

## INDEPENDENT REVIEW PANEL

In the matter of:

**Maxi Clean Co. Ltd**

**(Applicant)**

**v/s**

**Ministry of Environment, Sustainable Development, Disaster and  
Beach Management (Solid Waste Management Division)  
formerly Ministry of Local Government & Outer Islands**

**(Respondent)**

**(Cause Nos. 27/14/IRP)**

### **Decision**

#### **A. History of the case**

On 11 June 2014, the Ministry of Local Government and Outer Islands invited sealed bids through Open Advertised Bidding method from bidders for the operation and maintenance of Poudre D'Or Transfer Station and Transportation of Wastes from Poudre D'Or Transfer Station to Mare Chicose Landfill (reference no.: CPB/23/2014).

The main objectives of the Contract are to:

- (i) operate and maintain the Transfer Station at Poudre D'Or in a smooth running condition for the whole duration of the Contract and provision to be made for all necessary spare parts for the proper running of the station with competent and qualified personnel;

- (ii) transport from the Transfer Station all daily incoming wastes, except paper, plastics and used tyres to Mare Chicose landfill or to any other site as directed by the Ministry. The amount of wastes received is 140 Tonnes per day, however, the peak may reach up to 160 Tonnes per day;
- (iii) retrieve the recyclables such as used tyres, paper and plastics from the incoming wastes;
- (iv) receive e-wastes and store these wastes in designated storage areas.

Latest bidding documents for the procurement of non-consultancy services as customized by the Public Body were used. The CPB approved the revised documents on 10 June 2014.

Three addenda were issued during the tender period.

The closing date was the 31 July 2014 at 13.30 hours (local time) and Public Opening was carried out on the same day at 14.00 hours in the Conference Room of the Central Procurement Board. Five bids were received from the following,

- Sotravic Limitee
- Interwaste (Pty) Ltd
- Atics Ltd
- Maxi Clean Co Ltd
- Compagnie Regionale de Services et de L'Environnement Ltee (CRSE Ltee)

From documents on record, the read out prices at opening were as follows:

SN	Name of Bidder	Discount (Rs)	Bid Amount after Discount Inclusive of VAT (Rs)
1	Sotravic Limitee	Nil	162,182,011.40
2	Interwaste (Pty) Ltd	Nil	118,382,729.60
3	Atics Ltd	Nil	167,223,800.00
4	Maxi Clean Co Ltd	Nil	119,531,000.00
5	Compagnie Regionale de Services et de L'Environnement Ltee	Nil	171,881,300.00

## B. Evaluation

After opening of bids, the following committee was appointed for evaluation of bids:

Mr M.S. Ayoob Saab Deputy Permanent Secretary, Ministry of Education and Human Resources (Chair)

Mr G.P. Bobeechurn Civil Engineer (Member)

Mr N. Moorlah Project Officer/Senior Project Officer, Ministry of Local Government and Outer Island (Member)

Mrs N.O.S. Hosany Assistant Permanent Secretary (Secretary)

The committee submitted its report on 19<sup>th</sup> August 2014 and recommended that the award of the contract for the 'Operation and Maintenance of Poudre D'Or Transfer Station and Transportation of Wastes from Poudre D'Or Transfer Station to Mare Chicose Landfill' to the lowest substantially responsive evaluated bidder Interwaste (Pty) Ltd at a price of One hundred and eighteen million three hundred eighty two thousand and seven hundred and twenty nine rupees and sixty cents (Rs 118,382,729.60) inclusive of VAT.

It is of interest to note that the BEC mentioned in its report that:

*The BEC verified the list of disqualified/ debarred bidders on the website of the Procurement Policy Office and noted that none of the above mentioned bidders was disqualified/ debarred.*

With regard to Interwaste (Pty), the Bid Evaluation Committee (BEC) made this remark:

*The authorized signatory of Interwaste (Pty) Ltd, as per the Power of Attorney, is 'Jason James McNeil' whilst the Bid Submission Form has been signed by ' Jason McNeil'. The BEC further noted that the Resolution of the Board signed on 29 July 2014 authorised 'Jason McNeil' to submit the bid. The BEC is of the opinion that 'Jason McNeil' has been duly authorized to sign the bid.*

*The BEC recommends that in case Interwaste (Pty) Ltd is to be awarded the contract, the bidder be requested to confirm whether ' Jason James McNeil' and 'Jason McNeil' is one and the same person.*

Whereas it made no specific remark about the bidder Maxiclean Co. Ltd and only mentioned:

*Maxi Clean Co Ltd was the second lowest substantially responsive evaluated bidder with a price of One hundred and nineteen million five hundred and thirty one thousand rupees (Rs 119,531,000.00) inclusive of VAT.*

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

The Ministry of Local Government & Outer Islands through a letter dated 10 September 2014, informed Maxi Clean Co. Ltd that its bid had not been retained for award and of the particulars of the successful bidder as follows:

<i>Bidder</i>	<i>Address</i>	<i>Contract Price inclusive of 15% VAT (Rs)</i>
<i>Interwaste (Pty) Ltd</i>	<i>The Junction Hub Block C Office 132 Calebasses</i>	<i>118,382,729.60</i>

## D. The Challenge

On 16 September 2014, Maxi Clean Co. Ltd, the Applicant, challenged the award on the following grounds:

- “1. *Interwaste (Pty) Ltd to whom the contract is to be awarded has already been operating in Mauritius since 01 May 2014 without complying with the Laws of Mauritius.*
2. *Interwaste (Pty) Ltd has failed to register a local branch of a foreign Company for Interwaste (Pty) Ltd in Mauritius in contravention of Section 276 of the Companies Act 2001 upon starting work after being awarded the contract for CPB/53/2013.*
3. *The aggrieved party verily believes that Interwaste (Pty) Ltd will subcontract the work to a local company in complete contravention of the conditions for subcontracting as laid down in the bidding documents, to wit:  
ITB 5.6 Subcontractor’s experience will be taken into account for subcontracting components of the Services which is limited to 20 percent of the Contract Price. Details of the Subcontractors’ and resources should be submitted.*
4. *The aggrieved party nurtures these apprehensions from the fact that Interwaste (Pty) Ltd has completely subcontracted the contract for CPB/53/2013 to another entity, namely: Interwaste (Mauritius) Ltd, in contravention of ITB 5.6.*
5. *The aggrieved party further avers that searches at the Companies Division have revealed that Inter-Waste (Pty) Ltd is 40% shareholder of Interwaste (Mauritius) Ltd.*
6. *The aggrieved party verily believes that Interwaste (Pty) Ltd is not acting in good faith in this bidding process. Interwaste (Pty) Ltd is using collusive methods in breach of Section 3.3 of the Instructions to Bidders, with a local domestic company Interwaste (Mauritius) Ltd incorporated on 10 April 2014, the majority shareholder of which is another local entity, Serveng Ltd, to obtain the present bid.*
7. *The aggrieved party verily believes that the Ministry of Local Government and Outer Islands has to investigate this matter and reject the proposal made by Interwaste (Pty) Ltd for award of this present contract CPB/23/2014.*
8. *Interwaste (Pty) Ltd has indulged in serious irregular practice to obtain the contract for CPB/53/2014, which malpractices have*

*already been reported to the Public Procurement Office and when proven will result in the disbarment of Interwaste (Pty) Ltd to participate in future bids.*

9. *At the time Interwaste (Pty) Ltd participated in bid exercise CPB/23/2014 its hands were already tainted with such irregular practices.*
10. *Interwaste (Pty) Ltd which is a South African company without any representation in Mauritius does not have any assets in Mauritius to cover any claim for damages occasioned in the execution of the contract.”*

#### **E. The Reply to challenge**

On 22 September 2014, the Public Body made the following reply to the challenge:

*“This is to inform you that most of the grounds for challenge do not relate to evaluation exercise carried out for Operation and Maintenance of Poudre D’Or Transfer Station and Transportation of Wastes from Poudre D’Or Transfer Station to Mare Chicose Landfill but instead to the implementation of another contract awarded by the Ministry, namely that for Operation and Maintenance of Roche Bois Transfer Station and Transportation of Wastes from Roche Bois Transfer Station to Mare Chicose Landfill.*

*As regards ground no. 3, the Ministry has been informed by the awarding body, the Central Procurement Board, that Interwaste PTY Ltd has clearly stated in its bid that no work would be subcontracted.*

*You may also wish to note that this Ministry is investigating into allegations made with regard to non-compliance to the provisions of the Roche Bois contract”.*

#### **F. Grounds for Review**

On 23 September 2014, the Applicant seized the Independent Review Panel for review on the following grounds:

- “1. *The Ministry of Local Government and Outer Islands (hereinafter referred to as the Public Body)*
2. *The Public Body was wrong to dismiss the grounds for challenge in toto. By so doing the Public Body chose not to address the serious issues raised by the Applicant, to wit that Interwaste (Pty) Ltd was*

*tainted with fraudulent practices in contravention of the Bidding Documents more specially under the item: Instructions to Bidders, section 3: Corrupt or Fraudulent Practices.*

3. *The Public Body was wrong to have rejected the grounds of challenge dismissively when these grounds:
  - (a) *depicted the fraudulent practices of Interwaste (Pty) Ltd based on official available information;*
  - (b) *established the modus operandi of Interwaste (Pty) Ltd*
  - (c) *pointed out the collusion of Interwaste (Pty) Ltd with third parties to obtain a previous contract from the same Public Body in the same field;*
  - (d) *established on a balance of probabilities the likelihood of Interwaste (Pty) Ltd replicating the same scenario for CPB/23/2014*
  - (e) *established that Interwaste (Pty) Ltd, a foreign entity is not respecting the Mauritian Laws and the bidding process;*
  - (f) *established that Interwaste (Pty) Ltd is not a Law-abiding entity*
  - (g) *bring to the knowledge of the Public Body the reasons why Interwaste (Pty) Ltd could not be awarded the contract CPB/23/2014.**
4. *The Public Body while dismissing Applicant's challenge admitted at the same time that the "allegations" of the Applicant were serious enough to be investigated.*
5. *Having made such an admission the Public Body was wrong to have dismissed the Applicant's challenge.*
6. *The Public Body will be imprudent and/or negligent to allocate the contract CPB/23/2014 allocating the contract to a foreign entity with no local representation and which is already tainted with fraudulent practices.*
7. *Once allocated the contract for CPB/23/2014 Interwaste (Pty) Ltd does not have the physical means to mobilize for the execution of the contract."*

## **G. The Hearing**

Hearings were held on 21 May, 26 May, 11 June, 14 July, 28 July, 18 August and 04 November 2015. Written submissions were made by the Applicant and Respondent on 24 July 2015 and 05 June 2015 respectively. Applicant was represented by Mr Y. Mohamed, SC instructed by Attorney Mrs A. Jeewa, the Respondent by Counsel Ms O. Ombrasine

from the State Law Office, and the Successful Bidder by Counsel Mr G. Mooneesawmy, who attended all hearings.

During hearings, the Applicant has sought first to show that the bid from the Successful Bidder was not properly signed, and secondly, through past performance, has attempted to show that the Successful Bidder intended to perform the contract through another entity.

The Applicant raised the preliminary point that the Power of Attorney given by the Successful Bidder to local representatives had no legal weight in Mauritius as the document did not comply with the provisions of the Deposit of Powers of Attorney Act. The Panel ruled that a properly constituted Power of Attorney was only one of the instruments whereby physical persons were empowered to sign and submit a bid on behalf of a corporate entity, and that the Respondent (as it stated in its written submissions) only had to produce the actual instrument used by Interwaste Pty, and all discussions on Power of Attorney shall cease. The Respondent informed the Panel that the requested document had been submitted as part of the bundle from the Respondent.

The Applicant also sought to show that previous experience on Roche Bois Transfer Station tended to prove the intention of the Successful Bidder to perform the operation of Poudre D'Or Transfer Station through another entity either by sub-contracting or by other means. There has been much discussion and objections, especially from the Counsel for the Successful Bidder, on whether matters relating to the operation of Roche Bois Transfer Station were relevant to the present discussions. The Panel was of the view that the contract for operation of Roche Bois Transfer Station not being completed, and a completion report not being available, and furthermore, because of the impossibility for the Applicant to get access to official documents, the latter should be given enough latitude to adduce evidence that may have a bearing on the present case. As it happened, the Respondent admitted that there were “problems” in the initial stages of the operation of Roche Bois Transfer Station, but that these were smoothed out and that the Client Ministry was satisfied with the performance of the Successful Bidder on Roche Bois Transfer Station.



## H. Findings

### 1. Fraudulent Practice

The Applicant has sought to introduce evidence on practices obtaining at Roche Bois Transfer Station. The Panel is not equipped, nor empowered, to investigate or decide on such allegations and refer the Applicant to the appropriate fora. The only relevance that this could have on the present Application is a possible extrapolation on the operation of Poudre D'Or Transfer Station. The fact that the Public Body has stated that it is satisfied with the operation of Roche Bois Transfer Station indicates, however, that even if such extrapolation was permissible, it would be of no help to the Applicant.

### 2. Bid Signature and Submission

The Applicant has sought to prove that a Power of Attorney in his possession was not a legal document under the laws of Mauritius, and, if used as the empowering instrument to allow signature and submission of the bid by certain Mauritian Nationals, then such bid would not be valid.

As it happened, quite another instrument, allowed in the bidding documents, was used for that purpose. In fact the BEC did make mention of this document: *The authorized signatory of Interwaste (Pty) Ltd, as per the Power of Attorney, is 'Jason James McNeil' whilst the Bid Submission Form has been signed by ' Jason McNeil'. The BEC further noted that the Resolution of the Board signed on 29 July 2014 authorised 'Jason McNeil' to submit the bid. The BEC is of the opinion that 'Jason McNeil' has been duly authorized to sign the bid.*

*The BEC recommends that in case Interwaste (Pty) Ltd is to be awarded the contract, the bidder be requested to confirm whether 'Jason James McNeil' and 'Jason McNeil' is one and the same person.*

In this instance also, the Panel can only conclude that the Applicant has not been able to prove its point, and that there is no merit in this ground of review.

3. The Intent To Subcontract

The Applicant has sought to show the intent of the Successful Bidder to subcontract or perform the contract through another entity by other means, by extrapolation from its performance on a previous contract (the Roche Bois Transfer Station) for the same Public Body, claiming that this was the only available way to prove intent.

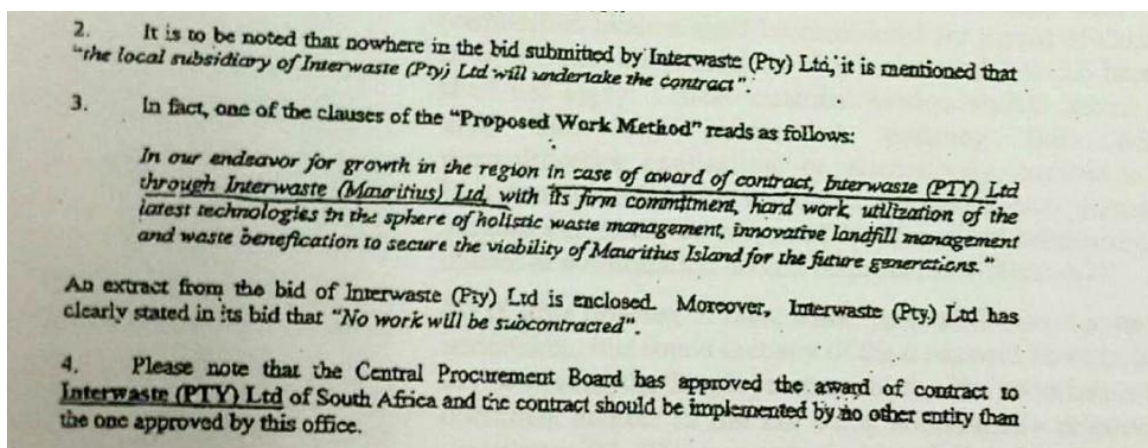
The Respondent was of the opinion that the intent of the Successful Bidder may not be known until contract implementation.

There is a third way.

The intent of any bidder as to how he will perform the contract may be known from the bidder's methodology statement. This statement is requested from bidders in certain tenders where method is important, expressly as a means to understand and appraise how bidders intend to perform the contract, and the means at their disposal to do so.

In the introduction of this statement, the Successful Bidder states inter alia: *"In our endeavour for growth in the region in case of award of contract, **Interwaste (PTY) Ltd through Interwaste (Mauritius) Ltd**, with its firm commitment, hard work, utilization of the latest technologies in the sphere of holistic waste management, innovative landfill management and waste beneficiation to secure the viability of Mauritius Island for the future generations."* (Underlining is ours)

This statement is ambiguous enough as to prompt a letter from the CPB to the Public Body, stating:



There has been much discussion about this letter, a copy of which was tabled by the Applicant, but its authenticity has not been questioned. The Respondent has argued that the letter in isolation, without "context" may give rise to erroneous interpretations. The Panel has invited the Respondent to give in confidence to the Panel the so called "context" with the guarantee that whatever was considered confidential would not be communicated to third parties. However, no further communication was made by the Public Body or the CPB.

The Panel is bound, therefore to take this letter at face value, and concludes that there was considerable apprehension because of the Successful Bidder's statement "*Interwaste (PTY) Ltd through Interwaste (Mauritius) Ltd*".

A simple drawing of the attention of the Public Body cannot provide a remedy to this ambiguity. For if the Successful Bidder really intended to perform the contract *through Interwaste (Mauritius) Ltd*, then simply preventing it to do so would imply a change in its tender. Such intent, if true, can only be sanctioned by a rejection of its tender.

As stated above, no information was forthcoming from the Public Body or the CPB to assist the Panel in unravelling the meaning of the impugned phrase. The Panel has had therefore to seek other evidence to show the likelihood of sub-contracting or otherwise performing the contract through another entity.

The bid from the Successful Bidder contains a list of transport and other equipment belonging to various entities with whom arrangements have been made for lease to Interwaste Pty Ltd.

Moreover, the Applicant has benevolently submitted a document that shows conclusively that Interwaste Pty Ltd has been registered as a local company.

The Panel can only conclude that the letter from the CPB provides a clarification that there is no intent to sub-contract on the part of Interwaste Pty Ltd.

## **I. Decision**

The Panel can only note the lack of cooperation from the Public Body in its refusal to communicate relevant documents, and is of opinion that with a more open approach, this case could have been concluded earlier.

The Panel also reiterates its remark to the Applicant that it is not equipped to investigate or otherwise deal with any allegation of impropriety or malpractice, and invites him to communicate all facts at his disposal to the proper fora.

The Applicant has failed to prove the intent of the Successful Bidder to subcontract or otherwise perform the contract for Poudre D'Or TS through another entity.

The Panel therefore finds that there is no merit in this application.

**(R. Lauloo)**  
***Chairperson***

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

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

**Dated 06 November 2015**