

INDEPENDENT REVIEW PANEL

In the matter of:

ATICS LTD

(Applicant)

v/s

**Ministry of Environment, Sustainable Development, and Disaster
and Beach Management
(Solid Waste Management Division)**

(Respondent)

(Cause No15/16/IRP)

DECISION

1. History

The Ministry of Environment, Sustainable Development, and Disaster and Beach Management invited bids on 14 January 2016, using the Open Advertised Bidding method, for the contract “Operation and Maintenance of La Laura Transfer Station and Transportation of Wastes from La Laura Transfer Station to Mare Chicose Landfill.” The procurement reference number was CPB/37/2015. The deadline for submission of bids was fixed to Thursday 18 February 2016 up to 13.30 hours (local time) at latest. Bids were to be received at the Central Procurement Board (CPB) 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.

Addendum No. 1 was posted on the Public Procurement Portal and sent by e-mail to all prospective bidders on 11 February 2016.

Addenda No. 2 was posted on the Public Procurement Portal and sent by e-mail to all prospective bidders on 29 March 2016.

The closing date for submission of bids was postponed to Thursday 21 April 2016 up to 13.30 hours (local time) at latest, as per Addendum No. 3 which was posted on the Public Procurement Portal and sent by e-mail to all prospective bidders on 29 March 2016.

Clarification No.1 was posted on the Public Procurement Portal and sent by e-mail to all prospective bidders on 14 April 2016, and stated *inter alia*, in reply to a question:

Question No. 1: *Whether the submission of a bank certificate is mandatory?*

Reply No. 1:

The submission of a bank certificate is not mandatory. To qualify for award of contract, bidders have to demonstrate a minimum amount of liquid assets and/or credit facilities, net of other contractual commitment of MUR 15 Million. However, if a bidder opts to submit a bank certificate to demonstrate the availability of liquid assets amounting to MUR 15 million, such bank certificate should be in compliance with the format as per Directive No 24 issued by the Procurement Policy Office on 1 July 2015, failing which his bid will be rejected.

On 14 April 2016, Atics Ltd informed the Ministry that it considered that its reply, confirming that a Bank Certificate is not mandatory, was in contravention of Directive No.24 of the PPO.

By letter dated 18 April 2016, the Ministry wrote to Atics Ltd reiterating that the submission of a Bank Certificate is non-mandatory.

On 25 April 2016, Atics Ltd filed a challenge to the Ministry.

The Ministry communicated its rejection of the Challenge to Atics on 29 April 2016.

On the 3rd May, Atics Ltd lodged an Application for Review with the IRP on the grounds that the Public Body has erred and acted in breach of Directive 18 in removing the mandatory requirement of a Bank Certificate in order to demonstrate adequacy of cash flow. The Applicant further averred that it *“is being forced to proceed with a reduction in its workforce due to a wrong decision of the Public Body, and that the decision of the Public Body to disregard Directives 3, 18 and 24 of the Procurement Policy Office defies the principles of fairness in proceedings, equity and natural justice.”*

Bids have been received and opened, but evaluation was stopped when the suspension order was issued by the Panel on receipt of the Application for Review.

2. Submissions

Written submissions were made by the Applicant and Respondent respectively on 24 May 2016 and 18 May 2016.

3. Appearances

The Applicant was represented by N. Hurnaum, Counsel whereas the Public Body was represented by Mrs C. Green Jokhoo, Assistant Parliamentary Counsel together with Mrs A. Pillay Nababsing, State Counsel.

4. Issues and Findings

In his written submission of 18 May 2016, the Respondent raised the following *in Limine Litis*:

IN LIMINE LITIS

Respondent moves that the present application for review be set aside inasmuch as ex facie the application-

(a) it discloses no cause of action against the Respondent;

(b) Applicant has failed to show how Respondent has acted in breach of a duty imposed upon it by the Public Procurement Act or that Applicant has suffered any loss or injury as a result of that alleged breach;

Respondent also moves that prayer 3 (b) of the Statement of Case be set aside inasmuch as the Independent Review Panel does not have the jurisdiction to entertain same.

The Panel will deal with the determination of the points raised *in Limine Litis*.

It must be said at the outset that the Applicant has alleged, but has not attempted to show that the alternative provided to demonstrate liquid assets is in anyway inferior to a bank certificate.

Also, both parties agreed as to the legal standing of the Directives, and there were no arguments in that respect.

Essentially, the Respondent maintained in arguments that a Bank Certificate is **only one of** the possible instruments whereby liquid assets can be demonstrated, whereas the Applicant argued that it is **the** only acceptable instrument, that it is mandatory, and the inclusion of an alternative constitutes a lowering of standards and flouts the directives.

On being queried by the Panel, the Public Body informed that all bidders, including the Applicant itself, have submitted a Bank Certificate, and did not avail themselves of the opportunity offered by the alternative. Nevertheless, Applicant maintained his Application for review, on the grounds that since the Public Body had offered an alternative, it could also lower its standards as to the requirements of a Bank Certificate.

This argument is spurious, to say the least. It was pointed out to the Applicant that when a Bank Certificate is provided, it has to conform to a certain format, as per the directives and Clarification No 1. Furthermore,

the Applicant has submitted a letter dated 27th May, in which he claims that the tender procedure has been vitiated:

“As noted during the hearing, all bidders in the present procurement exercise have submitted a Bank Certificate. This information is of a confidential nature and we are of the humble view that any information relating to the evaluation, comparison and clarification of bids should not have been disclosed to Atics Ltd, as a bidder in the exercise. This duty is highlighted in the Public Procurement Regulations (2008), Regulation 23, as per below:

‘23. Confidentiality of bid evaluation

Except as provided in the Act and in these regulations, any information relating to the examination, clarification, evaluation and comparison of bids shall not be disclosed to bidders or to any other person not involved officially in the examination, evaluation or comparison of bids or in the decision on which bids should be accepted.’

We are of the opinion that the procurement proceedings have been vitiated and stand guided by the decision of the Review Panel on this matter.”

Before making such extravagant claims, the Applicant should have asked himself the following questions:

- Can the information disclosed be used by any bidder to alter his bid, or to alter the outcome of the tender?
- Did the Applicant suffer any prejudice as a result of the alleged disclosure?
- Has any other bidder claimed to have suffered any prejudice as a result of the alleged disclosure?

The answers to the above are self-evident, and all point to the absence of prejudice to the procedure and to the parties involved. It is obvious that the above quoted Regulation is meant to protect bidders and bids from disclosure of confidential methods, technology and pricing. The statement by the Respondent that all bidders had provided a Bank Certificate, does not in any way infringe upon the confidential nature of any bid.

The Public Procurement Act requires the Public Body to communicate certain information to the Panel in case of an Application for Review, and the above Regulation cannot be taken to mean that the latter may not use any information so imparted in the formulation of its Decisions.

It is therefore evident to the Panel that the letter dated 27th May is yet another attempt of the Applicant to delay the process of procurement of the services of a new Operator for the Transfer Station.

The Panel is conscious of its role in promoting the perception of fairness in procurement exercises, and is therefore very attentive to the arguments of Applicants. Nevertheless, it deeply resents any attempt to make use of this goodwill to delay Government business in order to satisfy private interests. The Panel wishes therefore that the Procurement Policy Office considers frivolous Applications for Review as instances of a negative history of litigation.

5. Ruling/Decision

The Applicant has failed to show how Respondent has acted in breach of a duty imposed upon it by the Public Procurement Act or that Applicant has suffered any loss or injury as a result of that alleged breach; furthermore, in the light of the above, the Application for Review discloses no cause of action against the Respondent.

The Applicant has relied almost exclusively on imputed motives to attempt to argue that future actions of the Respondent would cause prejudice to him.

This Application for Review is therefore set aside, as it has been made on frivolous grounds.

The Panel therefore rules in favour of the Respondent in regard to the issues raised *in limine Litis*.

Furthermore, the above ruling also determines the Application for Review in favour of the Respondent.

(R. Laulloo)
Chairperson

(Mrs C. Sohun)
Member

(R. Rajanah)
Member

Dated: 02 June 2016