

**INDEPENDENT REVIEW PANEL**

**In the matter of:**

**I. M. Bawamia Co. Ltd**

**(Applicant)**

**v/s**

**Central Water Authority**

**(Respondent)**

**(Cause No. 28/15/IRP)**

**Decision**

**A. History of the case**

TITLE OF PROJECT

The title of the project is “CONTRACT OAB CWA/C2014/87 – PROCUREMENT OF 100,000 No COLD POTABLE WATER METERS (Diameter 15 mm)”.

PROJECT DESCRIPTION

The Contract consists of the supply of 100,000 no cold potable water meters of 15 mm diameter for re-metering.

ADVERTISEMENT AND CLOSING DATE

Advertisement for invitation to bid was through Open Advertised Bidding (OAB) in local newspapers. The closing date was 09 April 2015 at 13.00 hrs at latest and bids were to be deposited in the Bid Box at CWA Headquarters –St Paul.

LIST OF ADDENDA

Four addenda were issued during the tender period:

- Addendum No 1 - dated 13 February 2015 concerns queries raised by Prospective Bidders on Qualification and Technical requirements.
- Addendum No 2 - dated 02 March 2015 concerns queries raised by Prospective Bidders in respect of Schedule of Requirements.
- Addendum No 3 - dated 26 March 2015 concerns queries raised by Prospective Bidders on Qualification and Technical requirements in the Bid Documents.
- Addendum No 4 - dated 03 April 2015 concerns queries raised by Prospective Bidders on payment terms and fluctuation in Rate of Exchange.

Bids were opened on 09 April 2015 at 13.05 hrs at the CWA Head Quarters - St Paul. The list of Bidders and the “Read Out Bid Prices” is summarised in the Table below:

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<b>SN</b>	<b>Bidders</b>	<b>Bid Opening Price MUR (incl. VAT)</b>	<b>Bid Submission Form</b>	<b>Sample Submitted</b>
1	JV Enviro/Squaredeal – C2014/87	109,245,400.00	Signed & Submitted	Yes
2	Ningbo Jiangbei Water Meter Factory & Emmanuel Trading Services	USD 1,600,000.00	Signed & Submitted	Yes
3	Amato Ltd – Option 1	218,500,000.00		Yes
	Amato Ltd – Option 2	74,750,000.00	Signed & Submitted	Yes
	Amato Ltd – Option 3	56,350,000.00		Yes
4	Blychem Ltd	96,738,000.00	Signed & Submitted	Yes
5	Yutu Interior Design Ltd	58,995,000.00	Signed & Submitted	Yes
6	Aqualia DPI Ltd	64,330,000.00	Signed & Submitted	Yes
7	I.M. Bawamia Co. Ltd	90,390,000.00	Signed & Submitted	Yes
8	Aquaflo Ltd – Offer 1	92,425,500.00		Yes
	Aquaflo Ltd – Offer 2	119,600,000.00	Signed & Submitted	Yes
	Aquaflo Ltd – Offer 3	137,425,000.00		Yes
9	Jiangxi Sachuan Water Meter Ltd	USD 1,637,000.00	Signed & Submitted	Yes
10	Emcar Ltd	59,800,000.00	Signed & Submitted	Yes
11	Metex Trading Co Ltd	65,780,000.00	Signed & Submitted	Yes

**B. Evaluation**

The Bid Evaluation Committee was constituted as follows:

<b>Mr D Lutchmun</b>	<i>Principal Engineer (P&amp;D) – Chairperson</i>
<b>Mrs S Nundloll</b>	<i>Deputy Manager CS – Member</i>
<b>Mrs R Tengur-Jeewood</b>	<i>Accountant – Member</i>
<b>Mr R Ramdhonee</b>	<i>Technical Officer - Member</i>

In its report dated June 2015, the Bid Evaluation Committee found that:

*Bidder 7 – I.M Bawamia Co. Ltd has proposed to supply meter of make Baylan, model VK6 of Turkey and has complied with all the requirements of the Bid Documents and is the lowest responsive Bidder. The BEC concluded that the Bidder is to be retained for the award of “CONTRACT OAB CWA/C2014/87 – PROCUREMENT OF 100,000 No COLD POTABLE WATER METERS (Diameter 15 mm)” in the amount of Rupees Ninety Million Three Hundred and Ninety Thousand (Rs 90,390,000.00) inclusive of 15% VAT, which is lower than the cost estimate of Rs 103.5 M by about 15%*

The Bid Evaluation Report ended with this recommendation:

RECOMMENDATION

*The Procurement Committee is requested to approve the Bid Evaluation Report and to recommend to the Finance Committee the award of “CONTRACT OAB CWA/C2014/87 – PROCUREMENT OF 100,000 No COLD POTABLE WATER METERS (Diameter 15 mm)” to the lowest evaluated and substantially responsive bid from BIDDER 7 - I.M Bawamia co Ltd in the Bid Price of RUPEES NINETY MILLION THREE HUNDRED AND NINETY THOUSAND ONLY (Rs 90,390,000.00), inclusive of 15% VAT.*

*The proposed meter is of make Baylan, model VK6 of Turkey.*

**C. Notification of Cancellation**

The Central Water Authority through a letter dated 29 October 2015, informed the Applicant that the procurement proceedings have been cancelled.

**D. The Challenge**

On 03 November 2015, the Applicant challenged the award on the following grounds:

*“I. We feel aggrieved by the decision of the Public Body to cancel the proceedings inasmuch as we have fully complied with all*

*specifications and conditions of contract, both on the technical and commercial requirements of the bidding exercise.*

- II. *Clause 39(4) Public Procurement Act is not a ground for this cancellation as per PPO Act 2006.*
- III. *By relying on a reference to clause 36(b) of the Public Procurement Regulations 2008 without more the Public Body has acted in an arbitrary manner to decide upon the cancellation of the procurement proceedings. This course of action is, to say the least, puzzling inasmuch as it does not seem to make sense why the Public Body now intends to modify the technical specifications or the critical aspects of the contract. These same specifications have been used over the past few years for the procurement of more than 40000 units of same water meters as the ones we are offering for the present bidding exercise. It is to be emphasized that as at that date, these Water meters are still performing to the required standard without any significant complaint neither from the Public Body technical department nor the public at large.*
- IV. *Furthermore, we have reasons to believe that in fact, public interest would be better served by completing the procurement process inasmuch as the procurement of Cold Potable Water Meters for residential use represents an ever-increasing urgency in a sensitive sector where delay in the implementation of the project amounts to an unnecessary waste of time and money, in addition to the social cost that such delay may entail. This would be in line with the duty imposed upon a Public Body which is not to eliminate a substantially responsive bidder, but to ensure, by all legal means, within the powers conferred upon it under the act, which the procurement exercise is brought to its logical conclusion as soon as possible.”*

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

On 12 November 2015, the Public Body made the following reply to the challenge:

- “1. *At the outset, your bid is not responsive, and you have no locus standi to come and challenge the cancellation.*

2. *Regulation Section 36 of the Public Procurement Regulations 2008 specifically empowers cancellation of bids.*
3. *For the first time, the Central Water Authority has requested that a second certificate be submitted by an independent accredited laboratory of another country. Whereas this new requirements has been introduced, the time given to submit the tenders has not been extended in this tender. The result of this is that several bidders have not been able to submit that second certificate within the requested time limit, on account of the short time given to provide that second certificate. There is therefore full justification, in the public interest, to cancel the bidding proceedings.*
4. *The CWA considers that if an extended time is given, more items of cost to the public body will be able to be considered at the bidding process.*
5. *The CWA considers that it would be in the public interest to insert a clause in the bidding documents for the splitting of the contracts.*
6. *The Central Water Authority considers that it is necessary, in the public interest, for the reasons explained above, to modify the specifications and some critical aspects of the conditions of the contract.*
7. *All the reasons put forward by you to challenge the cancellation are unfounded and invalid.*
8. *The Central Water Authority states, inter alia,*
  - (a) *As stated above, your tender does not comply with the tender conditions, and Regulations 36 of the Public Procurement Regulations 2008 specifically provide for cancellation;*
  - (b) *It is not for you to come and state what are the necessary standards or the necessary contractual conditions. The CWA is free to decide what it wants;*
  - (c) *If there are latest standards applicable, the CWA is fully justified and legitimated to ask the latest standards. Previous contracts are irrelevant to the matter at issue;*

- (d) *The CWA notes your apparent willingness to let the public interest take precedence on your own private interest. In that respect, the CWA considers that, in that same spirit, you should allow the cancellation and resubmit fresh bids when the new tenders shall be issued;*
- (e) *The public interest in this case clearly warrants the cancellation of the bids and issue of fresh bids with amended terms and conditions.*

**F. Grounds for Review**

On 10 November 2015, the Applicant seized the Independent Review Panel for review on the following grounds:

- “1. We feel aggrieved by the decision of the Public Body to cancel the proceedings inasmuch as we have fully complied with all specifications and conditions of contract, both on the technical and commercial requirements of the bidding exercise.*
- 2. Clause 39(4) Public Procurement Act is not a ground for this cancellation as per PPO Act 2006.*
- 3. By relying on a reference to clause 36(b) of the Public Procurement regulations 2008 without more, the Public Body has acted in an arbitrary manner to decide upon the cancellation of the procurement proceedings. This course of action is, to say the least, puzzling inasmuch as it does not seem to make sense why the Public Body now intends to modify the technical specifications or the critical aspects of the contract. These same specifications have been used over the past few years for the procurement of more than 40000 units of same water meters as the ones we are offering for the present bidding exercise. It is to be emphasized that as at that date, these Water meters are still performing to the required standard without any significant complaint neither from the Public Body technical department not the public at large.*
- 4. Furthermore, we have reasons to believe that in fact, public interest would be better served by completing the procurement process inasmuch as the procurement of Cold Potable Water Meters for residential use represents an ever-increasing urgency in a sensitive sector where delay in the implementation of the project amounts to an*

*unnecessary waste of time and money, in addition to the social cost that such delay may entail. This would be in line with the duty imposed upon a Public Body which is not to eliminate a substantially responsive bidder, but to ensure, by all legal means, within the powers conferred upon it under the Act, which the procurement exercise is brought to its logical conclusion as early as possible.”*

### **G. The Hearing**

Hearings were held on 17 November and 03 December 2015. Written submissions were made on 30 November and 11 December 2015 by Applicant and 15 December 2015 by Respondent respectively.

The Applicant was represented by Mr N. Bheekhun, Counsel whereas the Respondent was represented by Mr R. Pursem, Senior Counsel together with Mrs A. Ramphul, Counsel and Mr A. Robert, Attorney.

The points raised *in limine litis* by the Public Body were dropped during the last hearing.

#### *In Limine Litis*

*1. The CWA avers that the Review is defective} in as much as it does not comply with the formalities prescribed by law} and more precisely those prescribed by section 45 (2) of the Public Procurement Act. In that connection, the CWA avers that no witness statement have been filed by the Applicant.*

*2. The CWA therefore prays that the present application be dismissed.*

### **H. Findings**

At the outset, it would seem that the Public Body is seeking at all costs to justify *à posteriori* a decision to cancel the proceedings that has already been taken. Nevertheless, it is incumbent upon the Panel to rule on all issues raised by the different parties.

It also befalls the Panel to point out that its jurisdiction has not been questioned. The Panel has always maintained that cancellation of a bidding exercise, as one of the possible outcomes of the exercise may be subject to Review. Section 43 (1) of the Public Procurement Act reads as follows: *(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. In the Panel's opinion, the words "before the entry into force of the procurement contract" cannot mean that without an entry into force of the procurement contract the Challenge would not be valid. The Public Body has rightly considered the Challenge to be valid and replied to it within the prescribed time. Furthermore, Section 45 (1) (a) and (b) state:

*(1) An unsatisfied bidder shall be entitled to ask the Review Panel to review the procurement proceedings where -*

*(a) the Chief Executive Officer of the public body does not issue a decision within the time specified in section 43(4);*

*(b) he is not satisfied with the decision; or*

It is therefore established that the Application for Review was in order and properly receivable by the Panel. Whether the Panel can reverse a decision of the Public Body taken under Regulation 36(b) of the Public Procurement Act is a different matter, and is discussed below.

As regard the merits of the case, the principles of fairness and equity which the Panel considers its duty to uphold, though absent from the submissions of the Public Body, are best served by considering in detail each issue raised by the litigants.

*Ground 1 of the Application for Review.*

*1. We feel aggrieved by the decision of the Public Body to cancel the proceedings inasmuch as we have fully complied with all specifications and conditions of contract, both on the technical and commercial requirements of the bidding exercise.*

*CWA's Reply to Ground 1*

*The CWA denies Ground 1. In that respect, the CWA states that the Applicant has no locus standi to come and apply for a review.*

In its reply to the Challenge, the Public Body also stated:

1. *At the outset, your bid is not responsive, and you have no locus standi to come and challenge the cancellation.*

It is recalled that the Bid Evaluation Committee found the Applicant fully responsive and recommended an award to him. There is nothing on record to show what analysis, if any, was undertaken for CWA to reverse the findings of the Bid Evaluation Committee. The Applicant had no way of knowing the results of the evaluation at the time of Challenge, but was very much aware that the nature of his tender was such that it could not be found unresponsive. In later submissions, the CWA no longer insisted on this aspect, yet it is on record that it sought to mislead the Applicant in its reply to the latter's challenge, which reply, being found unsatisfactory, eventually led to this Application for Review.

As to the absence of locus standi of the Applicant, once it is agreed that a cancellation may be subject to an Application for Review, the Applicant as an aggrieved bidder who is deprived of a contract by the Public Body's decision has an undeniable right to challenge that decision, and if unsatisfied with the reply thereto, eventually to an Application for Review.

*Ground 2 of the Application for Review.*

*Clause 39(4) Public Procurement Act is not a ground for this cancellation as per PPO Act 2006.*

*CWA's Reply to Ground 2*

*This ground is also denied. The Law and the Regulations specifically provide for the possibility to cancel bids. Reference can, for example, be made to Regulation 36.*

Section 39 of the Public Procurement Act does make provision for cancellation of a bidding exercise in specific circumstances:

*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.*

None of the conditions in s39(1)(a) to (d) is applicable to the circumstances of the present exercise under review. The Applicant is therefore right in his averment that s39 of the Public Procurement Act does not provide valid grounds for cancellation of this bidding exercise. However, the actual Notice of Cancellation mentions both s39 of the Public Procurement Act and Regulation 36: *Pursuant, to Clause 39(4) of the Public Procurement Act and Clause 36(b) of the Public Procurement Regulations....* . The CWA has therefore invoked s36 of the Regulations under the Public Procurement Act to justify the cancellation. However, the cancellation under Regulation 36 can only be made under specific circumstances, which are discussed below.

### *Ground 3 of the Application for Review.*

*By relying on a reference to clause 36(b) of the Public Procurement regulations 2008 without more, the Public Body has acted in an arbitrary manner to decide upon the cancellation of the procurement proceedings. This course of action is, to say the least, puzzling inasmuch as it does not seem to make sense why the Public Body now intends to modify the technical specifications or the critical aspects of the contract. These same specifications have been used over the past few years for the procurement of more than 40000 units of same water meters as the ones we are offering for the present bidding exercise. It is to be emphasized that as at that date, these Water meters are still performing to the required standard without any significant complaint neither from the Public Body technical department nor the public at large.*

### *CWA's Reply to Ground 3*

*This ground is denied. Reference to the words "arbitrary" and "puzzling" are specifically denied. The CWA is fully entitled to modify criteria if it so wishes.*

*The CWA considers that Regulation 36 (b) fully find their application in the circumstances of the present case, in the public interest.*

*Mere reference to the past is inapplicable: standards change, systems change, needs change, and the CWA is more than fully justified in adapting itself to the changes. It is not for the Applicant to come and impose its own standards or its own rules on the CWA, and to prevent the CWA from making use of a procedure contemplated and provided by law.*

*The CWA considers that apart from the above changes, other changes are also necessary to the bidding document. In that respect, the CWA avers that the following changes will be made:*

*(a) provision will be made for a split award;*

*(b) the quantities to be procured will be revised downwards;*

*(c) the condition for the bidder to submit a second certificate from an accredited laboratory in another country will be reviewed;*

*(d) the requirements of the bid document pertaining to the financial capability of the bidders will be revisited;*

*(e) the standard to be applied will also be slightly changed;*

*(f) other changes may also be necessary, and same are being examined at the level of the CWA.*

*The CWA further draws attention to paragraph 40.1. at section 1 - Instruction to Bidders, which provides that "The Purchaser reserves the right to accept or reject any bid, and to annul the bidding process and reject all bids at any time prior to contract award, without thereby incurring any liability to bidders". The Applicant was fully aware of the said section and accepted it because it submitted its bid on the basis of the bidding documents.*

The Panel shall not comment on the choice of adjectives by the Applicant to describe CWA's actions, nor decide on whether they were justified. However, the Panel also finds surprising, to say the least, the assertion of the Public Body that *is fully entitled to modify criteria if it so wishes*. Surely, even at the CWA there must be some awareness at management level that it is a Public Body, and therefore accountable for its actions,

and that decisions taken in respect of procurement must comply with the provisions of the Public Procurement Act and its Regulations.

There has been an evaluation, and a recommendation for award which has never been questioned, nor the evaluation report sent back for review or modification, and suddenly, when the Successful Bidder is known, then it becomes important and urgent to modify the criteria. Inevitably, the question arises as to why from the time of drafting the tender documents until the evaluation report was finalised, no modification of certain aspects of the tender appeared necessary.

As to the “changes” that CWA says have become suddenly necessary after the Successful Bidder became known, there is no explanation as to why they became necessary. Even the Panel is left in the dark as to how a split contract is more advantageous, and why reduced quantities could not be negotiated with the Successful Bidder. A notable exception to the above is the proposed change of standard, which is discussed further below.

As regards the need for a second certificate, this was not the first time apparently that the CWA has specified this, and if it was found cumbersome in previous exercises, it should not have been included in this one. If not, then why should the need for a second certificate be eliminated? From the Bid Evaluation Report, at least three tenderers had provided a satisfactory second certificate.

The CWA also asserts that it will effect changes as follows:

*(d) the requirements of the bid document pertaining to the financial capability of the bidders will be revisited;*

*(f) other changes may also be necessary, and same are being examined at the level of the CWA.*

The Panel can only point out the vagueness of the proposed changes, which again begs clarification as to their necessity.

As to the provision in the Bidding Documents that “*The Purchaser reserves the right to accept or reject any bid, and to annul the bidding process and reject all bids at any time prior to contract award, without thereby incurring any liability to bidders*”, the Panel reiterates its remark that such power can only be exercised within the limits of the Law.

Ground 4 of the Application for Review.

*Furthermore, we have reasons to believe that in fact, public interest would be better served by completing the procurement process inasmuch as the procurement of Cold Potable Water Meters for residential use represents an ever-increasing urgency in a sensitive sector where delay in the implementation of the project amounts to an unnecessary waste of time and money, in addition to the social cost that such delay may entail. This would be in line with the duty imposed upon a Public Body which is not to eliminate a substantially responsive bidder, but to ensure, by all legal means, within the powers conferred upon it under the Act, which the procurement exercise is brought to its logical conclusion as early as possible.”*

CWA’s Reply to Ground 4

*This ground is also denied by the CWA.*

*For the first time, the CWA has requested that a second certificate be submitted by an independent accredited laboratory of another country. Whereas this new requirement has been introduced, the time given to submit tenders has not been extended in this tender. The result of this is that several bidders have not been able to submit that second certificate within the requested time-limit, on account of the short time given to provide that second certificate. There is therefore full justification, in the public interest, to cancel the bidding proceedings.*

*The CWA considers that if an extended time is given, more items of cost to the public body will be able to be considered at the bidding process. The slight loss of time and alleged social cost will be amply compensated by the other advantages to be gained by the cancellation of the tender. And the expenses are same are very limited, the more so that tenders are now done by e-procurement, at a very low cost.*

*The CWA notes the apparent willingness of the Applicant to let the public interest take precedence over its own private interests. In that respect, the CWA considers that, in that same spirit, the Applicant should allow the cancellation and resubmission of fresh bids when the new tenders shall be issued.*

*It is furthermore not for the Applicant to dictate to the CWA, a public body, what the Applicant considers as public interest.*

The CWA avers that *for the first time, the CWA has requested that a second certificate be submitted by an independent accredited laboratory of another country.* This apparently is not true. The Applicant has produced documentary evidence that in another exercise in 2013 (OAB/CWA/2013/98) for the procurement of 12000 meters, the same requirement was imposed. In a letter dated 25<sup>th</sup> March 2014, in reply to a query in respect of tender OAB/CWA/2013/98 – Procurement of 12000 potable water meters (Dia 15mm), the CWA wrote:

After taking cognizance of the contents of your reply to the CWA's queries, and further to analysis by CWA's Finance Committee of the documents you submitted from the Manufacturer and its laboratory, you are requested to submit the following:-

*Either:-*

A scope/schedule of accreditation as per ITB 12.1 (h) (a), which should be in line with ITB 12.1 (h), (c) under Section II – Bidding Data Sheet (BDS) of the bid document.

*Or:-*

A test certificate from another independent laboratory accredited to ISO/IEC 17025: 2005.

If this condition imposed undue constraints on bidders, this would have become apparent then. If the condition was not required, it should not have been included in the Bidding Documents for this exercise; and if it has, one would assume that CWA would have given due consideration to the extent of the tender period to allow enough time for bidders to secure this certificate. This is apparently borne out by Addendum No 1, wherein a reply to a query about the time taken to secure a second certificate, the CWA replied: *The normal submission time for an international bidding exercise is two months. However, for this present procurement exercise, the bidding period has been extended to three months, precisely for bidders to carry out the independent testing.*

The CWA further avers that *(it) considers that if an extended time is given, more items of cost to the public body will be able to be considered at the bidding process.* Surely, a new tender exercise would take much more time than an extension of the tender period. In spite of new facilities

provided by e-procurement, it would still take 7 days to complete one week. Bidders would still need adequate time to prepare their bids, from scratch, which would therefore take longer than a simple extension. The logic of the CWA is once again hard to follow.

The Panel shall not dwell on matters of economic interest raised by the Applicant, nor on the reply thereto by the Public Body, except perhaps to deplore the cavalier tone of the latter. At the risk of stating a truism, the Panel would like to highlight that the bidder is an essential part of the bidding process, and that the long term sustainability of the procurement system rests on fair and equitable treatment of bidders.

It is time now to address the issue of public interest, and the related issue of change of standards. In its submissions, the CWA has hinted, in places obliquely, at the necessity of retendering out of public interest. At the last hearing, during examination in chief, the representative of the CWA stated that the latter had just been apprised that there was a new ISO standard issued in 2014 (ISO 4064/2014) which provided for 2 classes of meters (Class I and Class II) with permissible errors of  $\pm 1\%$  and  $\pm 2\%$  respectively, whereas ISO 4064/2005, on which this tender was based provides for only one class with permissible errors of  $\pm 2\%$ . The inference was that it would be in the public interest to use the latest standard, with lower tolerance values. These “latest” standards were published in 2014, and no explanation was given as to how nobody at the CWA was aware in 2015 that ISO 4064/2005 had been superseded in 2014, and why tender documents issued in 2015 comprised the “old” specification, which it has become suddenly necessary to change after the identity of the Successful Bidder became known.

Only, there are several issues associated with the assertion of the CWA representative, and it is apposite that the Panel should first address the issue of public interest.

If indeed CWA had properly invoked urgent public interest, the matter would be out of the hands of the Panel. Subsections (5), (6) and (7) of section 45 of the Public Procurement Act would then be relevant:

*(5) The suspension provided by subsection (4) shall not apply where the public body certifies that urgent public interest considerations require the procurement proceedings to proceed.*



*(6) A certificate issued by a public body pursuant to subsection (5) shall expressly state the grounds of the urgent public interest considerations and shall be made a part of the record of the public procurement proceedings.*

*(7) A certificate issued by a public body pursuant to subsection (5) shall be binding on the Review Panel and the procurement proceedings shall proceed.*

Regulation 36(b) provides for cancellation of a bidding exercise in the following circumstances:

**36. Cancellation of procurement proceedings after opening of bids**

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

*(a) ---*

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

The Regulation above does not specify what constitutes *in the public interest*. More importantly, it does not imply that a decision taken by the Public Body under Regulation 36 (b) shall be binding on the Panel. Moreover, the Panel considers that if Regulation 36 (b) were to give the same powers to the Public Body as s 45 (5), (6) and (7) of the Public Procurement Act, this would be against the principles of transparency and good governance which could not have been the intention of the Minister, for under Regulation 36, the Public Body is not required to *expressly state the grounds of the urgent public interest considerations and provide a certificate that shall be made a part of the record of the public procurement proceedings*. The cancellation under Regulation 36 (b), like any other act performed during procurement proceedings, is therefore reviewable by the Panel.

The Public Body has not explained why it has become necessary in the public interest to modify specifications etc. The CWA has given no explanation as to what advantage would accrue to the Public Body to split tenders, or to reduce quantities or even to change standards.

The latter issue deserves some further consideration. At first sight, it might appear that there would be an advantage to specify meters with

lower permissible errors. But the self-deprecating assertion of the CWA that it was unaware of the latest ISO standard one year after its publication, and did not seek any information about standards while preparing the Bidding Documents for meters, does not unfortunately give adequate responses to queries which immediately come to mind:

1. Why would the CWA seek to spend more money on meters with tolerance limits of  $\pm 1\%$  instead of  $\pm 2\%$  when the best estimate of the national average of unaccounted for water (“ufw”) is in excess of 50%, and the most optimistic scenario of ufw reduction would only bring it to a level of about 17%?
2. The CWA would like the Panel to believe that meters with permissible errors of  $\pm 1\%$  suddenly came into being after publication of ISO 4064/2014, of which the CWA became aware in late 2015. That is not so. It did not take the Panel more than 5 minutes to find out that ISO 4064/2014 in fact follows the publication of OIML 2013 (ORGANISATION INTERNATIONALE DE MÉTROLOGIE LÉGALE), which was the latest edition of OIML standards published in 2013, on which ISO 4064/2014 was based. Was the CWA also unaware of OIML standards, more specifically of OIML 2013 while drafting specifications for water meters in 2015?
3. It is the unrefuted assertion of the Applicant that the CWA has launched three more tenders (Contracts CWA 2014/190, CWA 2015/36 and CWA 2015/96) after the present one, with closing dates on 23.04.15, 13.08.15 and 16.10.15 respectively, based on ISO 4064/2005. The Applicant has further asserted without rebuttal that two of these tenders have actually been awarded, the latest on 30<sup>th</sup> November 2015, after the decision of the CWA to cancel the present exercise.
4. If the CWA had suddenly discovered the existence of meters with permissible errors of  $\pm 1\%$ , and considered that it was in the public interest to cancel the present exercise to procure the more efficient ones, why was this not mentioned in its reply to the Challenge? The right of the Respondent to bring up additional arguments is not contested, but the circumstances in which this argument was brought up suggest that it was raised to provide an *à posteriori* justification to a decision already taken.

More to the point, however, is whether a bidding exercise based on extinct standards is valid and can be allowed to continue to its conclusion. If the Public Body had relied exclusively on ISO certification to judge compliance, then the exercise could not have been allowed to come to fruition. But, instead, the Public Body had specified laboratory testing at 2 different laboratories to prove compliance. Directive 11 of the Public Procurement Office, at paragraph d states:

*(d) Where a public body makes use of the option of referring to standards, or common technical specifications, it cannot reject a bid on the grounds that the goods and services proposed for do not comply with a required standard or common technical specification where the bidder can show in its bid, by whatever appropriate means, that the solutions the bidder proposes satisfy in an equivalent manner the requirements defined by the technical specifications in the bidding documents. An appropriate means is constituted by a technical dossier of the manufacturer or a test report of a body which is a third party.*

Whether by design or by coincidence, therefore, the provision of the Bidding Documents for independent laboratory testing resolves this issue.

## **I. Decision**

For the above reasons, the Panel finds that there is merit in the Application, and hereby orders the annulment of the decision of the Public Body to cancel the bidding exercise CWA/C2014/87.

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

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

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

**Dated 23 December 2015**