

INDEPENDENT REVIEW PANEL

In the matter of:

Maxi Clean Co. Ltd

(Applicant)

v/s

**Ministry of Environment, Sustainable Development and Disaster and
Beach Management**

(Respondent)

(Cause No. 25/15/IRP)

Decision

A. History of the case

The Ministry of Environment, Sustainable Development, and Disaster and Beach Management invited bids on 31 August 2015, using the open advertised bidding method, for the contract "Operation and Maintenance of Poudre D'or Transfer Station and Transportation of Wastes to Mare Chicose Landfill." The procurement reference number was ENV/SWM/06/2015-2016. The deadline for submission of bids was fixed for Wednesday 30 September 2015 up to 13.30 hours (local time) at latest. Bids were to be received at the Ministry and the opening of bids was scheduled on the same day and at the same place at 14.00 hours in the presence of bidders who chose to attend.

On 04 September 2015, one aggrieved bidder, namely Maxiclean Co. Ltd filed a challenge to the Ministry. A reply to the challenge was sent by the Ministry to the aggrieved bidder on 11 September 2015.

Addenda No. 1 & 2 were posted on the Public Procurement Portal and sent by e-mail to all prospective bidders on 11 & 23 September 2015 respectively.

On Wednesday 30 September 2015, four bids were received at the Ministry. On 02 October 2015, two aggrieved bidders, namely Maxiclean Co. Ltd and Atics Ltd filed a challenge to the Ministry.

A reply to the challenge was sent by the Ministry to the aggrieved bidders on 09 October 2015. Maxiclean Co. Ltd, being dissatisfied with the decision of the Ministry, filed an appeal before the Independent Review Panel (IRP) on 15 October 2015.

B. The Challenges

On 04 September 2015, the Applicant challenged the tender proceedings being in disagreement with the procurement method adopted:

Challenging ITB 4.1 of Bidding Data Sheet: The bidding exercise method is Open Advertised Bidding

Maxi Clean Co Ltd contends that the bidding exercise method should be Open National Bidding instead of Open Advertised Bidding method for the reasons given in the Annex- Ground for Challenge

The Applicant offered the following grounds of Challenge:

It is Maxi Clean Co Ltd's contention that the bidding exercise method should be Open National Bidding instead of Open Advertised Bidding method for the following reasons:

1. There are enough local contractors in Solid Waste Management to participate in the present bidding exercise capable of executing similar projects in nature and complexity equivalent to the project concerned. The bidding method should be Open National Bidding to keep it for the local market.

2. The present bidding exercise is of a short duration, i.e. 6 months and the mobilisation period is only of 10 days: no international bidder can mobilize in such a short span of time.

3. The value of this bid of such duration will be so small as not to be profitable for a foreign company to bid.

4. The only international bidder for whom it will be profitable to participate in the present bidding exercise, Interwaste (Pty) Ltd who is already operating on the Mauritian Territory. It is to be noted that since Interwaste (pty) Ltd have started to participate in bidding exercises In Mauritius the Bidding Documents for the Operation and Maintenance of Transfer Stations have been altered to 'Open Advertised Bidding.

5. Interwaste (Pty) Ltd has been awarded the contract Operation and Maintenance of Roche Bois Transfer Station and Transportation of Wastes from Roche Bois Transfer Station to Mare Chicose Landfill CPB/53/2013

6. Interwaste (Pty) Ltd is operating in illegal conditions, in defiance of the public procurement directions and set rules of public procurement.

- Interwaste (Pty) ltd has subcontracted the Roche Bois Contract to a 100% to Interwaste {Mauritius} Ltd, an inexperienced newly created entity.

- Interwaste {Pty} Ltd is the subject of extensive litigation.

- *Interwaste (Pty) Ltd has been operating since 01 May 2014 at Roche Bois and has so far not mobilised the technical and human resources, personnel, logistics, vehicle's and specialized plant and equipment for waste management which such company should have.*

- *Interwaste (pty) Ltd is shamelessly exploiting private taxi lorries and lorry helpers in defiance of health and safety rules and regulations on place of work. This lack of health and safety measures has resulted in the death of a lorry helper on the Roche Bois Site on 27 May 2015.*

- *Interwaste (pty) Ltd is using Trailers with 2 axles instead of 3 axles at the Roche Bois transfer Station.*

- *Interwaste (Pty) Ltd is using Prime Movers 4X2 instead of Prime Movers 6X4 at the Roche Bois Transfer Station.*

- *These combination of using trailers with 2 axles draw by prime movers 4X2 carrying loads over 2 tons of waste is highly detrimental to our roads and with a high probability of being involved in road accidents.*

- *This illicit and illegal state of affairs has already been brought to the attention of the Public Procurement Office, Ministry of Financial Services and Good Governance as well as the Ministry of Environment, Sustainable Development, and Disaster and Beach Management.*

7. The present bidding exercise should be by Open National Bidding Method for the safeguard of our institutions involved in public procurement, to protect the local market, to maintain existing jobs and create new jobs and to ensure circulation of Government funds/investments ,within the country to prevent outflow of monetary resource and to prevent any repetition of the Roche Bois scenario leading to the exploitation of taxi lorries, helpers, the tax payer and the Mauritian government and public generally.

8. At a time when the Government is striving for creation of jobs an Open Advertised Bidding will only achieve the contrary.

In the Challenge dated 02 October 2015, the Applicant gave the following reasons for challenge:

Specific Act or Omission in relation to the procurement:

- a) Challenging the participation of Interwaste (Pty) ltd to the present procurement proceedings ENV / SWM/ 06/ 2015-2016*
- b) Challenging the bidding exercise method, the Open Advertised Bidding.*
- c) Challenging the lack of transparency of the procurement process at the level of the Public Body*

He further gave the grounds for this second Challenge as follows:

1. Under a) Challenging the participation Interwaste (Pty) Ltd to the present procurement proceedings ENV/ SWM/ 06/ 2015-2016

a. THE BIDDER MAXI CLEAN Co. LTD (herein after referred to as Maxi Clean) contends that the bidder Interwaste (Pty) Ltd should be debarred under s53(1)(a)&(d) of the Public Procurement Act.

b. Interwaste (Pty) Ltd should be disqualified from the present procurement exercise as it is not in conformity with the Companies Act as per tender requirement contained at ITB 4.1.

2. Under b) challenging the bidding exercise method, the Open Advertised Bidding.

a. Maxi Clean challenges ITB 4.1 and the Open Advertised Bidding method used in the present procurement for the following reasons which were also raised by way of Challenge on 04.09.15 Annex A:

1. There are enough local contractors in Solid Waste Management to participate in the present bidding exercise capable of executing similar projects in nature and complexity equivalent to the project concerned. The bidding method should be Open National Bidding to keep it for the local market.

2. *The present bidding exercise is of a short duration, i.e. 6 months and the mobilisation period is only of 10 days: no international bidder can mobilize in such a short span of time.*

3. *The value of this bid of such duration will be so small as not to be profitable for a foreign company to bid.*

4. *The only international bidder for whom it will be profitable to participate in the present bidding exercise is Interwaste (Pty) Ltd who is already operating on the Mauritian Territory. It is to be noted that since Interwaste (Pty) Ltd have started to participate in bidding exercises in Mauritius the Bidding Documents for the Operation and Maintenance of Transfer Stations have been altered to 'Open Advertised Bidding'.*

b. Although In its Reply dated 11 September 2015 (hereto annexed as Annex B) the Public Body averred, inter alia, that "The Ministry has opted for Open Advertised Bidding in order to allow more competition and all prospective bidders (whether local or overseas) will be considered on the same level playing field." In actual fact, at the Public Opening of the tenders which took place on 30 September 2015 at 14.00hrs there were four bidders: three locals, to wit, Maxi Clean Co Ltd at Rs.32,823,300.-, Atics Ltd at Rs.35,190,000.- and Sotravic Ltee at Rs.36,073,372.50cs; and inevitably only one "foreign" bidder Interwaste (pty) Ltd which is an allegedly South African company but which has been operating illegally through a local company Interwaste (Mauritius) Ltd which bid for Rs.20,355,000

c. Maxi Clean contends, can and will prove that Open Advertised Method has been purposefully resorted to so as to benefit solely to Interwaste (Pty) Ltd.

3. *Under c) challenging the lack of transparency of the procurement process at the level of the Public Body*

a. It is now a fact that the Open Advertised Method was successful in attracting only Interwaste (Pty) Ltd as Maxi Clean rightly brought to the attention of the Public Body through its Challenge dated 04.09.15 and set aside by the Public Body through its Reply dated 11.09.15.

b. The Public Body is aware for having awarded the contract and thereafter, as in duty bound, monitored the performance of the contract that:

(i) Interwaste (Pty) ltd has been awarded the contract Operation and Maintenance of Roche Bois Transfer Station and Transportation of Wastes from Roche Bois Transfer Station to Mare Chicose landfill CPB/53/2013

(ii) the contract Operation and Maintenance of Roche Bois Transfer Station and Transportation of Wastes from Roche Bois Transfer Station to Mare Chicose landfill CPB/53/2013 is in truth and fact being performed by Interwaste (Mauritius) Ltd

(iii) payment for the months of May, June and July 2014 has been effected to Interwaste (Mauritius) Ltd

c. The Public Body is also aware for being a party to all litigation involving Interwaste (Pty) ltd, more especially the case pending before the Independent Review Panel that:

(i) Interwaste (Pty) ltd is operating in illegally in Mauritius. in breach of the laws and regulations of public procurement:

(ii) Interwaste (Pty) ltd has subcontracted the Roche Bois Contract 100% to Interwaste (Mauritius) ltd, an inexperienced newly created entity.

(iii) Interwaste (Pty) ltd and Interwaste (Mauritius) ltd are two separate legal entities as per their respective shareholdings at Annex C Interwaste (Pty) ltd and Annex D Interwaste (Mauritius) ltd

(iv) The signatures of the company secretary Mr. Allen Stuart de Villiers as well as the seal of Interwaste (Pty) ltd vary significantly in different documents used creating a legitimate doubt that the signatures are not genuine. Samples of such varying signatures and seals are found at Annex E

(v) Interwaste (Pty) ltd has been operating since 01 May 2014 at Roche Bois and has so far not mobilised the technical and

human resources, personnel, logistics, vehicles and specialized plant and equipment for waste management which such a company should have.

(vi) Inter-waste (Pty) ltd is exploiting private taxi lorries and lorry helpers in breach of health and safety rules and regulations at place of work. This lack of health and safety measures has resulted in the death of a lorry helper on the Roche Bois Site on 27 May 2015.

(vii) Interwaste (Pty) ltd is using Trailers with 2 axles instead of 3 axles at the Roche Bois transfer Station. Interwaste (Pty) ltd is using Prime Movers 4X2 instead of Prime Movers 6X4 at the Roche Bois Transfer Station. These combinations of using trailers with 2 axles drawn by prime movers 4X2 carrying loads over 25 tons of waste is highly detrimental to our roads and with a high probability of being involved in road accidents. There has already been at least one accident.

(viii) This illicit and illegal state of affairs has already been brought to the attention of the Public Procurement Office however Interwaste (Pty) Ltd is still operating in the same manner with impunity.

d. It is the contention of Maxi Clean that the Public Body is deliberately refusing to give consideration to; the past performance of Interwaste (Pty) Ltd and the illegality of Interwaste (Pty) ltd's on the performance of the Roche Bois contract CPB/53/2013.

e. From its date of start of business in Mauritius on the Roche Bois Transfer Station on 01 May 2014 up to now Interwaste (pty) Ltd has not been in compliance with the provisions of the Companies Act:

(i) Interwaste (Pty) Ltd failed to register its local branch within one month from 01 May 2014, its start of business in Mauritius, as required by s276 of Companies Act Registration of Foreign Companies (Annex F)

(ii) Interwaste (Pty) Ltd registered its local branch in September 2014, only after Maxi Clean denounced Interwaste (Pty) Ltd's illegality. The application for the registration was

done by Mr. Shailendrasing Mohun using an illegal power of attorney (Annex G IRP Ruling 08.07.15) thus making the registration of the local branch of the foreign company Interwaste (Pty) Ltd illegal.

(iii) Interwaste (Pty) Ltd failed to file with the Registrar of Companies within 3 months from its annual shareholders' meeting a copy of its balance sheet and all relevant documents as required by s281 of the Companies Act - Balance Sheet (Annex H)

(iv) As per the website of Interwaste (Pty) Ltd www.interwaste.co.za its annual shareholders' meeting was held on 30 June 2015 after which it uploaded the annexed Integrated Report 2014 (Annex I) a soft copy thereof may be downloaded on this link: http://www.interwaste.co.za/contents_files/IntegratedReport_2014.pdf containing its audited accounts for year ending 31 December 2014. A close reading of this Annual Report reveals that Interwaste (Pty) Ltd does not acknowledge the existence of its local branch Interwaste (Pty) Ltd registered in Mauritius since it does not appear in the said Annual Report, however Interwaste (Mauritius) Ltd appears under the item related company at page 65 of the Integrated Report - Annex I .

(v) The audited accounts of Interwaste (Pty) Ltd do not mention the turnover from Mauritius operations. The illegally registered local branch of the foreign company Interwaste (Pty) Ltd is being run by the two appointed agents in Mauritius of Interwaste (Pty) Ltd, Messrs Shailendrasingh MOHON, who is a director of Interwaste (Mauritius) Ltd and Muhammad Mehboob KHADAROO to illegally run illegal operations and receive the payments. It is highlighted that Messrs Andreas Pieter BROODRYK and Jason James MCNEIL, directors of Interwaste (Pty) Ltd are also directors of Interwaste (Mauritius) Ltd.

C. The Replies to Challenges

On 11 September 2015, the Public Body made the following reply to the challenge of 04 September 2015:

The Ministry highlights the following:

(i) the Public Procurement Act allows for an open advertised bidding for the present bidding exercise and this is in line with paragraph 2(ii) of Circular No.4 of 2014 issued by the Procurement Policy Office on 11 February 2014 and which reads as follows:

"Public bodies may choose to open participation to all eligible and qualified suppliers (including overseas suppliers) for procurements with estimated value of Rs 200 million or less. The invitation to bid, or the invitation to prequalify shall be published in a national newspaper with wide circulation.

Furthermore, the invitation shall also be posted in the public procurement portal. Bids obtained from overseas suppliers shall be considered"

(ii) the Ministry has no preference, at this stage, for any national or international company for the award and implementation of the contract. The successful bidder will be identified only after the evaluation exercise is completed. The Ministry has opted for Open Advertised Bidding in order to allow more competition and all prospective bidders (whether local or overseas) will be considered on the same level playing field.

In regard to your grounds of appeal, please note that:

(a) items such as duration and mobilisation periods are matters of policy which are decided upon by the Ministry. It is for the potential bidder to decide whether to submit a bid or not;

(b) the award to any company of any contract pertaining to other transfer stations has no relevance to the present tender exercise. This tender exercise relates to a distinct and new contract; and

(c) by allowing for more competition, the Ministry is of the view that this will impact positively on the disbursement of public funds and is therefore beneficial.

In reply to the Challenge of 02 October 2015, the Public Body averred the following:

i) Challenge 1a.

Under the prevailing legislation, this Ministry is not in a position to debar a firm. It would also appear from your challenge dated 04 September 2015 from your company that you have already brought to the attention of the Procurement Policy Office (PPO), issues related to Interwaste (Pty) Ltd.

(ii) Challenge 1b.

The assessment of compliance to eligibility and qualifying criteria are effected at Bid Evaluation stage. The Ministry also reiterates its reply to the challenge dated 11 September 2015 from your company, more especially reply 2(ii) therein

(iii) Challenge 2a.

The Ministry notes that the issues raised in this ground have already been subject of an earlier challenge from Maxiclean Co. Ltd and a reply has been made by the Ministry on 11 September 2015. The Ministry further reiterates para. 2(i) of its reply dated 11 September 2015.

(iv) Challenge 2b.

As at the date of this letter, the Ministry is not in presence of any proven case of illegality against Interwaste (Pty) Ltd.

(v) Challenge 2c.

The Ministry denies that Open Advertised Method has been purposefully resorted to so as to benefit solely Interwaste (Pty) Ltd. The Invitation to Bid was posted on the Public Procurement Portal of the Government of Mauritius. As such, the process is fully transparent and allows competition in all fairness.

(vi) Challenge 3a.

The Ministry reiterates that the Public Procurement Act 2006 and the Standard Bidding Documents allow for an Open Advertised Bidding exercise, and this is in line with para.(2)(ii) of Circular No.4 of 2014 issued by the PPO. The Ministry further reiterates its reply to challenge 2c.

(vii) Challenge 3(b), 3(c), 3(d) & 3(e)

The above grounds of challenge refer to another contract and pertain to contract management issues; these are not relevant to the present procurement exercise. The present tender exercise relates to a distinct and new contract. The Ministry further states that there is a case pending before the Supreme Court (bearing Serial No.1579/14) in relation to the three-year contract of Operation and Maintenance of Poudre D'Or Transfer Station and Transportation of Wastes from Poudre D'Or Transfer Station to Mare Chicose Landfill - CPB/23/2014 lodged by Maxi Clean Co. Ltd. The Ministry reiterates its reply to challenge 2b and 2c.

Grounds for Review

On the 15 October 2015, the Applicant seized the Independent Review Panel for review on the following grounds:

1. The Ministry of Environment, Sustainable Development and Disaster and Beach Management (hereinafter referred to as 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:

a) that Interwaste (Pty) Ltd, has not been and still is not complying with the Companies Act as required by ITB 4.1 of BDS of the Bidding Documents;

b) that the Public Body was not justified in adopting the Open Advertised Bidding Method;

c) that the Open Advertised Bidding Method would and did in fact attract only one foreign entity: Interwaste (Pty) Ltd.

2. 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) established on a balance of probabilities the likelihood of Interwaste (Pty) Ltd replicating its past scenario;

d) established that Interwaste (Pty) Ltd, a foreign entity, is not respecting the Laws of Mauritius as well as the bidding process;

- e) established that Interwaste (Pty) Ltd is not a Law-abiding entity
- f) bring awareness to the Public Body about the fraudulent practices of Interwaste (Pty) Ltd
- g) bring awareness to the Public Body about the consistent lack of performance of Interwaste (Pty) Ltd which is the self-imposed benchmarking of Interwaste (Pty) Ltd for obtaining future contracts.

The Applicant has requested for the suspension of the bid evaluation exercise and the following relief:

1. Disqualification of the bidder Interwaste (Pty) Ltd:

a) under section 5 Qualification of the Bidder subsection 5.5 of Instructions to Bidders in the Bidding Documents:

"A consistent history of litigation or arbitration awards against the Applicant or any partner of a Joint Venture may result in disqualification ".

b) Under ITB 4.1 of BDS of the Bidding Documents compliance with the Companies Act (Laws of Mauritius)

2. Recommending an investigation on Interwaste (Pty) Ltd to the Procurement Policy Office for Section 3 of the Bidding Documents - Corrupt or Fraudulent Practices

The Applicant has asked for a Hearing with the Independent Review Panel for the following reasons:

A. For Oral submissions and arguments to be offered in support of the present statement of case since a delay of 7 days from the date of the reply is not adequate for the filing of a comprehensive Statement of Case inclusive of all submissions in Law ;

B. FOR THE FOLLOWING WITNESSES TO BE CALLED THROUGH THE PANEL TO ADDUCE EVIDENCE UNDER THE VARIOUS GROUNDS FOR REVIEW

- 1. The representative of the Registrar of Companies to show whether Interwaste (Pty) Ltd is compliant with the Companies Act;

2. Accountant General concerning Interwaste (Pty) Ltd

3. the representative of the Public body

D. Issues

There has been as yet no evaluation or award. The Applicant is contesting the validity of the bidding exercise and the participation of Interwaste (Pty) Ltd therein.

The first Challenge dated 04 September 2015 by Maxi Clean was not followed by an Application for Review, presumably because the Applicant was satisfied with the reply thereto from the Public Body. However, both the Challenge and the reply from the Public Body have been reproduced *in toto* above, and in reaching its Decision, the Panel has referred to all relevant information available to it and to the Applicant at the time of Application for Review.

E. Findings

The Panel met on 27 October 2015 and after deliberation, decided on the following:

Ground 1 a.

a) that Interwaste (Pty) Ltd, has not been and still is not complying with the Companies Act as required by ITB 4.1 of BDS of the Bidding Documents;

The Public Body has replied to a Challenge that it is not in presence of any proven case of illegality against Interwaste (Pty) Ltd. Furthermore, the Applicant has described Interwaste (Pty) Ltd as a foreign firm in his Application for Review and Challenge. The Applicant has failed to give any indication of the Acts or Omissions by which Interwaste (Pty) Ltd has contravened the Companies Act.

Ground 1 b & c.

b) that the Public Body was not justified in adopting the Open Advertised Bidding Method;

c) that the Open Advertised Bidding Method would and did in fact attract only one foreign entity: Interwaste (Pty) Ltd.

The Public Body has replied that it was entitled under the Public Procurement Act to use that method of procurement. The Ministry could not foresee at the time of launching the tender that only one foreign bidder would be interested.

This method of bidding allows for more competition and more competitive prices from local tenderers from the mere fact that the latter cannot predict the number of foreign tenderers, nor their profit margins, whereas even without cartelisation, local contractors are more or less familiar with each other's methods of pricing. Without competition, or the threat of competition from outside, prices would tend to go up. The Ministry was therefore right in adopting the Open Advertised Bidding method.

Ground 2 a. b. & c.

2. 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) established on a balance of probabilities the likelihood of Interwaste (Pty) Ltd replicating its past scenario;

There has been as yet no proven case of fraud or fraudulent practice against Interwaste (Pty) Ltd. The Applicant has made various allegations at various *fora*, but has not established, in this Application for Review or elsewhere that Interwaste (Pty) Ltd is still resorting to what the Applicant calls fraudulent practice, and that he intends to resort to the same practice in any new contract. Lastly, bids have not been evaluated, and there is no indication that the Public Body would not take all material information in consideration at the time of evaluation.

2 d. to g.

d) established that Interwaste (Pty) Ltd, a foreign entity, is not respecting the Laws of Mauritius as well as the bidding process;

e) established that Interwaste (Pty) Ltd is not a Law-abiding entity

f) bring awareness to the Public Body about the fraudulent practices of Interwaste (Pty) Ltd

g) bring awareness to the Public Body about the consistent lack of performance of Interwaste (Pty) Ltd which is the self-imposed benchmarking of Interwaste (Pty) Ltd for obtaining future contracts.

The Challenge has not established any of the averments above. The findings in regard to grounds 2 a. b. & c. are reiterated.

The Applicant has further requested that Interwaste (Pty) Ltd be disqualified because of "*A consistent history of litigation or arbitration awards against the Applicant or any partner of a Joint Venture may result in disqualification*".

The Applicant has here again failed to cite the concrete cases of litigation or arbitration in which Interwaste (Pty) Ltd is involved. The only such cases of which the Panel is aware are those instigated by the Applicant, which would tend to show that the latter has an equivalent or superior number of such cases.

The Applicant has also made other requests and allegations all of which are not within the power of the Panel to grant or investigate. The Panel also has no power of *subpoena* and the Applicant cannot rely on the Panel to call for witnesses so as to obtain information to prove his averments.

F. Decision

The Public Body has adequately replied to the Challenge of the Applicant. This Application for Review is not supported by any evidence or proven facts.

For the above reasons, the Panel has found that this Application for Review is frivolous, and hereby sets it aside.

(R. Laulloo)
Chairperson

(Mrs C. Sohun)
Member

(V. Mulloo)
Member

Dated 30 November 2015