

280

Decision No. 29/15

# INDEPENDENT REVIEW PANEL

In the matter of:

Sawon SNSR Co. Ltd

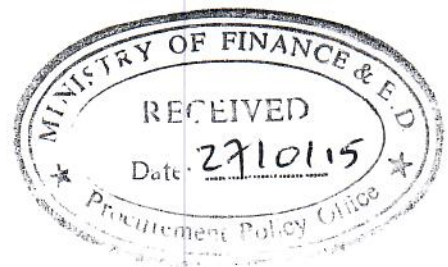
(Applicant)

v/s

Central Electricity Board

(Respondent)

(Cause No. 20/15/IRP)



Decision

*[Handwritten signatures]*

**A. History of the case**

The Central Electricity Board launched an Invitation to Participate in a Framework Agreement for Underground Networks Ref **OAB-TD-3717** on the 28<sup>th</sup> January 2015.

The following are the landmark dates relative to this tender:

Tender documents issued on:	28 January 2015
Tender closing date:	25 March 2015, extended to 22 April 2015
Opening Date:	22 April 2015
Validity of bids:	90 days
Pre-bid meeting:	12 February 2015 at CEB Curepipe

On the closing date, the following proposals were received:

1. Prakash Foolchand Contractor Ltd
2. Sakari Network Ltd
3. PAD & Co Ltd
4. ONIX Co Ltd
5. Trivan And Company Ltd
6. Nine Thousand Nine Hundred & Ninety Nine Co Ltd
7. Sawon S.N.S.R. Co Ltd
8. Black Line Co Ltd
9. Emmanuel & Appavou Cie Ltee
10. Akaram Contracting Co Ltd
11. Gokhool Engineering & Constructions Co Ltd
12. Vishnudutt Foollee Building & Civil Contractor
13. Societe S. Sawon et Fils et Cie
14. PKB Contracting Services Ltd

## B. Evaluation

The evaluation committee was comprised of:

The Bid Evaluation Committee was set up by the General Manager on 7 May 2015 and the members of this committee are as follows:

Chairman	M.S. Khodabocus	Senior Engineer ( T& P)
Member	I. Essackjee	Senior Engineer (P & C)
Member	A. Kurrumbacus	Accountant

The committee submitted its report on 3<sup>rd</sup> June 2015. In respect of the Applicant and others, the committee found that

*Note 1: Bidder No 7 - Sawon S.N.S.R. Co Ltd, Bidder no 10 - Akaram Contracting Co Ltd and Bidder No 13- Societe S. Sawon et Fils et Cie have specified a validity date of 22 April 2015 in the letter of proposal instead of 21 July 2015. These bids have thus been rejected.*

*Note 2: Bidder No 8 - Black Line Co Ltd has specified a validity date of 25 March 2015 in the letter of proposal instead of 21 July 2015. Its bid has thus been rejected.*

The Bid Evaluation Committee concluded that:

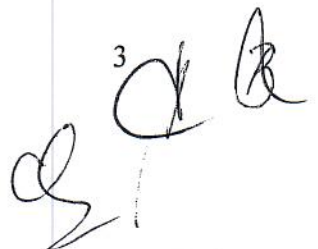
*The Contractors whose proposals have shown substantial responsiveness to the framework agreement documents are as follows:*

1. PAD & Co Ltd
2. Gokhool Engineering & Constructions Co Ltd
3. Vishnudutt Foollee Building & Civil Contractor
4. PKB Contracting Services Ltd

## C. Notification of award

The Central Electricity Board through a letter dated 17 July 2015, informed the Applicant of the particulars of the successful bidders as follows:

- (1) PAD & Co Ltd
- (2) Gokhool Engineering & Construction Co. Ltd
- (3) Vishnudutt Foollee Building & Civil Contractor

3  


(4) PKB Contracting Services Ltd

#### **D. The Challenge**

On 21 July 2015, the Applicant challenged the award on the following grounds:

*"We confirm that our offer was fully responsive in all respect as well as our experience and performance.*

*Page 38 Letter of Proposal states as follows:*

*Our proposal shall be valid for a period of ninety (90) days from the date fixed for the bid submission deadline i.e up to ..... in accordance with the Framework Agreement Documents, and it shall remain binding upon us and may be accepted at any time before the expiration of that period.*

*At time of submission when filling the blank space of page 38 para (d) instead of inserting 22 July 2015 we have inserted 22 April 2015. We point out that this error is considered as an immaterial error.*

*Reason: Because we agreed "our proposal shall be valid for a period of ninety (90) days from the date fixed for bid submission deadline".*

*We also confirm that we meet all criterias (sic) as per page 24 Clause 30 in all respect.*

*We also confirm that we meet all criterias (sic) as per page 63 "Financial Resources".*

*We also confirm that we meet all criterias (sic) as per section 11 "Evaluation and Qualification criterias (sic)".*

*However we wish to put on record that among the list of bidders retained for award, bidders 3 and 4 have never performed works as per clause 2.3.3 and are therefore not eligible to be retained for award.*

*In addition we confirm that we are the only experienced local contractor so far performing underground networks for 66 KV.*

*In the light of the above we shall appreciate if our offer be retained for award."*

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

-On 28 July 2015, the Public Body made the following reply to the challenge:

Independent Review Panel – Decision No. 29/15

*"We wish to inform you that the evaluation of bids received has been carried out in line with the evaluation criteria and methodology specified in the bidding document.*

*Your offer has not been retained as the validity of your offer is up to 22 April 2015 which is shorter than the validity period of ninety (90) days required in the bidding documents."*

**F. Grounds for Review**

On 31 July 2015, the Applicant seized the Independent Review Panel for review on the following grounds:

*"We confirm that our offer was fully responsive in all respect as well as our experience and performance.*

*Page 38 Letter of Proposal states as follows:*

*Our proposal shall be valid for a period of ninety (90) days from the date fixed for the bid submission deadline i.e up to ..... in accordance with the Framework Agreement Documents, and it shall remain binding upon us and may be accepted at any time before the expiration of that period.*

*At time of submission when filling the blank space of page 38 para (d) instead of inserting 22 July 2015 we have inserted 22 April 2015. We point out that this error is considered as an immaterial error.*

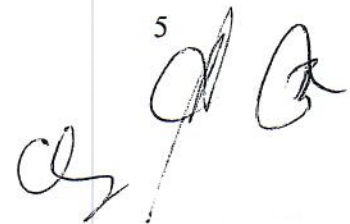
*Reason: Because we agreed "our proposal shall be valid for a period of ninety (90) days from the date fixed for bid submission deadline".*

*We also confirm that we meet all criterias (sic) as per page 24 Clause 30 in all respect.*

*We also confirm that we meet all criterias (sic) as per page 63 "Financial Resources".*

*We also confirm that we meet all criterias (sic) as per section 11 "Evaluation and Qualification criterias (sic)".*

*However we wish to put on record that among the list of bidders retained for award, bidders 3 and 4 have never performed works as per clause 2.3.3 and are therefore not eligible to be retained for award.*

5  


**Independent Review Panel – Decision No. 29/15**

*In addition we confirm that we are the only experienced local contractor so far performing underground networks for 66 KV.*

*In the light of the above we shall appreciate if our offer be retained for award."*

**G. The Hearings**

Hearings were held on 25 August and 10 September 2015. Written submissions were made on 09 September and 15 September 2015, by Applicant and Respondent respectively.

The Applicant was represented by Mr Y. Bhadain, of Counsel, instructed by Mr Preetam Chuttoo, Attorney-at-Law. The Respondent was represented by Ms S. A. Carrim, of Counsel.

The Applicant's contention is that it made a mistake in its proposal letter (equivalent to a bid form) in writing down the date up to which his bid will be valid, and that this mistake is immaterial, and that the Public Body should have sought clarifications to give him an opportunity to correct this mistake. He has argued furthermore that at the request of the Public Body, he has extended his validity up to 31<sup>st</sup> August 2015, and that therefore this would make his tender valid up to that date, and any previously stated date as to validity would as a result be irrelevant.

Lastly, in the same proposal letter, the validity period stated by the Applicant is 90 days, and the latter avers that the requirement to state a specific date leads to redundancy, and that in such case, the period 90 days should take precedence over any stated date.

The Respondent has contested each of the averments of the Applicant. The merits of the averments of both are discussed below.

## H. Findings

It is necessary for the sake of clarity to explain how this exercise differs from the more current construction contracts involving priced Bills of Quantities. In the section I "Instructions to Contractors", the bidding document states at section 1.9

*The framework agreement shall be a "closed framework agreement without "second-stage competition" meaning a framework agreement where the terms and conditions of the procurement are set out at the time the agreement is entered into.*

That means that contractors are chosen according to their submitted technical and financial capacity, without any financial or other competition between bidders, either before, or after the Framework Agreement proposals. By submitting a proposal, contractors are deemed to signify acceptance of pre-determined rates and conditions, such that all retained contractors will thereafter be allotted works on the same rates and conditions.

There is also no upper limit stated by the Public Body on the number of contractors that should be retained as a result of this exercise, although a minimum of 3 was targeted.

This short introduction allows disposal of one of the issues raised by the Applicant. The latter has averred that some of the retained contractors, whom he has mentioned by name, are not qualified to perform the relevant works. There is no competition between bidders, and one contractor's qualification does not, in any way, impact on the disqualification of another. Unlike construction tenders of the common or garden variety, this exercise does not follow the "Highlander" rule, whereby, in the end, there shall be only one.

The Panel has not therefore investigated into this allegation, as it has no bearing on this case.

Another averment of the Applicant implies a mistake in dates made by the Respondent to justify the former's mistake in dates in his letter of proposal.

*The Respondent's letter dated 17 July 2015 refers to the Applicant's bid submission date as being 14 March 2015 when the date should in fact have been 22 April 2015.*

3. Should the bid submission date inserted in the Respondent's letter dated 17 July 2015, bearing Ref SCQ/CMO/ TD 3717/Noti/Sawon SNSR Co Ltd, be read as 14

Handwritten signatures and initials, including a large signature on the left, a smaller signature in the middle, and the letters '7' and 'a' on the right.

**Independent Review Panel – Decision No. 29/15**

*March 2015, then the award should, as per the Respondent's own interpretation, be revoked by the Independent Review Panel. An error as to the insertion of a date cannot be material when the Applicant makes a mistake and immaterial when it is the Respondent which makes such a mistake.*

*4. It is therefore submitted that there should be no double standard of justice or else the Respondent would be seen as acting wrongly and the decision of the CEB should be quashed on this ground.*

The Respondent has explained that the date to which reference is made is the date that appears in the letter of proposal submitted with and as part of the bid and not the closing date of the tender when the bid was actually submitted. The administrative procedure as explained by the Respondent is correct. Only, the date which appears in the letter of proposal is the 14<sup>th</sup> April, and not the 14<sup>th</sup> March.

The Respondent did therefore make a mistake in dates, but any mistake made by the Respondent after the closing date, and which could not therefore have affected the Applicant's bid, cannot be used to justify a mistake in the latter.

More to the point, however, is the Respondent's lack of consistency in the interpretation of the period of 90 days from the closing date. In its report, the Bid Evaluation Committee sets the end of this period as the 20<sup>th</sup> and 21<sup>st</sup> of July at two different places.

**2. Bidding exercise dates**

<i>Tender documents issued on:</i>	<i>28 January 2015</i>
<i>Tender closing date:</i>	<i>25 March 2015, extended to 22 April 2015</i>
<i>Opening Date:</i>	<i>22 April 2015</i>
<i>Validity of bids:</i>	<i>90 days, that is, up to <b>20 July 2015</b></i>
<i>Pre-bid meeting:</i>	<i>12 February 2015 at CEB Curepipe</i>

**Note 1:** Bidder No 7 - Sawon S.N.5.R. Co Ltd, Bidder no 10 - Akaram Contracting Co Ltd and Bidder No13- Societe S. Sawon et Fils et Cie have specified a validity date of 22 April 2015 in the letter of proposal instead of **21 July 2015**. These bids have thus been rejected.



Independent Review Panel – Decision No. 29/15

**Note 2:** Bidder No 8 - Black Line Co Ltd has specified a validity date of 25 March 2015 in the letter of proposal instead of **21 July 2015**. Its bid has thus been rejected.

This inconsistency would have been fatal to the Respondent's case had the date inserted in his letter of proposal by the Applicant been just a few days short of the deadline. As it is, the question arises as to whether the Respondent can disqualify the Applicant for a mistake on a date on which the Respondent is not himself clear. This is discussed below.

Interestingly, three bidders, two of whom bear similar names, have inserted the same erroneous date of 22<sup>nd</sup> April 2015 as the end of the validity period. The Panel cannot help but wonder whether this would bear further investigation by relevant Authorities.

Furthermore, the Panel views with great concern the following issue raised by the Applicant:

In his submission dated 17<sup>th</sup> August 2015, the Applicant explained the mistake in dates as follows:

*In reply to paragraph 3 of RC, Applicant avers that although the date 22/4/2015 was erroneously inserted in its letter bearing Procurement Reference No. OAB-TD-3717, the period of ninety days clearly appeared in its letter. Applicant therefore maintains that the error of **4 instead of 7** is immaterial. Applicant avers that where there is an inconsistency in a numerical and words, it is the words which should take the precedence. The Respondent ought to have acted responsibly in the circumstances by making an attempt to clarify the issue from the Applicant instead of making an abuse by setting aside Applicant's bid straightaway.*

The closing date for submission of proposals was 22 April 2015. It is therefore obvious that 22 April 2015 was wrong and any reasonable person would have rightly come to the conclusion, upon a simple mathematical calculation, that the date for the bid submission deadline could only be 22 July 2015. The insertion of the figure '**4**' instead of the figure '**7**' was immaterial and this can only be understood to be a mere clerical error. The Respondent has therefore taken an irrelevant factor into consideration in rejecting the Applicant's bid. At any rate, the sanction for such a clerical mistake is disproportionate and is not one which any reasonable body or person would have inflicted upon the Applicant in the circumstances. Furthermore, it would be in defiance of any logic for the Respondent to even contemplate that the contract amount was valid for only one day.

9  


Again, in his submission of 9<sup>th</sup> September 2015, the Applicant repeated the same explanation:

*The insertion of the figure '4' instead of the figure '7' was immaterial and this can only be understood to be a mere clerical error.*

An extract from the letter of proposal of the Applicant is reproduced below:

(d) Our proposal shall be valid for a period of ninety (90) days from the date fixed for the bid submission deadline i.e up to ....22 April 2015 in accordance with the Framework Agreement Documents, and it shall remain binding upon us and may be accepted at any time before the expiration of that period;

It can be clearly seen that the word "April" was written in words. Therefore, the whole repeated argument of the Applicant that the mistake arose by merely and only inserting a figure "4" instead of the figure "7" is, to say the least, erroneous, and therefore does not stand. The Panel reiterates its concern, and draws the attention of Counsel and Attorney for the Applicant thereto.

That the date of 22 April inserted by the Applicant in the letter of proposal is a mistake is not contested. Whether it was a clerical mistake, or arose because of a misunderstanding of what constitutes a validity period, is open to debate, but not material in the ensuing discussion. Whether the Applicant should have been given the opportunity to correct that mistake through clarification or otherwise is quite another matter.

The letter of proposal of the Applicant mentioned a validity period of 90 days up to the contradictory date of 22<sup>nd</sup> April. The period of 90 days was proposed by the Public Body and already inserted by the latter in the form of the letter of proposal. The fact that it was not struck out by the Applicant represents a passive acceptance of this period of validity of 90 days by the latter. However, the insertion of the date, in hand, represents an active commitment to keep the bid valid up to that date. There was no other document, such as a bid security, where the Applicant committed himself to maintain the validity of his proposal. It is the considered opinion of the Panel that the handwritten active commitment takes precedence over the passive acceptance of the period of 90 days.

If this is the case, then at the time of evaluation, the bid was not valid, and could not have been revived through the correction of a date, whether as a result of a clarification requested by the Public Body or through an unsolicited letter by the Applicant.

Furthermore, to address an issue raised by the Applicant, there was no obligation on the part of the Respondent to give such an opportunity to the Applicant to correct his mistakes. As the Respondent has averred, four tenderers were eliminated because of similar mistakes in dates.

There is, however, an important issue raised by the Applicant. At the request of the Public Body, by letter dated 14<sup>th</sup> July 2015, the Applicant has granted an extension to the validity of his bid up to 31<sup>st</sup> August 2015. He therefore argues that this new validity date overrides any other previously given commitment as to validity, whether erroneous or not.

The Respondent has countered this argument by saying that the Public Body was required to request extension of the validity period from all tenderers, because no determination had as yet been made. Moreover, the Respondent argued that, in effect, the validity of any offer which has already expired cannot be extended.

In a previous Decision, the Panel agreed with this view, stating that an offer cannot be brought back from the dead by the simple act of an extension of the validity period after its expiry. To be revived, the offer would have to be made anew, which would mean a new offer from one or more tenderers after the closing date of the tender, or altogether a new tender.

To address other issues raised by the Applicant, the Public Procurement Act provides that a Public Body shall reply within seven days of a challenge, but also for steps to be taken by an Applicant in case of an absence of a reply from the Public Body. It is therefore irrelevant to this case, whether the reply to the challenge was made within seven days or not. Also, it is not up to the Public Body to infer any information not explicitly stated in any bid. As stated above, the bid from the Applicant was already expired at the time of bid evaluation, and the Public Body cannot be said to have acted unreasonably in rejecting the Applicant's bid.

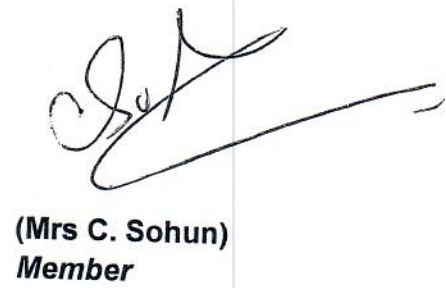
#### **I. Decision**

For the above reasons, the Panel finds that there is no merit in this application.

**Independent Review Panel – Decision No. 29/15**



**(R. Laulloo)  
Chairperson**



**(Mrs C. Sohun)  
Member**



**RR Ragnuth  
Member**



**Dated 26<sup>th</sup> October 2015**