

## INDEPENDENT REVIEW PANEL

In the matter of:

**Como Construction Ltd**

**(Applicant)**

**v/s**

**Ministry of Public Infrastructure, National  
Development Unit Land Transport and Shipping  
(National Development Unit)**

**(Respondent)**

**(Cause No. 07/14/IRP)**

### **Decision**

#### **A. History**

This case has had a chequered history, with a change of successful bidder from Tayelamay & Sons Enterprise Ltd to Como Construction Ltd and back to Tayelamay & Sons Enterprise Ltd.

In October 2013 the NDU launched tenders through National Open Advertised Bidding for the construction of a new Market Fair at Goodlands, reference CPB/44/2013 (Public Body Ref: NDU/OAB/0512013).

The project consists of the Construction of a New Market Fair at Goodlands.

- The proposed building is a single storey structure in reinforced concrete of an area of 4029 m<sup>2</sup> comprising 600 nos. stalls, 8 nos. tuck shops for cake and 7 shops for meat and fish.
- The works also comprise 2 public toilet blocks each comprising of 5 nos. cubicles for public female, 4 nos. for public male and 1 no. for disabled.

**Independent Review Panel – Decision No. 23/14**

- An office section with 2 nos. offices, 1 no. store and 1 no. toilet for staff.
- Site works including green areas, parking, electrical works and other ancillary works.

The tender was advertised in:

- I. Government Gazette: 31 October and 09 November 2013
- II. Le Matinal : 31 October and 04 November 2013
- III. Le Defi Quotidien: 31 October and 04 November 2013
- IV. The Mauritius Times: 31 October 2013

Addenda were issued as follows:

- Addendum 1. Issued on 07 November 2013 informing bidders about the amended technical specifications for electrical and associated works for the project.
- Addendum 2. Issued on 29 November 2013 informing bidders about the revised pages 45R to 72R of the Bidding Document referring to Section V -Employer's requirements- specifications for electrical and associated works and page 117R- schedule of materials which needs to be considered instead of pages 45 to 72 and 117 of the Bidding Document.

The Closing date for the submission of bids initially fixed for 05 December 2013 was extended to 11 December 2013 up to 13.30 hours at latest at the CPB. Public Opening was carried out on the same day at 14 .00 hours in the Conference Room at the CPB and nine (9) bids were received and read out as follows:

**Independent Review Panel – Decision No. 23/14**

S/N	Bidder's Name	Discount Offered (Rs)	Price at Bid Opening after discount (incl. of VAT) (Rs)
1	Como Construction Ltd	5,250,026.38	90,047,588.21
2	Le Dophin Construction Co. Ltd	-	93,188,419.67
3	Tayelamay & Sons Enterprise Ltd	16,466,621.52	95,397,610.00
4	Safety Construction Co. Ltd	-	121,069,461.95
5	EDCC Co. Ltd	-	106,752,586.40
6	Nundun Gopee & Co. Ltd	3,000,000.00	103,322,612.50
7	Keep Clean Ltd		99,172,178.00
8	Ramloll Bhooshan Renovation & Building Contractor	15,139,102.00	109,838,800.00
9	Chang Cheng Esquares Co. Ltd	-	118,918,677.35

**B. Evaluation**

The Bid Evaluation Committee was comprised of the following:

Name	Official Status	Position
Mr. Pragaladen Chocalingum	Architect /Senior Architect, Ministry of Public Infrastructure, National Development Unit, Land Transport and shipping (Public Infrastructure )	Chairperson and Registered Evaluator
Mrs. Geeta Devi Luchoomun	Project Officer, Ministry of Public Infrastructure, National Development Unit, Land Transport and shipping (National Development Unit)	Member and Registered Evaluator
Mr. Kevin Noello Li Kum Fong	Head, Public Infrastructure Department, District Council of Savanne	Member and Registered Evaluator
Mr. Bheesam Sharma Cyparsade	Assistant Permanent Secretary, Ministry of Public Infrastructure, National Development Unit, Land Transport and shipping (National Development Unit)	Acting as Secretary

The BEC gave its report on 4<sup>th</sup> February 2014 and found that:

*The (...) clarifications submitted by Bidder 1, Como Construction Ltd demonstrate that the latter has not undertaken any project of similar size over the last 5 years which the BEC considers as a major deviation to ITB 6.2 (c) and 6.3 (b).*

As a result, it concluded that the lowest evaluated responsive bidder proposed for contract award was:

Name: Tayelamay & Sons Enterprise Ltd

Address: 3, Morcellement Noel, Phoenix

The CPB, not being satisfied with this evaluation, set up a Review Committee to “review the findings and recommendations of the Bid Evaluation Committee (BEC) Report submitted on 4 February 2014.” This committee was composed of:

Name	Official Status	Position
Oudesh Chundrgupt Domah	Head of Public Infrastructure Dept City Council of Port Louis	Chairperson & Registered Evaluator
Madookur Desha	Registered Professional Engineer & Consultant	Member & Registered Evaluator
Jacques Nauvel	Project Manager / Consultant	Member & Registered Evaluator

It submitted its report on 18<sup>th</sup> February 2014 and concluded as follows:

*“The Review Committee therefore recommends that "Construction of Market Fair at Goodlands" be awarded to the lowest responsive Bidder Como Construction Ltd for the corrected amount of Rs 89,846,836.16 (Inclusive 0/ VAT) which includes a contingency sum of Rs 3,600,000 and a discount of Rs 5,250,026.38, provided that the Bidder No.1 Como Construction Ltd Construction Ltd*

*(i) satisfies the clarifications sought with regard to paragraph 10*

*(i) accepts the reduced corrected amount of Rs 89,846,836.16 (Inclusive of VAT)”*

The Public Body then issued a Notification of Award to Como Construction Ltd. However, following information received, the Public Body once more changed its mind and informed the Applicant of the reasons not to proceed with an award as previously intended.

### **C. Notification of award**

The Public Body through a letter dated 13 March 2014, informed the Applicant of the particulars of the successful bidder as follows:

<i>Name of Successful Bidder</i>	<i>Contract Price</i>
<i>Tayelamay &amp; Sons Enterprise Ltd</i>	<i>Rs 97,606,287.35, inclusive of a contingency sum of Rs3,600,000, a discount of Rs16,466,621.52 and VAT</i>

## **D. The Challenge**

On 18 March 2014, the Applicant challenged the award on the following grounds:

- (a) Failure to comply with the requirements of law as per section 40(4) of the Public Procurement Act 2006 because in the absence of any challenge by any other bidder within 7 days of the date of the notice (i.e. 26 February 2014), the contract should have been by operation of law awarded to the successful bidder i.e. Como Construction Ltd and in the circumstances considered to have been so awarded.*
- (b) In the absence of any challenge, the withdrawal of the notification of award as per the letter dated 13 March 2014 bearing Ref NDU/OAB/05/13 is to all intent and purposes null and void, illegal and contrary to law.*
- (c) No challenge, if any, by another bidder has been communicated to us.*
- (d) The request for extension of bid validity period and bid security which was sent on 10 March 2014 was already outside the 7 days mentioned in ground 1 above.*
- (e) In any event, the said bid validity period was extended as per the request.*
- (f) The said request mentioned a bid security which was not even applicable to this tender exercise.*
- (g) Taking into consideration grounds 1 and 2 above, the notification of award sent to Tayelamay & Sons Enterprise Ltd was null and void, illegal and contrary to law.*
- (h) Being null and void, illegal and contrary to law, the notification of award of contract for the project to Tayelamay & Sons Enterprise Ltd is ultravires. Attention is drawn that Tayelamay & Sons Enterprise Ltd was the 3<sup>rd</sup> lowest bidder and its bid was also revised.*
- (i) No reason whatsoever has been given in the letter dated 13 March 2014 to justify the decision to annul the approval of award made in favour of the Applicant.*
- (j) The fact that un-particularised alleged “new elements” have come to the knowledge of the Board; and which prompted it to annul the approval of award to the Applicant is not a valid reason, is unfair and completely unreasonable,*

*illegal and highly prejudicial to the Applicant. This breach of duty imposed by law is likely to cause the Applicant to incur loss.*

*(k) For the reasons mentioned above, the decision to annul the approval of award to the Applicant was illegal and the Applicant was lawfully entitled to be awarded the contract.”*

## **E. The Reply to Challenge**

By letter dated 20 March 2014, the Public Body made the following reply to the challenge:

*Your bid was found to be non-responsive by the Bid Evaluation Committee on the following grounds:*

### **(c) ITB 6.2 of Instruction to Bidder stipulates that:**

*“Bidder shall include the information and documents listed hereunder with their bids unless otherwise stated in the BDS.”*

*Among others, the following documents were requested under ITB 6.2(1)*

*Report on the financial standing of the Bidder for the last three years, such as certified copies of Financial Statements/Audited accounts as filed at the Registrar of Companies before the deadline set for submission of bids.*

*Your company has submitted audited accounts at Registrar of Companies for the year 2010, 2011 and 2012. It has been verified and confirmed from Registrar of Companies that your company has filed audited accounts for only years 2010 and 2011. However, no accounts for years 2012 and 2013 have been lodged as at March 2014. Moreover, the figures for 2011 Accounts as submitted to the Central Procurement Board do not tally with that filed at the Registrar of Company.*

### **(d) ITB 6.2 of Instruction to Bidders stipulates that:**

*“Bidders shall include the information and documents listed hereunder with their bids unless otherwise stated in the BDS”.*

### **ITB 6.2 (i)**

*“information regarding any litigation, current or during the last five years, in which the Bidder was/is involved, the parties concerned, the issues involved, the disputed amounts, and onwards”.*

*Your company has submitted in its bid a letter certifying that the company has not been involved in any current litigation. However, it has come to the knowledge of the Central Procurement Board that your company submitted a fake or forged bid security/guarantee in respect of a project “SME Park at La Valetta Bambous” for the State Land Development Company which resulted into termination of the contract awarded to you in 2012. Moreover, we are informed that the matter is being investigated into by the police.*

*In the light of the above information which has come to the knowledge of the Central Procurement Board, decision was taken to annul the approval of award made your company.”*

## **B. Grounds for Review**

The Applicant gave the following Grounds for Review:

1. *Failure to comply with the requirements of law as per section 40(4) of the Public Procurement Act 2006 because in the absence of any challenge by any other bidder within 7 days of the date of the notice (i.e. 26 February 2014), the contract should have been by operation of law awarded to the successful bidder i.e. Como Construction Ltd and in the circumstances considered to have been so awarded.*
2. *In the absence of any challenge, the withdrawal of the notification of award as per the letter dated 13 March 2014 bearing Ref NDU/OAB/05/13 is to all intent and purposes null and void, illegal and contrary to law.*
3. *No challenge, if any, by another bidder has been communicated to us.*
4. *The request for extension of bid validity period and bid security which was sent on 10 March 2014 was already outside the 7 days mentioned in ground 1 above.*
5. *In any event, the said bid validity period was extended as per the request despite the very short notice.*
6. *The said request mentioned a bid security which was not even applicable to this tender exercise.*
7. *Taking into consideration grounds 1 and 2 above, the notification of award sent to Tayelamay & Sons Enterprise Ltd was null and void, illegal and contrary to law.*
8. *Being null and void, illegal and contrary to law, the notification of award of contract for the project to Tayelamay & Sons Enterprise Ltd is*

*ultravires. Attention is drawn that Tayelamay & Sons Enterprise Ltd was the 3<sup>rd</sup> lowest bidder and its bid was also revised.*

9. *No reason whatsoever has been given in the letter dated 13 March 2014 to justify the decision to annul the approval of award made in favour of the Applicant.*
10. *The fact that un-particularised alleged “new elements” have come to the knowledge of the Board; and which prompted it to annul the approval of award to the Applicant is not a valid reason, is unfair and completely unreasonable, illegal and highly prejudicial to the Applicant. This breach of duty imposed by law is likely to cause the Applicant to incur loss.*
11. *In letter dated 20 March 2014 whereby the Ministry of Public Infrastructure, National Development Unit, Land Transport and Shipping replied to our challenge, we were informed that our bid was found to be non-responsive by the Bid Evaluation Committee on the following grounds:*
  - (A) *“your company has submitted audited accounts at registrar of Companies for the years 2010, 2011 and 2012. It has been verified and confirmed from the Registrar of Companies that your company has filed audited accounts for only years 2010 and 2011. However, no accounts for years 2012 and 2013 have been lodged (sic) as at March 2014. Moreover the figures for 2011 Accounts as submitted to the Central Procurement Board do not tally with that filed at the Registrar of Company”.*
  - (B) *“your company has submitted in its bid a letter certifying that the company has not been involved in any current litigation. However, it has come to the knowledge of the Central Procurement Board that your company submitted a fake or forged bid security/guarantee in respect of a project “SME Park at La Valetta Bambous” for the State Land Development Company which resulted into termination of the contract awarded to you in 2012. Moreover, we are informed that the matter is being investigated into by the police.”*
12. *In relation to paragraph 11(a) above, we state the following:*

*“Figures for 2011 Accounts as submitted to the Central Procurement Board do not tally since they were tampered by unknown person – A declaration was given at Pope Hennessy Police Station bearing OB no 1262/2014. The Applicant obtained the correct version from the Registrar of Companies (Annexed).”*



13. *In relation to paragraph 11(B) above, we state the following:*

*“There is a police enquiry in relation to a bid security/guarantee in respect of a project “SME Park at La Valetta Bambous” for the State Land Development company. We gave declarations to the police and have been collaborating with the authorities conducting the said enquiry. We are presumed to be innocent until and unless proved to be guilty by a Court of Law. Annexed are proceedings before the Procurement Policy Office and decision on hearing for Proposed suspension and debarment of Applicant dated 26.7.2013.”*

14. *Anyway the issues raised by the Ministry in Paragraph 11 are considered to be minor omissions as per directive No. 3 issued pursuant to section 7(b) of the Public Procurement Act.*

15. *For the reasons mentioned above, the decision to annul the approval of award to the Applicant was illegal and the Applicant was lawfully entitled to be awarded the contract.”*

#### **F. The Hearing**

Hearings were held on 07 May, 02 June and 16 June 2015. Written submissions were made by the parties on 15 June and 16 June 2015.

At the last hearing, Counsel for the Applicant informed the Panel that on one occasion, validity of bids had been extended after they had lapsed. Thereafter, both Counsel for the Applicant and the Respondent submitted legal arguments and Case Law to prove their respective points of view, namely that in certain circumstances, validity could be extended after its expiry provided that all parties were agreeable (Respondent), and in no circumstances was this permissible (Applicant). The fact of extension after expiry of validity was not contested.

#### **G. Findings**

This case has been running for a long time, the tender having been floated in October 2013. Conditions at the time of tender do not obtain at this time.

After first informing the Applicant of its intention to award the contract to him, the Public Body informed the latter that “*new elements*” having come to the knowledge of the Board, it now intended to make an award to Tayelamay & Sons Enterprise Ltd. In its reply to the challenge, the Public Body enlarged on this and informed the Applicant that “*Your company has submitted audited accounts at Registrar of Companies for the year 2010, 2011 and 2012. It has been verified and confirmed from Registrar of Companies that your company*

*has filed audited accounts for only years 2010 and 2011. However, no accounts for years 2012 and 2013 have been lodged as at March 2014. Moreover, the figures for 2011 Accounts as submitted to the Central Procurement Board do not tally with that filed at the Registrar of Company.” and that “Your company has submitted in its bid a letter certifying that the company has not been involved in any current litigation. However, it has come to the knowledge of the Central Procurement Board that your company submitted a fake or forged bid security/guarantee in respect of a project “SME Park at La Valetta Bambous” for the State Land Development Company which resulted into termination of the contract awarded to you in 2012. Moreover, we are informed that the matter is being investigated into by the police.”*

In fact, the Public Body had received a challenge from Tayelamay & Sons Enterprise Ltd to which was attached copy of a letter purportedly from the State Land Development Company alleging that Como Construction Ltd had forged a Bid Security and as a result was terminating the latter’s contract.

The challenge was not receivable, as it was submitted outside delay. However, it was incumbent on the Public Body and the CPB to investigate the allegations of misrepresentation and fraud made against the Applicant. There is no record of investigations with the Bank which had purportedly issued the bid security, but it is not contested that there is an on-going police investigation in this matter. There is also no record of any action (suspension, disbarment etc.) against the Applicant.

Investigations were made with the Registrar of Companies, and the CPB and the Public Body found discrepancies between financial records with the Registrar and those submitted as part of the requirements of this tender. The Applicant has explained that the records of the Registrar had been tampered with, and this was also being investigated by the police.

It is noted that investigations have not been completed, and that there is no conclusion in either matter.

Also, at no time before the annulment of the first letter of intent to award did the CPB or the Public Body seek explanations from the Applicant and give him the opportunity to defend himself.

In these circumstances, if it is deemed necessary to withdraw the offer made to the Applicant, it would have been more appropriate to cancel the bidding process and start anew, with a re-launch.

Moreover, it is not contested that on one occasion, validity of tenders was extended after it had lapsed. The chronology in respect of extensions of validity is as follows:

28 <sup>th</sup> October 2013	As per letter dated 28 <sup>th</sup> October 2013 by the CPB, the bid was valid up to the <b>4<sup>th</sup> March 2014</b> .  The closing date was 5 <sup>th</sup> December 2013.  [Annex A]
21 <sup>st</sup> November 2013	Before the closing date, CPB requested the extension of the bid validity period until the <b>10<sup>th</sup> March 2014</b> .  [Annex B]
10 <sup>th</sup> March 2014	Bidders were asked to extend the bid validity of their bids up to the <b>10<sup>th</sup> April 2014</b> .  All bidders extended the validity of the bids accordingly.  [Annex C]
<b>10<sup>th</sup> April 2014</b>	<b>Lapse of Bid Validity Period</b>
24 <sup>th</sup> April 2014	Bidders were asked to extend the bid validity period of their bids up to the <b>10<sup>th</sup> May 2014</b> .  Seven Bidders, including Como Construction Ltd, agreed to extend the bid validity up to the 10 <sup>th</sup> May 2014.

The bid validity period lapsed on 10<sup>th</sup> April 2014, and bidders were asked to extend validity on the 24<sup>th</sup> April. This incident occurred after the decision to award to the Successful Bidder, and therefore the evaluation was well and truly over at that time.

The Panel has gone through the very learned judgements submitted by both parties, and would like to propose a simplified approach. A tender is no longer valid after it has lapsed, and cannot therefore be brought back from the dead through an extension of validity. All offers may however be renewed even after expiry of validity, with the agreement of all participants. This would make all tenders still valid, but would mean that the Public Body has requested the Applicant to renew his offer, and therefore does not consider him unfit for continued participation in this tender.

**H. Decision**

The challenge having been made outside delay, the award should normally have been made to the then Successful Bidder. The advent of new elements casting doubts on the desirability of awarding to him, should not lead to an award to the next evaluated bidder. The many grey areas as to validity of tenders, allegations and investigations of fraud and misrepresentation against the Applicant, and the fact that the latter has not been found guilty of such impropriety, and is not subject to suspension or disbarment would point rather to the desirability of cancelling this tender exercise.

The Panel therefore orders the annulment of the decision to award to the Successful Bidder, and prohibits the Public Body from proceeding further with this tender exercise.

**(R. Laulloo)**  
***Chairperson***

**(Mrs C. Sohun)**  
***Member***

**(V. Mulloo)**  
***Member***

**Dated 31 August 2015**