
H.Padiachy Contractor Ltd	13,642,669.65	11,475,102.50
Cimix Construction Ltd	14,453,327.80	
Onix Construction Ltd	16,961,063.65	16,048,903.26
Square Deal Multi-Purpose Cooperative Society Limited.	17,820,312.86	8,912,366.66
Pad & Co Contractors	28,866,558.25	26,043,938.45
Trivan & Co Ltd		18,847,867.50

It may be argued that in itself that reduction would validate the decision to re-tender. That would however be a very short term view. In general, anything that vitiates a single tender exercise will in the long term affect all Government procurement processes.

Moreover, the allegation that the successful bidder used the bid price of the Applicant in the first tender exercise as a benchmark to bid for the second cannot be proven one way or another.

4. THE RESPONSIVENESS OF THE BID FROM SQUARE DEAL:

The Applicant has alleged that the Successful Bidder did not submit a complete bid, that there were omissions in the Bid Submission Form, that the Successful Bidder did not have the required experience and personnel.

The Applicant could not substantiate these claims, for lack of access to bid documents. The Respondent at first maintained the findings of the Bid Evaluation Report in regard to both experience and personnel and to the completeness of the bid from the Successful Bidder. On the 11th June, however, the Respondent admits that there were omissions in the above bid, but that these were not substantial. The Respondent's opinion is based on the advice of its legal counsel, but at no time did the Respondent seek advice from the PPO.

The letter of Acceptance including the same formula cannot be said to have the same effect as if that formula had not been deleted from the Form of Bid. The letter of acceptance is issued (by the WMA) after the evaluation, and the completeness of the bid is judged on submissions at the time of tender.

Also, the Tender Bond would have the same effect, but expires at the end of the tender period, whereas the commitment that the Respondent seeks from the formula omitted in the bid form should extend until formal contract signature.

The Panel cannot imagine what advantage the Successful Bidder would gain from wilful suppression of the formula binding him until signature of a formal contract, and concludes that the omission of this paragraph was probably a mistake, which should not have happened in the normal course of events. Whether this mistake is fatal or not, is a different matter.

Moreover, the statement at p4 of the Bid Evaluation Report to the effect that all bidders have submitted a bid form complying with the requirements of the Bidding Document should have been qualified.

All five bidders have submitted a Bid Submission Form complying with the requirements of the Bidding Document. They have submitted a bid which is valid for a period of 120 days and also submitted a Bid Securing Declaration in accordance with the format in the Bidding Document.

In regard to experience and qualified personnel, the Panel has gone through the bid of the Successful Bidder, and determined that **on paper**, the latter does seem to have the required experience and qualified personnel. The Panel agrees that pipe laying works for any entity would constitute similar experience. However, as regard *similar size* the Panel is of opinion that the reference size can be determined from the allocated budget. Even if quantities in a schedule contract are only approximate, they are not totally fictitious, and could also be used as a benchmark.

The Bid Evaluation Report does not say whether there has been any attempt to verify the submissions of the Successful Bidder as to experience. Also, in regard to personnel, the BEC did not check whether the proposed Designers/Contractor's representatives are not full time employees of Consulting Firms.

J. Decision

The Panel is of opinion that there were flaws in the evaluation process, but is not convinced that without these flaws its conclusions would have been different. Nevertheless, the averments of the Applicant need to be addressed. The Panel therefore recommends a re-evaluation of the bids by an independent committee on the grounds mentioned above. Should the conclusion of the re-evaluation be different, the Respondent should propose solutions to the Panel, taking into account that the contract has been awarded and bid validities have expired.

(R. Laulloo)
Chairperson

(R. Ragnuth)
Member

(V. Mulloo)
Member

Dated 17 August 2015