Decision No. 34/15

INDEPENDENT REVIEW PANEL

In the matter of:

Colas – GCC AML Stand 16 and Boarding Bridge JV

(Applicant)

v/s

Airports of Mauritius Co. Ltd

(Respondent)

(Cause No. 23/15/IRP)

Decision

A. History of the case

AML has decided to construct a new aircraft parking stand no. 16 adjacent to the New Terminal building in order to maintain the necessary operational and commercial flexibility to meet flight schedules. Since the new aircraft parking stand no 16 will be for accommodation of aircraft up to code F, the existing taxiway P will be widened and also the existing aircraft parking no. 15 will be reconfigured by adding a new passenger boarding bridge to cater for Code F aircraft with lower and upper deck.

The works comprise, inter alia, of the following:

- Construction of an aircraft parking stand, airside road and General Services Equipment (GSE) area and a section of Taxiway P.
- Installation of airfield lighting (LED fittings) complete with associated trenching works, cablings, transformers, etc, in accordance with ICAO Annex 14.
- Installation of illuminated signage and markings in accordance with ICAO Annex 14.
- Installation of aircraft docking guidance systems.
- Installation of ground power units (GPU)
- Installation of floodlight masts
- Diversion of existing services such as sewer reticulation networks, water reticulation, power and signal cables
- Civil works associated with the extension of the fuel pipelines from Stand 15 to stand 16
- Fencing works
- Drainage works complete with oil separator
- Installation of a Passenger Boarding Bridge on Stand 15 with all associated civil and electrical works
- Replacement of floodlight masts on Stands 9 and 10
- Reconstruction of Taxi way N
- Repair works on Taxiways A and B

Following a prequalification exercise, the following four bidders had been retained to participate in the tender, and were so informed on the 16th March 2015:

1. China State Construction Engineering Corporation Limited

2. Rehm Grinaker Construction Co Ltd

3. Beijing Construction Engineering Group Co Ltd

4. Colas- GCC AML Stand 16 and Boarding Bridge JV

On the 9th June 2015, bidding documents were issued to the above prequalified bidders, under reference CPB/OS/2015. According to records before the Panel, the Standard bidding Documents of the Procurement Office were used to prepare the bidding document, which was thereafter vetted by the Central Procurement Board.

The following addenda were issued during the tender period:

Addendum No.1 dated 08th July 2015:

(i) Submission of drawings

(ii) Clarifications

(iii)Revision of BOQ

Addendum No.2 on the 15th July 2015

(i) Insertion of specific provisions to Conditions of contract Part B

(ii) Submission of drawings

(iii)Revision of BOQ

The closing date for the submission of bids was fixed for Wednesday 22 July 2015 up to 13.30 hours at latest at the Central Procurement Board (CPB). Four (4) bids were received and Public Opening was carried out on the same day at 14.00 hours in the Conference Room of the CPB.

SN	Bidder	Discount (Rs)	Bid amount after Discount (including VAT) MUR	Bid Security in the sum of 5,000,000 submitted Yes/No	Letter of Bid Completed and Signed Yes/No
1	China State Construction Engineering Corporation Limited	7,966,642.17	471,500,000.00	Yes	Yes
2	Rehm Grinaker Construction Co Ltd	Nil	505,875,894.30	Yes	Yes
3	Beijing Construction Engineering Group Co Ltd	Nil	480,834,072.75	Yes	Yes
4	Colas- GCC AML Stand 16 and Boarding Bridge JV	Nil	500,991,094.50	Yes	Yes

B. Evaluation

The following Bid Evaluation Committee was constituted to evaluate the bids:

Mr. S. Rambrichh Deputy Director. Civil Aviation Department (Chairperson & registered evaluator)

Mr. M Hurree Assistant Divisional Manager, Road Development Authority (member & registered evaluator)

Mr V Ujoodha Manager Technical Services, Airports of Mauritius Co Ltd (Member & evaluator)

Mr N Juggernauth Acting Chief Project Officer, Airports of Mauritius Co Ltd (acting as Secretary)

In their first evaluation report, submitted on 22nd August 2015, they found that all bids were responsive and compliant, and therefore determined that the *Lowest evaluated responsive bidder (Proposed for*

contract award) was Beijing Construction Engineering Group Co Ltd Address: 112 Corner Sodnac and Des Tulipes Ave, Quatre Bornes, Mauritius.

The BEC conclude and recommend that the contract be awarded to the lowest responsive bid from bidder: Beijing Construction Engineering Group Co Ltd for an amount of MUR 481,349,847.75 inclusive of 15% VAT.

Following comments by the Central Procurement Board (see below), the Bid Evaluation Committee produced a supplementary report:

This supplementary report has been prepared following the examination of the bid evaluation report for the Construction of one aircraft parking stand no.16 and installation of Passenger Boarding Bridge on Stand 15 at SSR International Airport by the CPB.

The following comments have been made by the Board:

a. Page 5, Bids as read out at opening: To correct Bid Amount of China State Construction Engineering Corporation Limited Table 1

b. Page 8, Financial Situation: To provide additional information with regards to cash flow requirements

c. Page 10, Margin of preference: To correct Bid Amounts after applying margin of preference Table 7 in accordance with ITB 35.2

d. Page 16, Conclusion and Recommendation: To elaborate on security preference and local manpower to be deployed.

2. Following the observations made by the Board/ the BEC has reassessed the above mentioned issues as detailed hereunder:

(a) Bid as read out at opening

Bid Amount for bidder 1 - China State Construction Engineering Corporation Limited to be MUR 471,500,000.00 instead of MUR 417,500,000.00.

(b) Financial situation

Additional notes to paragraph 6.2.1 (d) (iii) of bid evaluation report:

All the bidders have demonstrated that they will meet the cash flow requirement of MUR 25 Million. Moreover Beijing Construction Engineering Group Co Ltd has submitted a Testimonial stating that it "has, at the present time, the financial means and resources for the proper execution of the said contract up to MUR 40,000,000.00"

(c) Margin of preference

Pursuant to ITB 35.2, the bid amounts, after applying the 15% Margin of Preference, have been recalculated and table 7 of the bid evaluation report revised as shown below:

Bidder	Bid Prices @ Opening (Rs)	Corrected Bid Amount (Rs)	Provisional Sum and Contingency	Bid price excluding VAT, Provisional Sum and Contingency (Rs)	Bid Price after applying Margin of Preference and in accordance with ITB 35.2	Ranking
China State Construction Engineering Corporation Limited	471,500,000.00	479,754,642.57	19,000,000.00	398,177,950.06	457,904,642.57	4
Rehm Grinaker Construction Co Ltd	505,875,894.30	505,607,642.17	19,000,000.00	420,658,819.28	420,658,819.28	3
Beijing Construction Engineering Group Co Ltd	480,834,072.75	481,349,847.75	19,000,000.00	399,565,085.00	399,565,085.00	1
Colas- GCC AML Stand 16 and Boarding Bridge JV	500,991,094.50	500,991,094.50	19,000,000.00	416,644,430.00	416,644,430.00	2

The supplementary report concluded:

Conclusion and Recommendation

The bid evaluation committee would like to highlight that the bidder recommended namely Beijing Construction Engineering Group Co Ltd has applied for Margin of preference and thus the client should ensure that the bidder deploy the required local manpower during construction. Furthermore, the BEC recommends that the client should ensure that the bidder submit a preference security to the amount of MUR 1,595,205.18 at the time of contract award failing which the award of contract may be annulled.

C. Notification of award

The Airports of Mauritius Co. Ltd through a letter dated 14 September 2015, informed the Applicant of the particulars of the successful bidder as follows:

Name of Bidder	*Beijing Construction Engineering Group Co. Ltd*
Address	*112, Corner Tulipes & Sodnac, Quatre Bornes*
Contract Price	*MUR 481,349,847.75 inclusive of provisional sums, contingency sum and 15% VAT*

D. The Challenge

On 17 September 2015, the Applicant challenged the award on the following grounds:

"BCEG Co. Ltd fails to meet the requirements of the Prequalification Document (which it should continue to meet at bidding stage) insofar as Qualification Criteria and Requirements are concerned, more specifically the following:

A. General Construction Experience

Section 4.1(a) - General Construction Experience stipulates that a single Entity must meet the following Requirement: Experience under construction contracts in the role of prime Contractor, JV member, sub-contractor, for at least the last ten (10) years, starting 01 January 2004.

BCEG Co. Ltd is a Private Company incorporated in Mauritius since 17/07/2007 and limited by shares with a share capital of Rs300 only.

Based on an incorporation date of 2007 therefore, BCEG Co. Ltd does not meet this criterion.

B. Specific Construction & Contract Management Experience

Section 4.2(a) – Specific Constrcution & Contract Management Experience stipulates that the bidder must have undertaken a similar contract of minimum value US$10 million (Approx. MUR 350 Million) between 01 January 2004 and application submission deadline, whereby the similarity shall be based on the physical size, complexity, method, technology and/or other characteristics described in Section V, Scope of Works.

Abstracts of Section V are provided below:

1. Description of the Works

The works shall comprise, inter alia, the following:

- *Construction of 1 additional aircraft parking stand, airside road and General Services Equipment (GSE) area and a section of Taxiway P consisting of earthworks and pavement works both in Marshall asphaltic concrete and pavement quality concrete*
- *Repair of pavement on taxiway N with Marshall asphaltic concrete*
- *Installation of airfield lighting (LED fittings) complete with associated trenching works, cablings, transformers, etc, in accordance with ICAO Annex 14*
- *Installation of illuminated signage and markings in accordance with ICAO Annex 14*
- *Installation of aircraft docking guidance systems*
- *Installation of ground power units (GPU)*
- *Installation of floodlight masts*
- *Installation of a passenger boarding bridge on Stand 15 to meet Code F aircraft requirement, including all associated*

civil/electrical/mechanical works to link with existing facilities together with modification of existing passenger boarding bridge on Stand 15 as required

- *Diversion of existing services such as sewer reticulation networks, water reticulation, power and signal cables*
- *Civil works associated with the extension of the fuel pipelines from Stand 15 to Stand 16 Fencing works*
- *Drainage works complete with oil separator*

2. Site and Other Data

- *Site & Access Restrictions*
    - *Part of the Works will be carried out in a highly restrictive environment. The Contractor shall have to carry out works while the Airport will be operational with the runway, taxiways and apron remaining active. The Contractor shall also have to leave the active zones in an operational state at the end of each working day.*
    - *The Contractor shall therefore have to abide to strict regulations imposed by Airports of Mauritius Co. Ltd (AML) and the department of Civil Aviation (DCA) and shall comply with the environment and Health & Safety requirements and the Procedures for Airside Works issued by AML. The Contractor shall also be required to submit a Method of Work Plan prior to the start of works for approval by DCA.*
    - *Access to the site within the Airport premises shall be restricted and controlled. Access permits shall be required for the Contractor's plant and personnel in order to gain access on site. These permits are delivered by DCA against payment. The cost implications may be verified with the DCA and shall be borne by the Contractor. AML shall not be liable for whatsoever delays in obtaining access permits from DCA.*
    - *Part of the works shall be carried out at night. The Contractor shall thus also allow sufficient time to obtain all access permits and clearances. The Contractor may be required to vacate the*

> *site at any time during the works in emergency situations or when instructed to do so by AML. The Contractor shall strictly abide to the instructions given by AML and the DCA.*

On the basis of the above, bearing in mind the nature and complexity of the Works, the special environment and special conditions under which the same has to be executed, unless BCEG Co. Ltd have similar experience in airport works they are not adequately qualified for this bid.

Furthermore from a security point of view as mentioned in the scope of works described above we consider that all necessary security verifications including morality certificates of personnel would be insisted upon by the Employer. Without the necessary experience we consider that BCEG Co. Ltd will not be in a position to comply with the high level of security required especially from a workforce point of view and on a daily as may be insisted upon by the Employer and DCA.

Therefore, experience in general road works or the like for instance cannot in any way be considered as bearing any similarity whatsoever to the current project from all perspectives.

On this ground too therefore BCEG Co Ltd does not meet bid criterion.

C) ***Civil Works Experience***

Section 4.2(b) – Civil Works Experience stipulates that a Single Entity must meet the following Requirement: Minimum construction experience in the following activity, 1 project involving resurfacing/construction of a runway/taxiway/aircraft parking stand.

We are unaware of any such project undertaken by BCEG Co. Ltd.

We would request the Public Body to verify whether perhaps BCEG Co. Ltd has utilized reference of potential parent or sister company/ies.

If this be the case we would highlight that BCEG Co. Ltd should not be allowed to use references of other companies for this Bid, but that on the other hand perhaps a Joint Venture with the appropriately qualified entity may have been acceptable.

Since this is not the case, BCEG Co. Ltd does not qualify.

*D) **Margin of Preference for employment of local manpower***

The notification to unsuccessful bidders issued by Airports of Mauritius Ltd states that the bid of BCEG Co. Ltd has been retained following application of the Margin of Preference of 15%.

We consider that since its incorporation, BCEG Co. Ltd has not employed more than 80% local manpower on any of its projects and its undertaking to do so on this project should be treated with utmost caution.

Should BCEG Co. Ltd be awarded the project and fail to employ 80% local manpower, they only run the risk of losing their Preference Security. In the meantime the harm would have been done in that local Mauritian workforce would not have had the employment opportunity which BCEG would have undertaken to provide.

We therefore consider that in the interest of local manpower, in line with current Government strategy, in view of the sudden increase in unemployment rate in Mauritius since the beginning of the year and especially in the Construction Industry, (and not to mention plant and equipment, operators thereof and all associated supplies and quality thereof) this aspect should be afforded much scrutiny and all necessary proof of employment provided PRIOR to award and it should not merely be taken at face value.

For instance a payroll analysis of BCEG Co. Ltd since its incorporation may provide an appropriate insight into its employment history.

In support of the above, attention is drawn to the fact that in the Audited Accounts of BCEG Co. Ltd for the year ended 31 December 2011 (see paragraph F below), deposited with the Registrar of Companies, it is written the following at Note 9, page 16, of said Accounts:

The company employs mainly foreign workers on a contract basis and the directors do not thus consider the need to apply IAS 19 Employee Benefits as the contractual obligations of the company are not subject to the local Labour Act 1975.

The amount with regard to local employees is in the opinion of the directors too immaterial to warrant any provision.

The above statement has been made by the directors of BCEG Co. Ltd themselves.

E) ***Subcontracting***

In pursuance with ITA 25.3 of the Prequalification Document, Maximum % of subcontracting for this project is 30% or 100% of the volume of mechanical and Electrical Works.

The layerworks, pavement works and M&E Works represent more than 30% of the Works on this project. BCEG Co. Ltd may have undertaken roadworks and perhaps concrete pavement works in Mauritius in the recent past, but we consider that especially the road layerworks on those projects were undertaken by BCEG Co. Ltd's subcontractors of JV partners.

Since in this case there is no JV, we consider that BCEG Co. Ltd will invariably have no option but to Subcontract more than the % allowed for this project.

This would therefore constitute a clear breach of the contract.

We would once again draw the Public Body's close attention to this very important aspect of the Works bearing in mind that special aircraft such as airbus A380 will use these stands and hence quality and workmanship of the asphalt and pavement works especially will be of utmost importance insofar as aircraft traffic is concerned.

F) ***Audited accounts***

BCEG Co. Ltd is not abiding by the requirements of the Companies Act. AS at Friday 11.09.15, it had only filed its Audited Accounts made up to 31 December 2011 to the Registrar of Companies. This is in direct contravention of the existing law, which means that this company is not law abiding. As at 11.09.15, the Audited Accounts for the years ended 31 December 2012, 31 December 2013 and December 2014 should have been filed and made available to the public. They failed to do so."

E. The Reply to Challenge

On 22 September 2015, the Public Body made the following reply to the challenge:

"(i) ***Contentions at Paragraph 8A, 8B and 8C***

The preferred bidder Beijing Construction Engineering Group Co. Ltd meets all the criteria as spelt out at the prequalification stage. There has been no evidence of any change which would warrant disqualification of this bidder.

It is to be noted that bidders should have availed themselves of the opportunity to challenge the decision at prequalification stage in case of disagreement and if aggrieved.

(ii) ***Contention at Paragraph 8D – Margin of Preference***

The preferred bidder is eligible for a Margin of Preference of 15% as per provision at ITB 34 of the Bid Data Sheet of the bidding documents. The issue raised in respect of IAS 19 is not applicable for the present exercise as the bidder has undertaken to employ at least 80% of local labour. The apprehensions of the aggrieved bidder have been noted by the Public Body to ensure compliance. The preferred was initially incorporated in November 1993. However, to meet the requirement of the Company's Act 2001 and Business Registration Act 2002, it was incorporated in July 2007 in Mauritius.

(iii) ***Contention at Paragraph E-Subcontracting***

The preferred bidder complies fully with the provisions at ITA 25.3 of the prequalification documents.

(iv) ***Contention at Paragraph F – Audited Accounts***

The preferred bidder has submitted Audited Accounts in compliance with the provisions of bidding documents."

F. Grounds for Review

On 28 September 2015, the Applicant seized the Independent Review Panel for review on the following grounds:

"The Applicant refers the Independent Review Panel to the Applicant's challenge which was filed on the 17 September 2015 and the Public Body's reply dated 22 September 2015 to the Applicant's challenge. The

Applicant maintains all its grounds for challenge as grounds for review since the Applicant is unsatisfied with the decision of the Public Body in that the Public Body's responses to each ground of challenge does not provide any detailed explanations as to the decision of the Public Body in that the Public Body's responses to each ground of challenge does not provide any detailed explanations as to the decision of the Public Body on each ground for challenge.

For instance, with regards to contentions of the Applicant at 8A, B and C of the Applicant's challenge, the Public Body's response merely states: "The preferred bidder Beijing Construction Engineering Group Co. Ltd meets all the criteria as spelt out at the prequalification stage" without any explanation whatsoever.

The Applicant contends that the bid of the preferred bidder, Beijing Construction Engineering Group Co. Ltd was non-responsive in as much as it failed to satisfy all the bid criteria requirements of the bidding documents as detailed in the Applicant's challenge dated 17 September 2015. The Applicant reiterates all its grounds of challenge before the Independent Review Panel.

The Applicant also contends that the Public Body was wrong to have applied the margin of preference of 15% to the bid of the preferred bidder given that the latter does not meet the requirements to be eligible for the said margin of preferences at the time of the bid.

In view of the decision of the Public Body, the Applicant therefore maintains all his grounds for challenge and requests the Independent Review Panel to call for the prequalification submission document and bid submission document of Beijing Construction Engineering Group Co. Ltd for a hearing on the Applicant's grounds for challenge."

G. The Hearing

Hearings were held on 06 and 22 October 2015. Written submissions were made on 16 October 2015 and 22 and 27 October 2015, by Applicant and Respondent respectively.

The Applicant was represented by Mr G. Glover, SC whereas the Respondent was represented by Mr Y. Bhadain, Counsel.

H. Issues

From submissions of the various parties, it is incumbent upon the Panel to decide on the following:

- Whether the Applicant submitted his application for review outside the allowable time limit
- Whether the selected bidder is the same entity which was prequalified.
- If so, whether that entity is entitled to a preference of 15%
- Whether the decision of the Public Body amounts to a "decision" under section 43(4) of the Public Procurement Act 2006 and whether the Public Body was right in its determination of the Applicant's challenge.

I. Findings

It is the contention of the Respondent that the letter sent to the Applicant advising the latter that he has been prequalified along with the Chinese Company BCEG, should be considered as the "Notification" under section 43 of the Public Procurement Act. It his submission, it is stated:

In its letter dated 16 March 2015, the Central Procurement Board informed the Bidders of the names of the four companies which had submitted applications for prequalification. In the said letter, the name of the Preferred Bidder was inserted as 'Beijing Construction Engineering Co Ltd' instead of 'Beijing Construction Engineering Group Co Ltd'. For all intents and purposes, it is the latter company, i.e. the foreign company registered in China, which was one of the four bidders which applied for the prequalification exercise and there was no challenge in this respect within the statutory delay of 7 days. At any rate, on 4 September 2015, the Central Procurement Board sent a letter to the Respondent, informing the latter of the names of the bidders who had submitted their bids. The name of the Preferred Bidder which was among the four companies, was inserted as "Beijing Construction Engineering Group Co Ltd" so that there was no room for any confusion as to the name of the company which had submitted the bid (i.e. 'Beijing Construction Engineering Group Co Ltd').

It is the Respondent's contention that the Appellant's challenge has been lodged outside the delay provided for in law. Section 40(3) of the Public Procurement Act 2006 reads as follows:

"A public body, in relation to a procurement contract, the value of which is above the prescribed threshold, shall notify the successful bidder in writing of the selection of its bid for award and a notice in writing shall be given to the other bidders, specifying the name and address of the proposed successful bidder and the price of the contract."

The delay to challenge a decision based under subsection 40(3) of the Act is prescribed in sub-section 40(4) as follows:

"In the absence of a challenge by any other bidder within 7 days of the date of the notice referred to in subsection (3); the contract shall be awarded to the successful bidder."

It is submitted that in a letter dated 18 March 2015, the Applicant was informed of the names of the three other companies which were shortlisted. Applicant was further invited to bid for the above project if there was no challenge on the part of any other applicant within 7 days from the date of the notification and after receiving AML Board approval.

There was no challenge forthcoming from any of the four bidders within the said delay of 7 days and it is submitted that the Applicant's application for review is outside the statutory delay the more so since the grounds for Applicant's review are based on the Prequalification Document bearing Ref: CPB/46/2014.

The argument of the Respondent is spurious, and does not stand. The Applicant has not challenged the results of the prequalification exercise, but the decision and declared intention of the Public Body to award to BCEG. At the time of prequalification, the Applicant had no means of knowing the intention of the Respondent in the application of the preference clause. This issue is therefore set aside.

From the Prequalification Report, an application for prequalification was received and retained from:

Applicant No.3 - Beijing Construction Engineering Group Co Ltd

A company is prequalified on the basis of its technical and financial capability and its experience. Applicant No 3, BCEG was incorporated in China, and its experience, on the basis of which it was prequalified, was acquired solely in China. It is clear therefore that the entity prequalified is not the local branch or the local office. Furthermore, the prequalification is not transferable.

The entity making the bid bore the same name, but gave its address as that of its "local office" in Quatre Bornes. However, the Power of Attorney empowering Mr Yue to sign the Bid, reproduced below, was given in China. It is clear therefore that, even if the bid was signed by the "*General Manager of BCEG in Mauritius*", the latter only did so on behalf of the Chinese entity.

In regard to the second issue above, therefore, the same entity which was prequalified also tendered for the project.

A Public Body may, in appropriate cases and subject to any regulations to that effect, confer an advantage or preference to domestic or regional goods, services or contractors in the case of open advertised bidding proceedings. This excerpt from section 16 (2) of the Public Procurement Act clearly shows that 1. The preference clause cannot be applied to non-domestic or regional contractors, and 2. The Public Body is under no obligation to apply the preference in case of doubt.

To allow a foreign contractor to benefit from the preference clause, solely on the basis that he will perform the contract through a local branch or office, and of his pious intentions of employing 80% local labour, defeats the purpose of the preference clause, and makes a mockery of Government's intentions.

Equally spurious is the pretext of supposed safeguard of public interest by accepting a guarantee from the Successful Bidder to ensure that he does employ the stated proportion of local labour during implementation. There is no provision in Law or in any of the established procedures for preference to be given against a guarantee. The Panel wishes to stress that there can be no adequate *a posteriori* redress if preference has been wrongly given to any entity.

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POWER OF ATTORNEY

Airport of Mauritius Co., LTD ,

I, the under-mentioned Mr. Dai Binbin, Chairman of the Board of Beijing Construction Engineering Group Co.,Ltd organized and existing under the laws of People's Republic of China and having its principal place of business in No.1 Guanglian Road, Xuanwu District, Beijing, the People's Republic of China (hereinafter referred to as the Company), is hereby appointing **Mr. Chen Yue** (Holder of Chinese Passport No. G32515895) to be my true and lawful attorney, and to act in my name and on my behalf towards signing all the documents related to the tender for the project of **Construction of One Aircraft Parking Stand No. 16 and Installation of Passenger Boarding Bridge on Stand 15AT SSR International Airport** and conduct all matters in connection with the above tender.

Whereas this authorization takes effect from the date of July 22, 2015 and shall remain valid till Jan. 18, 2016.

For and on Behalf of Beijing Construction Engineering Group Co., Ltd.

Authorized by

Dai Binbin

Chairman of BCEG

To be Authorized

Chen Yue

General Manager of BCEG in Mauritius

Section 35 of the Public Procurement Regulations, (1) and (2) states:

(1) *Where applicable, the financial evaluation stage shall involve the application of price preference in favour of domestically manufactured goods and domestic and foreign contractors and a regional price preference where the regional preference is applicable.*

(2) Any applicable preference shall be stated in the bidding document and shall be in accordance with directives issued by the Policy Office (amended as per G.N. No. 71 of 2008).

A preference is therefore given by increasing the bid of competitors by a percentage **for the purposes of evaluation only.** There is otherwise no pecuniary advantage given to the bidder accorded such preference. There is something inherently wrong in giving a preference, and thereafter relying on *a posteriori* audits and monitoring to ensure compliance with conditions which govern such preference. Either the conditions are present, and verifiable at the time of tender, in which case the bidder is entitled for a preference, or preference is not given, as there is no obligation on the Public Body to do so.

In the present case, the entity prequalified and invited to bid is not registered in Mauritius. It has been prequalified on the basis of experience, and financial status, not applicable to its Mauritian office or branch. Even if the intention is to perform the contract through a locally registered branch or office, whether such branch or office existed at the time of tender or not, the foreign entity making the bid is not entitled to a preference. Only the locally registered branch could have been entitled to such preference, but it was neither invited to bid nor prequalified. To be given a preference, it would have to be considered as a separate entity, and not as a branch of the Chinese company. To allow the local branch to perform the contract in lieu of the prequalified bidder, and then arguing that it is entitled to a preference, because it is registered in Mauritius, is equivalent to having the cake and eating it.

Also, the proportion of local labour cannot be assessed simply from pious intentions. If a bidder already employs a workforce where the proportion of local labour is 80% or more, then a simple statement of intent would be adequate. In all other cases, the bidder would have to show in a table or otherwise, on which tasks the local labour is to be deployed, and the number of man-hours for each task separated in local and foreign man-hours. The bidder BCEG has not done this.

It is therefore clear to the Panel that the bidder BCEG is not entitled to a preference. The Panel is also of the opinion that the reply of the Public Body to the challenge of the Applicant does not constitute a "decision" as per section 43 (4) of the Public Procurement Act, as it has failed to give reasons for its decision.

J. Decision

The Panel is of the view that the Public Body has gone out of its way to apply the preference to a foreign entity not entitled to it.

The Panel therefore orders the annulment decision of the Public Body to award to BCEG, and orders a re-evaluation of the bids for the reasons mentioned above.

(R. Laulloo)

Chairperson

(Mrs C. Sohun)

Member

(V. Mulloo)

Member

Dated 06 November 2015