

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 No. 37/14/IRP)

Decision

A. History of the case

Project Description: Cleaning of Public Beaches (Lot 2, Lot 3 and Lot 5)

Procuring Entity: Ministry of Local Government & Outer Islands

Updated Cost Estimate (lot wise):

- Lot 2 – Rs 22,569,507.00 inclusive of VAT
- Lot 3 – Rs 29,627,483.00 inclusive of VAT
- Lot 5 – Rs 17,864,190.00 inclusive of VAT

Contract number: CPB/26/2014

Contract Description: Cleaning of Public Beaches (Lot 2, Lot 3 and Lot 5)

Method of Procurement: Open National Bidding

Margin of Preference if applicable: Domestic – N/A SMEs – N/A

The Ministry of Local Government & Outer Islands (MOLG) has on 02 July 2014 invited bids through Open National Bidding from local bidders registered with the Ministry of Local Government & Outer Islands as Scavenging Contractors for the purpose of the Contract pertaining to Cleaning of Public Beaches.

The Scope of Services comprise mainly of the following:

1. Daily Cleaning
2. Daily carting away of wastes
3. Mowing and cutting grassed areas
4. Lopping and Pruning of branches
5. Cutting and removal of stumps
6. Levelling of depressions, holes and furrows
7. Maintenance of litter bins
8. Burial of corals
9. Burial of seaweeds or carting away to designated area
10. Collection and Carting of Post Cyclonic wastes following instructions from Employer

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The objective is to keep the areas within each public beach and the amenities under the Contract clean at all times.

Each lot consists of several beaches.

The closing date for the submission of bids was fixed for Thursday 07th August 2014 up to 13.30 hours at latest at the Central Procurement Board (CPB).

Seven bids were received and a Public Opening was carried out on the same day at 14.00 hours in the Conference Room at the CPB.

Bids were received from seven bidders namely:

- (i) Mauriclean Ltd
- (ii) Maxiclean Co Ltd
- (iii) B.National Cleaning Services
- (iv) Compagnie Régionale de Services et de L'Environnement Ltée (CRSE Ltee)
- (v) Atics Ltd
- (vi) Securiclean (Mtius) Ltd
- (vii) Norba Nettoyage Ltée

A copy of the bid prices as read out by the CPB is given at Table below:

Bidder	Lot 2	Lot 3	Lot 5	Total (Rs)
	Bid Amount after Discount Inclusive of VAT for 36 Months (Rs)	Bid Amount after Discount Inclusive of VAT for 36 Months (Rs)	Bid Amount after Discount Inclusive of VAT for 36 Months (Rs)	
Mauriclean Ltd	17,999,800.00	21,725,800.00	-	39,725,600.00
Maxiclean Co Ltd	16,566,946.00	16,566,946.00	9,366,658.00	42,500,550.00
B. National Cleaning Services	12,789,610.00	17,360,170.00	9,448,630.00	39,598,410.00
CRSE Ltée	23,500,000.00	27,600,000.00	11,615,000.00	62,715,000.00
Atics Ltd	24,150,000.00	28,175,000.00	14,145,000.00	66,470,000.00
Securiclean (Mauritius) Limited	13,659,792.00	18,735,984.00	10,443,610.00	42,839,386.00
Norba Nettoyage Ltée	12,535,000.00	16,882,000.00	9,430,000.00	38,847,000.00

B. Evaluation

The Bid Evaluation Committee was composed as follows:

Mr. N. Langur	Chief Health Inspector, District Council of Riviere du Rempart- (Chairperson)
Mr. G.S. Boodiah	Chief Procurement and Supply Officer, Ministry of Finance – (Member and registered evaluator)
Mrs.S. Ramracheya	Civil Engineer, Ministry of Local Government and Outer Islands – (Member and registered evaluator)
Mr. M. Rene	Technical Officer, Ministry of Local Government and Outer Islands (acting as Secretary)

In its examination of completeness of bids, the Bid Evaluation Committee noted *inter alia* that:

Securiclean (Mauritius) Ltd.

ITB 5.3(g) – Audited accounts for the last three years

Securiclean (Mtius) Ltd submitted its audited accounts for the year 2010, 2011 and 2012. The BEC through the CPB requested the company to submit its audited account for the year 2013 and same was submitted on 20 August 2014.

It is noted that these accounts were prepared and filed before the date of tender, and therefore acceptable. Furthermore, the Company Securiclean made a loss of MUR 16.8 million for the year 2013, after incurring losses after tax of MUR 28.3 million in 2012. The Bid Evaluation Committee, however, did not make any comments on those financial statements, probably considering that the mere fact of submission meets the requirements of the tender, missing the point that financial statements are required for a purpose.

In respect of availability of liquid assets, and/or access to credit facilities, the Bid Evaluation Committee had this to say:

ITB 5.5(e) - Liquid assets/credit facilities – Bidder to submit documentary evidence from its Auditor for Liquid Assets and/or certificate in original from a Commercial Bank with respect to credit facilities

All bidders have submitted a bank statement to confirm that they have the financial guarantee and resources for the proper execution of different lots.

All bidders met with the qualifying criteria as per ITB 5.5(e).

The Bid Evaluation Committee considered that the following bidders were responsive and eligible to be qualified for award of contract:

- Maxi Clean Co Ltd
- Compagnie Regionale de Services et de l'Environnement Ltee (CRSE Ltee)
- Atics Ltd
- Securiclean (Mauritius) Ltd;
- Norba Nettoyage Ltd

After financial evaluation, the Bid Evaluation Committee, in its first report made the following recommendations for award:

<i>Lot No</i>	<i>Contractor</i>	<i>Amount inclusive of VAT</i>
2	<i>Norba Nettoyage Ltee</i>	<i>12,535,000.00</i>
3	<i>Maxiclean Co Ltd</i>	<i>16,566,946.00</i>
5	<i>Maxiclean Co Ltd</i>	<i>9,366,658.00</i>

On 11th September 2014, the Bid Evaluation Committee submitted a second report for the following reason:

The BEC was convened by the CPB on 11 September 2014 to review its report in line of new elements concerning financial accounts of the bidder Norba Nettoyage Ltée obtained from the Registrar of Companies (Annex). The BEC was apprised that this Bidder had not filed its financial accounts for the year ending June 2013 and 2014 with the Registrar of Companies as per ITB 5.3(g). The BEC undertook to review its report by considering

financial accounts received from the Registrar of Companies for the years ending June 2010, 2011 and 2012.

It concluded that: The attempt of Norba Nettoyage Ltée to misguide/mislead the Bid Evaluation exercise is deplored and the BEC recommends that serious actions be taken against this bidder.

In the light of all observations and comments, the BEC recommends to retain the following lowest evaluated bids for lot 2, lot 3 and lot 5 as shown below:

<i>Lot No</i>	<i>Contractor</i>	<i>Amount inclusive of VAT</i>
<i>2</i>	<i>Securiclean (Mtius) Ltd</i>	<i>13,659,792.00</i>
<i>3</i>	<i>Maxiclean Co Ltd</i>	<i>16,566,946.00</i>
<i>5</i>	<i>Maxiclean Co Ltd</i>	<i>9,366,658.00</i>

However, the matter was not to end there. The Bid Evaluation Committee made yet another report on 18th September 2014 to review the Bank Testimonial submitted by the Bidder Securiclean (Mtius) Ltd, the issue being that the testimonial provided by the MPCB Ltd shows a lack of commitment on behalf of the bank as it makes mention of the wordings ‘Are of the opinion that the firm’ while testimonials for the other bidders submitted by MCB Ltd has the wordings ‘certifies that the firm’.

In this latest instalment to the long standing saga, the Bid Evaluation Committee noted that As per ITB 5.5 (a), bidders were required to submit “The minimum required average annual financial amount of cleaning/scavenging services over last three years shall be at least 40 % of the annual contract amount for the lot(s) to be allocated” This exercise has been carried out and although the financial accounts of the bidder Securiclean (Mtius) Ltd show losses over the last three years, however in accordance with ITB 5.5 (a) Securiclean (Mtius) Ltd has complied to this requirement as shown in Evaluation Report dated 26 August 2014.

As per ITB 5.5(e), the bidder was required to “submit documentary evidence from its Auditor for Liquid Assets and/or certificate in original from a Commercial Bank with respect to credit facilities as per table below mentioning the name of the Project and CPB Reference”. The BEC has thus evaluated the bid of Securiclean (Mtius) Ltd in accordance with this

ITB and Securiclean (Mtius) Ltd has been found to be fully compliant to this ITB as its testimonial clearly mentions the name of the Project, the CPB Reference and access to credit facilities as per table mentioned at ITB 5.5 (e). While providing for the testimonial, banks were not required to certify that the firm has the financial means to execute the project. Furthermore, although the words “Are of the opinion that” appear on the testimonial, the Committee feels that the credit facilities and liquid assets are exclusively meant for the execution of the said contract.

It is to be noted that there is no prescribed form or wordings for Bank Testimonials and bidders were only required to comply to ITB 5.5 (e). The wordings ‘Are of the opinion that’ therefore cannot be interpreted as a major deviation from the bid requirement.

It is also to be pointed out that all testimonials submitted by the bidders have a disclaimer having the same interpretation as follows:

For MPCB Ltd

‘This testimonial is based on available information and without in any way engaging the liability of the Bank or any officers..’

For MCB Ltd

‘The above testimonial is given without any liability or responsibility on the part of the Bank or any of its officers’.

Therefore, whether the Bank has certified the testimonial or expressed an opinion, in both cases the contents of the disclaimer is similar and one bank cannot be dissociated from the other.

Furthermore, this bidder has been using the same format of bank testimonial with exactly the same wordings “are of the opinion that” over the past seven years for bids, made by the Securiclean (Mtius) Ltd, which have been successful and accepted by different Employers (Ministry Of Local Government & Outer Islands, Local Authorities etc). The BEC also wishes to refer to Decision Nos 17/ 14, 18/ 14 and 19/ 14 available on the PPO’s website, [www.gov.mu/English/Independent Review Panel/Pages/Decisions-2014.aspx](http://www.gov.mu/English/Independent_Review_Panel/Pages/Decisions-2014.aspx), whereby the IRP clearly points out “that drafting/wording, which is more a question of form than anything else, cannot per se be interpreted as a major deviation from the bid requirement, moreso, as in this case, no prescribed form is available”. The

same reasoning is being used for this case also where the BEC feels that the wordings in the testimonial cannot be interpreted as a major deviation as they do not have any bearing on the competitive position of other substantially responsive bidders.

The Bid Evaluation Committee therefore maintained its recommendation for Lot 2 and other lots.

C. Notification of award

The Ministry of Local Government & Outer Islands through a letter dated 27 October 2014, informed the Applicant of the particulars of the successful bidder for Lot 2 as follows:

<i>Lot No.</i>	<i>Beaches</i>	<i>Bidder</i>	<i>Address</i>	<i>Contract Price for a period of 36 months inclusive of VAT</i> <i>Rs</i>
2	<i>Poste Lafayette (near Toilet Block), Bras D'Eau, Palmar (near Surcouf), Quatre Cocos Village, Trou D'Eau Douce (main beach), Pte des bambous, Bois Des Amourettes, Providence</i>	<i>Securiclean (Mtius) Ltd</i>	<i>La Chaumiere St Martin Bambous</i>	<i>13,659,792</i>

D. The Challenge

On 31 October 2014, the Applicant challenged the award on the following grounds:

- “1. The Bid Proposal submitted by Securiclean (Mauritius) Ltd to whom the contract is to be awarded, does not comply with the requirements of the Tender Documents.*

- 2. Securiclean (Mauritius) Ltd has failed to supply a certificate of its liquid assets/credit facilities as per ITB 5.5(e) which states as follows:*

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Liquid assets/credit facilities – Bidder to submit documentary evidence from its Auditor for Liquid Assets and/or certificate in original from a Commercial Bank with respect to credit facilities as per table below mentioning the name of the Project and the CPB Reference:

<i>Eligible for award of</i>	<i>Amount of liquid asset and/or credit facilities required (Rs)</i>
<i>Lot 2</i>	<i>1,700,000</i>
<i>Lot 3</i>	<i>2,400,000</i>
<i>Lot 5</i>	<i>1,400,000</i>

- 3. The bank document which Securiclean (Mauritius) Ltd has been using in all its bids is an opinion issued by its Bank complacently to help out its client: it is not a certificate but merely an opinion and does not reflect the financial realities of Securiclean (Mauritius) Ltd which are known to the Bank.*
- 4. The complacency of the Bank is further highlighted by the fact that the Bank has persistently given such opinion in the attached list of tenders totalling Rs38,204,000.*
- 5. The Public Procurement Office has issued Directive No. 18 on 22 October 2014 as an Explanatory Note to Directive No. 3 to impress upon all involved in tenders the importance of the Bank Certificate.*
- 6. Directive No. 18 leaves no doubt as to the importance of the Bank Certificate, it cannot be an opinion, it is a certificate and the words certificate and certified have been used on purpose. Shortcoming cannot be cured and “the inadequacy is considered a major deviation”.*
- 7. Directive no. 18 removes all remnants of doubt concerning the importance of the Bank Certificate and paragraph 1 of such Directive clearly states “failure to submit these major supporting documents required by the bidding document to determine substantial*

responsiveness of a bid are justifiable grounds for the rejection of bids”.

8. *As per the audited of Securiclean (Mauritius) Ltd contained in its file at the Registrar of Companies Securiclean (Mauritius) Ltd has been insolvent since 2010.*
9. *Securiclean (Mauritius) Ltd’s own auditor has expressed reservations as follows:*

“Emphasis of Matter

Without qualifying our opinion, we draw attention to page 5 in the financial statements which indicates that the Company (Securiclean (Mauritius) Ltd) incurred a net loss of Rs16,882,289 during the year ended 31 December 2013 and, as of that date the Company’s current liabilities exceeded its total assets by Rs30,635,119. These conditions, along with their matters as set forth in Note 16, indicate existence of a material uncertainty that may cast significant doubt about the Company’s ability to continue as a going concern”.

a. Going Concern Risk

The future of the Company depends on the continuous financial support of the banks and shareholders.

10. *Securiclean (Mauritius) Ltd has numerous charges on its assets as revealed by searches carried out at the office of the Conservator of Mortgages.*
11. *It is the aggrieved party’s contention that in view of all the above Securiclean (Mauritius) Ltd does not qualify to bid and the contract cannot be allocated to it.*
12. *It is also the aggrieved party’s contention that in the circumstances the bid of Securiclean (Mauritius) Ltd should have been rejected.”*

E. The Reply to Challenge

On 05 November 2014, the Public Body made the following reply to the challenge:

“ITB 5.5(e) of the bidding document stipulates that:

“To qualify for award of the Contract, bidders shall meet the following minimum qualifying criteria: liquid assets and/or credit facilities, net of other contractual commitments and exclusive of any advance payments which may be made under the Contract, of no less than the amount specified in the BDS”.

In the Bidding data Sheet (BDS) ITB 5.5(e) stipulates that:

“Liquid assets/credit facilities – Bidder to submit documentary evidence from its Auditor for Liquid Assets and/or certificate in original from a Commercial Bank with respect to credit facilities as per table below mentioning the name of the project and CPB Reference:

<i>Eligible for award of</i>	<i>Amount of liquid asset and/or credit facilities required (Rs)</i>
<i>Lot 2</i>	<i>1,700,000</i>

Securiclean (Mauritius) Limited has submitted an original Bank Testimonial stating that the company has the minimum amount of liquid assets and/or credit facilities, net of other contractual commitments for the proper execution of the said contract up to an amount MUR 1,700,000.00 (Rupees One Million and seven hundred thousand only).

You may further note that clause 3 under the Explanatory Note to Directive No. 3, Directive No. 18 from the Procurement Policy Office dated 22 October 2014 reads as follows:

“The concept of the net in “liquid assets/or credit facilities, net of other contractual commitments” is an accountancy terminology introduced in SBD’s as a standard measure for assessing the adequacy of the bidder’s cash flow to execute the specific contract as certified by his banker.”

In the light of the above the Bank Testimonial submitted by Securiclean (Mauritius) Limited meets the requirements of Clause 5.5(e) of the bidding documents.”

F. Grounds for Review

On 10 November 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, was wrong to have rejected the Applicant’s challenge especially after the issue by the Public Procurement Office of Directive no. 18.*
2. *The reasons put forward by the Public Body to justify rejecting the Applicant’s challenge are all wrong for the following reasons:*

(i) The bank testimonial submitted by Securiclean (Mauritius) Ltd is not in compliance with and/or does not meet the qualifying requirements under clauses of bidding document CPB/26/2014

(a) Section I Instructions to Bidders clause 5.3(h) on page 8 of the bidding document CPB/26/2014 – The clause stipulates that a bidder shall provide “evidence of adequacy of cash-flow for this Contract (access to line(s) of credit and availability of other financial resources)”

(b) Section II Bidding Data sheet ITB clause 5.5(e) on page 26 of the bidding document CPB/26/2014 – The clause stated that a bidder shall submit “documentary evidence from its Auditor for Liquid assets and/or certificate in original from a Commercial Bank with respect to credit facilities as per table below mentioning the name of the Project and CPB Reference”.

<i>Eligible for Award</i>	<i>Amount of liquid asset and/or credit facilities required (Rs)</i>
<i>Lot 2</i>	<i>1,700,000</i>
<i>Lot 3</i>	<i>2,400,000</i>
<i>Lot 5</i>	<i>1,400,000</i>

(c) Section Qualification Information – paragraph 1.8 on page page 35 of the bidding document CPB/26/2014 – The clause requires a bidder to produce “Evidence of access to financial resources to

meet the qualification requirements: cash in hand, lines of credit.”

- (ii) The document which the Public Body refers to as a testimonial is in fact a mere “opinion” and cannot be tantamount to a “testimonial” as misleadingly averred by the Public Body;*
 - (iii) The documents submitted by the Applicant in support of its challenge clearly establish that the bidder Securiclean (Mauritius) Ltd has been insolvent since 2010 and cannot qualify to bid, let alone being allocated a contract.*
3. *The Applicant avers that the Public Body is acting without any consistency and against the principles of good governance in as much as twice on 25 April 2014 and once on 06 May 2014 the Public Body has stated with regard to the bidder Securiclean (Mauritius) Ltd as follows:*

“ITB 6.5(e) of the bidding documents stipulates that “to qualify for award of Contract, bidders shall meet the following qualifying criteria: liquid assets and/or credit facilities, net of other contractual commitments as per the amount stated for each lot in the BDS in respect of lots for which the bidder I selected for award of contract.”

In the Bidding Data Sheet (BDS) ITB 6.5(e) stipulates that inter alia that “the bidder should have secured a credit facilities and/or liquid assets net of other contractual commitments for at least the amount as indicated for the lot(s) in Section VI – Table 2 to be qualified for award of contract.

Evidence in the form of Original Bank Testimonial dated not more than 1 month from date of submission of bids shall be submitted. The Bank Testimonial shall be on the letter head of the Bank, clearly mentioning the name of Bidder, refer to the present procurement exercise and stipulate the amount of financial resources/credit facilities that can be made available to the bidder”.

Securiclean (Mauritius) Ltd has submitted an original bank testimonial in which the bank opines that the company has the credit facilities and liquid assets for the proper execution of the above contract for a minimum liquid asset and/or credit facilities of MUR

3,600,000, MUR 1,200,000 and MUR 1,500,000 for Lot 1, Lot 2, and Lot 3 respectively (the figures change as per the tender). However, it did not specify whether the amounts are net of other contractual commitments. Moreover the fact that the bank has only given its opinion instead of certifying or testifying that the amount of financial resources/credit facilities that can be made available to the bidder is a major departure from the requirements of ITB 6.5(e); and you may further note that clause (iv) under the guidelines for the determination of responsiveness of bids of directive no. 3 from the Procurement Policy Office dated 30 April 2010 list the grounds for rejection of a bid and Clause (iv)(k) reads as follows:

“failure to submit major supporting documents required by the bidding documents to determine substantial responsiveness of a bid (e.g. evidence of adequacy of working capital if so required in the bidding document)”.

The Bank Testimonial submitted by Securiclean (Mauritius) Ltd fell short of meeting the requirements of the bidding process, thus not being acceptable as presently drawn. This omission on the part of the bidder being a major deviation cannot be cured through clarification at the evaluation stage.”

4. When rejecting the Applicant’s challenge the Public Body has failed to give any reason or rationale for departing from its administrative and/or legal reasoning as set down above.
5. The Bid Proposal submitted by Securiclean (Mauritius) Ltd to whom the contract is to be awarded, does not comply with the requirements of the Tender Documents.
6. The bank document which Securiclean (Mauritius) Ltd has been using in all its bids is an opinion issued by its Bank complacently to help out its client: it is not a certificate but merely an opinion and does not reflect the financial realities of Securiclean (Mauritius) Ltd which are known to the Bank.
7. The complacency of the Bank is further highlighted by the fact that the Bank has persistently given such opinion in the attached list of tenders totalling Rs38,204,000.

8. *The Public Procurement Office has issued Directive No. 18 on 22 October 2014 as an Explanatory Note to Directive No. 3 to impress upon all involved in tenders the importance of the Bank Certificate.*
9. *Directive No. 18 leaves no doubt as to the importance of the Bank Certificate, it cannot be an opinion, it is a certificate and the words “certificate” and “certified” have been used on purpose. Shortcoming cannot be cured and “the inadequacy is considered a major deviation”.*
10. *Directive No. 18 removes all remnants of doubt concerning the importance of the Bank Certificate and paragraph 1 of such Directive clearly states that “failure to submit these major supporting documents required by the bidding document to determine substantial responsiveness of a bid Are justifiable grounds for the rejection of bids”.*
11. *As per the audited accounts of Securiclean (Mauritius) Ltd filed with the Registrar of Companies Securiclean (Mauritius) Ltd has been insolvent since 2010.*
12. *Securiclean (Mauritius) Ltd’s own auditor has expressed reservations as follows:*

a. “Emphasis of Matter

Without qualifying our opinion, we draw attention to page 5 in the financial statements which indicates that the Company (Securiclean (Mauritius) Ltd) incurred a net loss of Rs16,882,289 during the year ended 31 December 2013 and, as of that date the Company’s current liabilities exceeded its total assets by Rs30,635,119. These conditions, along with the matters as set forth in Note 16, indicate the existence of a material uncertainty that may cast significant doubt about the Company’s ability to continue as a going concern”.

b. Going Concern Risk

The future of the Company depends on the continuous financial support of the banks and shareholders.

13. *Securiclean (Mauritius) Ltd has numerous charges on its assets as revealed by searches carried out at the office of the Conservator of Mortgages.*
14. *It is the aggrieved party's contention that in view of all the above Securiclean (Mauritius) Ltd does not qualify to bid and the contract cannot be allocated to it.*
15. *It is also the aggrieved party's contention that in the circumstances the bid of Securiclean (Mauritius) Ltd should have been rejected."*

G. The Hearing

Hearings were held on 23 April, 28 April, 16 June, 02 July, 21 July, 18 August and 10 November 2015. Written submissions were made on 06 August, 21 August, 23 November 2015 and 13 July, 12 August 2015 by Applicant and Respondent respectively. Written Submissions from successful bidder was made on 14 August 2015.

The Applicant was represented by Mr Y. Mohamed, Senior Counsel together with Mrs A. Jeewa, Attorney whereas the Respondent were represented by N. K. Reddy, Ag. Principal State Counsel together with Mr D. Bissessur, State Counsel. The successful bidder was represented by Mr S. Servansingh, Counsel.

H. Issues

The issue before the Panel, and canvassed by the Applicant and the Respondent in written and oral submissions, is simply whether the Successful Bidder has the necessary liquid assets and/or access to credit facilities, as per the terms of tender, to meet its obligations were it to be awarded Lot 2 of the present tender. A tributary issue is whether documents submitted with and as part of the Successful Bidder's tender, and other documents submitted during Clarification are adequate with regard to the terms of tender to show that it had the necessary liquid assets and/or access to credit facilities.

I. Findings

the Bid Evaluation Committee noted in its last report that *As per ITB 5.5 (a), bidders were required to submit "The minimum required average annual financial amount of cleaning/scavenging services over last three*

years shall be at least 40 % of the annual contract amount for the lot(s) to be allocated” This exercise has been carried out and although the financial accounts of the bidder Securiclean (Mtius) Ltd show losses over the last three years, however in accordance with ITB 5.5 (a) Securiclean (Mtius) Ltd has complied to this requirement as shown in Evaluation Report dated 26 August 2014. The only information extracted by the Bid Evaluation Committee from the financial statements is the turn over, which it found adequate. The Bid Evaluation Committee found irrelevant the fact that these statements show that Securiclean has incurred heavy losses during the three previous years.

Also, in the same report, the Bid Evaluation Committee further stated that: While providing for the testimonial, banks were not required to certify that the firm has the financial means to execute the project. Furthermore, although the words “Are of the opinion that” appear on the testimonial, the Committee feels that the credit facilities and liquid assets are exclusively meant for the execution of the said contract.

It is to be noted that there is no prescribed form or wordings for Bank Testimonials and bidders were only required to comply to ITB 5.5 (e). The wordings ‘Are of the opinion that’ therefore cannot be interpreted as a major deviation from the bid requirement.

It is also to be pointed out that all testimonials submitted by the bidders have a disclaimer having the same interpretation...

The Bid Evaluation Committee does not deny that the wording of the bank testimonial constitutes a deviation, but only asserts that it does not constitute a “major deviation”. At the risk of stating the obvious, the Panel wishes to highlight that minor deviations need to be clarified.

Furthermore, the Bid Evaluation Committee has read more into the disclaimer which appears in the bank testimonials/certificates given to all bidders than what is warranted. It cannot be expected that banks would, if asked, give the time or comment about the weather without at the same time issuing a disclaimer. It would seem that the Bid Evaluation Committee believes that all bank testimonials/certificates would have the same value, because of this disclaimer, whatever be the wording, so long as the requisite information such as the name of the project or the amount liquid assets and/or credit facilities appear in the testimonial. This view of the Bid Evaluation Committee is further reinforced by the

fact that the Public Body has not specified any specific wording for bank testimonials/certificate in the bidding documents.

The Panel does not agree with this view. A certificate issued by a bank to its client in respect of liquid assets and more specifically access to credit facilities does imply moral responsibility and obligation on the bank *vis à vis* its client, and in so doing, the bank does engage its reputation. If this is the case, then the moral responsibility and obligation, and the bank's engagement of its reputation are stronger in the case of a bank certifying "that the bidder has a minimum amount of liquid assets and/or credit facilities.....," as compared to one issuing a testimonial that it is of opinion "that the bidder has a minimum amount of liquid assets and/or credit facilities.....,".

The fact that the same bank had issued the same testimonials to the same bidder in the past is of no relevance. The real test would have been to verify if the bank issues or has issued "testimonials" with the same wording to other bidders having a healthier financial standing. This, the Public Body and the Bid Evaluation Committee failed to do.

In a Judgement dated 11th September 2015, in the case of Securiclean (Mauritius) Ltd v/s The Ministry of Local Government and OI, and The CPB, the Supreme Court agreed *inter alia* that the bank giving only an opinion instead of certifying or testifying that the amount of financial resources/credit facilities that can be made available to the bidder is not in conformity with the tender specification. It is perhaps apposite to mention here that the above mentioned Judgement refers to an application for leave to apply for Judicial Review of the Decision of the Public Body and the CPB taken in 2013, where the Ministry of Local Government etc. and the CPB in fact held that *the bank giving only an opinion instead of certifying or testifying that the amount of financial resources/credit facilities that can be made available to the bidder is a major departure from the requirements of ITB 6.5 (e)*. The Applicant is right in pointing out the lack of consistency of the Public Body.

However, the Panel does not agree with the Applicant that this departure should automatically eliminate Securiclean from further participation in the evaluation, and that the award should have been made to the Applicant. In the Panel's view, this departure in wording could have been clarified, and the tenderer be given a chance to obtain from the bank a testimonial/certificate with the correct wording, should the latter be

willing to do so. The fact that the Successful Bidder has made heavy losses during the three preceding years would not affect its performance of the contract if it has access to adequate credit facilities, should a bank be willing to grant such facilities. As it is, the failure of the Successful Bidder to submit with his tender an adequately worded bank testimonial/certificate is not just a matter of semantics, as averred by the Counsel for the Successful Bidder, but leaves the evaluators in the dark as to how to interpret the wording in the testimonial submitted. The Bid Evaluation Committee chose to simply ignore the difference in wording. The Public Body and the CPB, most astonishingly, chose to agree with the Bid Evaluation Committee, against their own views expressed in three other tenders the year before.

Instead, the Bid Evaluation Committee, the Public Body and CPB should have adopted one of two possible courses of action. They could have considered that the failure of the Successful Bidder to submit a bank certificate/testimonial that constitutes a definite engagement of the bank's reputation, and a definite moral commitment to its client, is a material and therefore fatal deviation. Or, it could have sought clarification on the terms "is of opinion", considering then that the deviation is minor. In Directive No 3, the PPO has laid down the rules to distinguish between material and minor deviations:

A substantially responsive bid is one that meets the requirements of the Bidding Document without material deviation, reservation, or omission. A material deviation, reservation, or omission is one that,

- (a) if accepted, would:*
 - (i) affect in any substantial way the scope, quality, or performance of the Works specified in the Contract; or*
 - (ii) limit in any substantial way, inconsistent with the Bidding Document, the Employer's rights or the Bidder's obligations under the proposed Contract; or*
- (b) if rectified, would unfairly affect the competitive position of other Bidders presenting substantially responsive bids.*

In the opinion of the Panel, a reputable bank would not seek to alter the meaning and intent of any testimonial it has issued before the date of

tender, and therefore seeking clarification would have been in order. However, this avenue is no longer available, as the finances of the Successful Bidder would have undergone substantial changes, for better or for worse, since the tender.

J. Decision

For the above reasons, the Panel therefore finds that there is merit in the Application, and orders the annulment of the Decision of the Public Body to award lot 2 to Securiclean (Mauritius) Ltd. The Panel also recommends that bidding documents for all tenders should incorporate a format/template for the bank certificate/testimonial, and adequate post qualification criteria in regard to financial performance.

(R. Lulloo)
Chairperson

(Mrs C. Sohun)
Member

(V. Mulloo)
Member

Dated 22 December 2015