

INDEPENDENT REVIEW PANEL

In the matter of:

Inter-Waste (Pty) Ltd

(Applicant)

v/s

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

(Respondent)

(Cause No. 14/16/IRP)

Ruling and Decision

A. History of the case

Applicant has applied for a review under section 45 of the Public Procurement Act 2006 by filing a challenge on the 05 April 2016. The application for review is against the award of the contract to Maxiclean Co. Ltd. The contract is a six-month contract for “Operation and Maintenance of Poudre D’or Transfer Station and Transportation of Wastes to Mare Chicose Landfill” awarded by Respondent. The Applicant is one amongst the unsuccessful bidders. The contract has already been awarded to Maxiclean Co. Ltd on 21 April 2016 following the lifting of the suspension order by the Independent Review Panel (IRP) by way of letter dated 20 April 2016.

The Ministry of Environment, Sustainable Development, and Disaster and Beach Management invited bids on 31 August 2015, using the open advertised bidding method, for a six-month contract for “**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, following the Invitation for Bids, 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.

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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 challenges to the Ministry.

A reply to the challenge was sent by the Ministry to the respective aggrieved bidders on 09 October 2015.

Maxiclean Co. Ltd, being dissatisfied with the decision of the Ministry, filed an application for review before the Independent Review Panel (IRP) on 15 October 2015.

On 30 November 2015, the IRP issued its decision wherein it stated that the Application for Review was not supported by any evidence or proven facts and was therefore found to be frivolous. The Application was thus set aside.

The Ministry set up a Bid Evaluation Committee (BEC) to evaluate the four bids and to submit its recommendations.

On 16 March 2016, the Bid Evaluation Committee submitted the Bid Evaluation Report and recommended to conduct negotiations with Maxiclean Co. Ltd, the lowest responsive bidder.

The Ministry appointed a Negotiation Panel to conduct negotiations with Maxiclean Co. Ltd.

On 28 March 2016 the Negotiation Panel submitted its report, recommending to award the Contract to Maxiclean Co. Ltd.

On 30 March 2016, the Ministry notified Maxiclean Co. Ltd that its bid has been selected for award. Concurrently, the other three unsuccessful

bidders were informed that their respective bids have not been retained for award and the particulars of the successful bidder were given.

On 30 March 2016, Interwaste (Pty) Ltd challenged the award of the procurement contract. According to the Respondent, the challenge, though dated 30 March 2016, was only received through hand delivery at the Ministry on 05 April 2016.

On 05 April 2016, the Ministry informed Interwaste (Pty) Ltd that a reply to the challenge will be made within 7 days as from date of receipt of challenge.

A reply to the challenge was sent to Interwaste(Pty) Ltd on 12 April 2016.

On 19 April 2016, the IRP informed the Ministry that Interwaste (Pty) Ltd has made an application for review to the IRP on 18 April 2016 and suspended the procurement proceedings in respect of the Procurement Contract Reference ENV/SWM/06/2015-2016.

On 20 April 2016, the Ministry issued a Certificate of Urgency informing the IRP that the suspension will not apply for reasons stated therein.

Accordingly, on 20 April 2016, the IRP informed the Ministry that the Suspension Order has been lifted.

On 21 April 2016, the Ministry issued the Letter of Acceptance to Maxi Clean Co. Ltd

B. Evaluation

The Bid Evaluation Committee (BEC) was composed of:

Mr.D. Dookee	-	Principal Project Officer, Ministry of Environment, Sustainable Development, and Disaster and Beach Management-(Chairperson)
Mr.M. Balloo	-	Acting Principal Engineer, Ministry of Public Infrastructure and Land Transport– (Member)
Mr.N. Moorlah	-	Project Officer/ Senior Project Officer, Ministry of Environment, Sustainable Development, and Disaster and Beach Management- (Member)
Mr.M. Rene	-	Technical Officer, Ministry of Environment, Sustainable Development, and Disaster and Beach Management(Member)

The following bids were received and accepted at tender opening:

S N.	Bidders	Bid Amount inclusive of VAT (Rs)
1	Sotravic Ltee	36,073,372.50
2	Maxiclean Co Ltd	32,823,300.00
3	Atics Ltd	35,190,000.00
4	Interwaste (Pty) Ltd	20,355,000.00

During detailed evaluation, the BEC found that the bid from the Applicant was deficient and/or lacking in certain respects in regard to responsiveness and qualification criteria. The information submitted by the Applicant in his bid was qualified by the BEC in the following respects:

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ITB	Description	Sotraviv Ltee	Maxiclean Co Ltd	Atics Ltd	Interwaste (Pty) Ltd	Remarks
5.3(a)	Copies of original documents defining the constitution or legal status, place of registration, and principal place of business;	✓	✓	✓	✓*	Interwaste (Pty) Ltd submitted constitution documents from South Africa and also local registration with the Registrar of Companies of Mauritius.
5.3(g)	<p>For companies incorporated in Mauritius, the bidder shall submit reports on the financial standing, auditor's reports and /or financial statements for the last three years, <u>as filed at the Registrar of Companies.</u></p> <p>For foreign companies, the bidder shall submit reports on the financial standing, auditor's reports and /or financial statements for the last three years <u>as filed in their country of operation.</u></p> <p><u>To qualify for award, the bidder's net worth calculated as the difference between total assets and total liabilities should be positive of the bidder's latest financial year.</u></p> <p>If the latest set of annual financial statements is for a period earlier than 12 months from the date of submission of bids, the reason for this</p>	submitted	submitted	submitted	submitted*	<p>Inter-waste (Pty) Ltd submitted financial statements for years 2012, 13 and 14 for South Africa. The Company is operating in Mauritius since May 2014 but no statements have been filed with the Registrar by June 2015. Bidder informed that non-declared revenue for 2014 will be combined with 2015 accounts and filed in 2016.</p> <p>Net worth is positive based on financial statements from South Africa.</p>

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ITB	Description	Sotravic Ltee	Maxiclean Co Ltd	Atics Ltd	Interwaste (Pty) Ltd	Remarks
	should be justified.					
5.5(c)	<p>For the operation and maintenance of the Transfer Station, the minimum essential vehicles and equipment to be deployed by the bidder are given below.</p> <p><u>I. Vehicles</u></p> <p>At least three (3) truck trailers, each of approximate bin capacity of 60 -80 m³ for carting away of compactible wastes as per Specifications under Section V- Scope of Service and Performance Specifications;</p> <p>Each truck trailer is expected to undertake a minimum of 2 trips daily from the Transfer Station to Mare Chicose landfill and to cart away 140-160 Tonnes of solid wastes daily.</p> <p>Bidders shall submit, in the bid,</p> <p>(i) Details of Lorries and major items of equipment owned by the bidder which are <u>proposed to be deployed</u> in carrying out the Contract, including:</p> <p>- type, number and volumetric capacity or carrying capacity in Tonnes, specifications of lorries proposed to</p>	✓	✓	✓	X	<p>From information available in its bid and clarifications submitted within the set time frame, Inter-Waste (Pty) Ltd has not been able to demonstrate that it can make available at least 3 Truck Trailers from the beginning of contract execution.</p>

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ITB	Description	Sotravic Ltee	Maxiclean Co Ltd	Atics Ltd	Interwaste (Pty) Ltd	Remarks
	<p>be deployed;</p> <p>(ii) Details of Lorries and Equipment that are intended to be hired, if any, including:</p> <ul style="list-style-type: none"> - a copy of lease agreement with the owner or an undertaking from the owner to lease; - type, number and volumetric capacity or carrying capacity in Tonnes, specifications of lorries proposed to be deployed; and <p>The station is expected to receive 140- 160 Tonnes of wastes per day from the catchment area, reaching up to a peak of 200 Tonnes, during end of year and festive periods. Bidder should then deploy additional vehicles at no additional cost to the Employer.</p>					
		✓	✓	✓	✓	

The BEC sent several requests for clarifications to the bidder to enable the BEC to determine the substantial responsiveness of the bid. The dates of issue of these requests with their corresponding dates of reply are listed in the Table below:

S/N	Request for Clarifications	Corresponding Reply
1.0	Issued to Inter-waste (Pty) Ltd on 25 January 2016	Replied on 2 February 2016
2.0	Request for Information issued to	Replied on 29 February 2016

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S/N	Request for Clarifications	Corresponding Reply
	Registrar of Companies on 16 February 2016	
3.0	Issued to Inter-waste (Pty) Ltd on 16 February 2016	Replied on 29 February 2016
4.0	Issued to Inter-waste (Pty) Ltd on 1 March 2016	Replied on 8 March 2016 was in connection with financial statement.

The only issue central to the recommendation of the BEC was the question of Truck and Trailers and Prime Movers -

- On 25 January 2016, the Ministry requested for clarification from the bidder as it has noted that six out of the seven truck trailers proposed to be made available for the Poudre D'Or Transfer Station were deployed at the Roche Bois Transfer Station.
- On 2 February 2016, the bidder replied that its submission exceeded the minimum requirement of 3 truck trailers on the basis of its large pool of truck trailers and RORO lorries in its ownership (part of which can be readily shipped from South Africa to Mauritius) plus 12 lorries that can be provided by local transport contractors to the six-month contract.
- These included the 4 truck trailers which Velogic Ltd undertook to supply to this contract which would in itself largely cater for contract execution requirements, according to the bidder.

In its letter dated 16 February 2016 addressed to the bidder, the BEC

- took note of the hundreds of truck trailers owned by the bidder but remarked that a lead time would be required for shipment from South Africa,
- took note that the truck trailers from Velogic Ltd were under fabrication;

- remarked that 6 out of the remaining trucks (7) proposed in the bid were currently deployed at the Roche Bois Transfer Station Contract.

The bidder was therefore asked to submit information on the truck trailers that were specifically intended to be deployed for the Poudre D’Or contract.

- On 29 February 2016, the bidder requested and obtained a maximum period of one week to reply to the clarifications sought.
- On 8 March 2016, the bidder provided clarification on the issue of submission of financial statements only and no information on vehicles, facility manager and written undertaking were submitted.

The BEC’s analysis on the issue of vehicles proposed to be deployed on the contract is as follows:

As per ITB5.5(c) of the BDS, the minimum essential vehicles to be deployed by the bidder are at least three (3) truck trailers, each of approximate bin capacity of 60-80 m3 for carting away of compactible waste. In case the vehicles were intended to be hired, copies of lease agreement with the owner or an undertaking from the owner to lease have to be included.

The trailers proposed to be deployed by the bidder are given in Table below.

S/N	Trailer Identification	Copy of lease agreement	Other remarks
1	1625 AG 92	✓	Currently deployed at RBTS
2	1084 AP 03	✓	Currently deployed at RBTS
3	4649 ZT 83	✓	Currently deployed at RBTS
4	1663 ZS 96	✓	Currently deployed at RBTS
5	1665 ZS 92	✓	Currently deployed at RBTS
6	2377 ZW 98	✓	Currently deployed at RBTS
7	2590 ZV 03	✓	
8	4 Trailers from Velogic with no Identification	X	Not retained as the bid and the clarifications indicated that these are under fabrication

✓ - submitted X – not submitted RBTS : Roche Bois Transfer Station

The Prime Movers proposed to be deployed by the bidder are Table below:

S/N	Prime Mover Identification	Copy of lease agreement	Other remarks
1	4466 ZV 02	✓	Currently deployed at RBTS
2	61 ZV 03	✓	Currently deployed at RBTS
3	5132 ZM 97	✓	Currently deployed at RBTS
4	V 1068	✓	Currently deployed at RBTS
5	1062 ZV 02 – 1062 ZV 04	✓	Currently deployed at RBTS
6	BC 998	✓	Currently deployed at RBTS
7	6248 ZT 00	✓	Currently deployed at RBTS
8	4251 JU 14	✓	From Velogic. Available
9	4253 JU 14	✓	From Velogic. Available
10	4256 JU 14	✓	From Velogic. Available
11	4284 JU 14	✓	From Velogic. Available
12	Unknown	X	Assumed as available.

✓ - submitted X – not submitted RBTS : Roche Bois Transfer Station

From information in Tables above, it can be noted that 5 Prime Movers and 1 Trailer are available for immediate deployment following award of contract. The clarifications submitted by the bidder have not demonstrated that the ability of the bidder to make 3 Truck Trailers available from the beginning of contract execution;

The BEC therefore concludes that the bid from Inter-Waste (Pty) Ltd is not responsive to the requirements of ITB 5.5 (c) – Vehicles. This is considered as a major deviation as transportation of wastes is the major component of the contract.

C. Notification of Award

The Ministry of Environment, Sustainable Development, and Disaster and Beach Management (Solid Waste Management Division) through a letter dated 30 March 2016, informed the Applicant of the particulars of the successful bidders as follows:

<i>Bidder</i>	<i>Address</i>	<i>Revised Negotiated Sum inclusive of Provisional sums and 15% VAT (Rs)</i>
<i>Maxiclean Co. Ltd</i>	<i>Grande Rosalie, D'Épinay</i>	<i>28,745,400.00</i>

D. The Challenge

On 30 March 2016, the Applicant challenged the award on the following grounds:

- *“Bidder’s offer was found to be the lowest after public opening*
- *Bidder has provided substantially responsive information in fulfilment of Bid requirements*
- *Bidder has replied substantively to the Public Body’s requests for clarification at the bid evaluation stage.”*

E. The Reply to Challenge

On 12 April 2016, the Public Body made the following reply to the challenge:

“The offer from Inter-Waste (Pty) was determined to be substantially non-responsive to the requirements of the bidding documents as it failed to meet the criteria laid down under ITB 5.5(c).

Following the clarifications sought from Inter-Waste (Pty) Ltd, (dated 25 January 2016, 16 February 2016, 23 February 2016, 29 February 2016 and 01 March 2016), your replies dated 02 February, 29 February and 08 March 2016 (relating to filing of financial statements with the Registrar of Companies), obtained within the set deadline, were considered but failed to demonstrate the bidder’s ability to make available three trucks trailers for contract execution. The Bid Evaluation Committee considered that this was a major deviation as the transportation of wastes constitute a major component of the contract.”

F. Grounds for Review

On 18 April 2016, the Applicant seized the Independent Review Panel for review on the following grounds:

- *“Bidder’s offer was found to be the lowest after public opening*
- *Bidder has provided substantially responsive information in fulfilment of Bid requirements*
- *Bidder has replied substantively to the Public Body’s requests for clarification at the bid evaluation stage”.*

G. Proceedings

Sittings were held on 26 April, 17 May, 24 May, 07 and 28 June 2016. Written submissions were received at the IRP on 16 May, 17 June and 13 July 2016 from the Applicant and 18 May, 13 June and 07 July 2016 from the Respondent respectively. The Co-Respondent (Successful Bidder, SB) made written submissions on 20 May, 14 June and 19 July 2016.

The Applicant was represented by Mr G. Moonesawmy, Counsel together with Mr M. Sauzier, SC who was not present at any of the proceedings, and the Respondent was represented by Mrs C. Green Jokhoo, Assistant Parliamentary Counsel together with Mrs A. Pillay Nababsing, State Counsel. The Successful Bidder was represented by Mrs A Jeewa, Attorney together with Mr Y. Mohamed, SC who was also not present at any of the proceedings.

At the start of proceedings, the Chairman disclosed *inter alia* that the same review Panel had heard a previous Application for Review involving the same tender. There was no objection or Challenge raised from any of the parties.

H. Representation of the Applicant, and Request for Hearing

H.1 Representation

At the sitting of 24th May 2016, which was the date fixed for the Hearing, Counsel for the Applicant was accompanied by Mr Akash Gura Gored, whom he introduced as representative of the Applicant. However, he could not produce any documentation or other instrument whereby this person had been mandated to act on behalf of the Applicant. Following protests from both Respondent and Successful Bidder, and the avowed inability of the Applicant to produce adequate documentation, Proceedings had to be adjourned.

At the next sitting of 07 June 2016, Counsel for the Applicant produced a letter from an official of the Applicant, appointing him as both Counsel and representative of the Applicant. On being queried, Counsel stated his intention to depone on behalf of the Applicant in regard to facts, and also argue on its behalf, as Counsel on matters of Law. When the ridicule of this intended situation was pointed out to him, Counsel withdrew the letter.

Although all facts and arguments had already been communicated to the Panel by way of written submissions, Counsel for Applicant submitted a letter on 16 June 2016, stating that he was now in possession of the necessary documentation for the acceptance by all parties of a representative of the Applicant, and requested for a Hearing. A *Pro-forma* hearing was organised by the Panel on 28 June 2016 to assess arguments from all sides as to the adequacy of the documentation, and the necessity of a Hearing. During that *Pro-forma* hearing, Counsel for the Applicant was not able to table the documentation by which a representative of the Applicant was duly authorised to represent the latter at these proceedings, although he did submit subsequently to the Panel by way of letter, a legally drawn document from South Africa, purporting to be the elusive Power of Attorney, which he objected to be submitted for scrutiny to the other parties.

H.2 Request for Hearing

The Applicant has consistently requested for a Hearing for the purposes of cross examination of the Respondent's officials. It was pointed out to him that the Panel does not have any power to summon witnesses, and the Public Body did not wish to call the witnesses identified by name by the Applicant, as all submissions from all Parties had already been filed. Nevertheless, the Applicant did not abandon his demands for a Hearing, and all his so-called efforts to convince the Panel that a duly authorised and documented representative could be made available were intended to convince the Panel that a Hearing was possible.

However, the efforts of the Panel to obtain from the Applicant the necessary documentation and arguments in favour of a Hearing were not met with success.

Section 57 (1) of the Public Procurement Regulations (2008) is reproduced below:

(1) At the request of the applicant for review or on its own initiative, the Review Panel may, where it deems appropriate, conduct a hearing

The decision to grant or not a Hearing rests solely on the Panel. In this case, the Applicant has maintained his request for Hearing even after he had avowedly submitted all facts and arguments in written form to the Panel. When asked for the purpose of the Hearing, Counsel for the Applicant stated that it would serve to give explanations to the Panel about facts and arguments stated in the written submissions.

The Panel does not feel that it needs such explanations from the Applicant's representatives as it had all the written submissions before it.

H.3 Panel's Views

The Applicant is well aware of the necessity of accreditation of his representatives if he wishes the latter to attend Hearings. This same issue was raised in a previous case before the Panel, where the Applicant was present and represented by the same Counsel. It should not, therefore, come as a surprise to him that the Panel cannot agree to carry out Hearings without the presence of a duly authorised representative of the Applicant.

Moreover, not only did the Applicant fail to make any effort to satisfy the Panel in respect of his representation at review proceedings, he has actively sought to delay the review process for reasons that are not evident to the Panel. It is not surprising, therefore, that the Applicant's request for a Hearing, for the purposes of 'providing explanations' to the Panel is viewed as unsatisfactory by the latter.

I. Ruling

In view of the following:

1. The Applicant has failed to produce in adequate and appropriate time documentation to establish the proper representation of the Applicant to attend review proceedings.
2. The Applicant has made complete written submissions.
3. The Applicant has failed to show why and how a Hearing is necessary for the satisfactory resolution of this Review exercise.
4. It is not binding on the Panel to grant a Hearing in any circumstances, the relevant Regulation using the wording '*the Review Panel may, where it deems appropriate, conduct a hearing*'

The Panel hereby decides not to grant the request of the Applicant for a Hearing and rules accordingly.

J. On the Merits

The grounds on which the Panel has been seized are as follows:

1. *Bidder's offer was found to be the lowest after public opening*
2. *Bidder has provided substantially responsive information in fulfilment of Bid requirements*
3. *Bidder has replied substantively to the Public Body's requests for clarification at the bid evaluation stage".*

As regards ground 1 above, it is neither contested nor relevant that the Applicant's bid was lowest at opening. The reasons for rejection of the Applicant's tender was that it did not allegedly comply with the requirements of the tender in respect of vehicles and equipment to be deployed for the performance of the Contract, and that the Applicant failed to respond satisfactorily and in time to requests for clarifications from the Public Body in that respect.

The Applicant has argued that:

1. Requests for clarifications were not sent to the address designated in his tender for that purpose,
2. The reply of the Public Body to the Challenge was issued after the prescribed delay, and should therefore be ignored,
3. The vehicles and equipment listed in his tender are in excess of requirements,
4. Other vehicles and equipment were being procured, and/or manufactured, and/or rented for deployment on the Contract
5. The Respondent did not have the right to ask "*specifically*" what vehicles and equipment were to be deployed on the Contract

It is obvious that the Public Body would want to assess the technical capability of tenderers during evaluation, and has therefore asked for a list of vehicles and equipment intended to be deployed on the Contract for which the tenderer is bidding. To carry out this assessment, an inventory of the equipment pool of the tenderer is of no use to the Public Body. The Bidder would have to satisfy the Public Body that the equipment it proposes to use on the Contract would be available and free.

There is therefore nothing sinister in the Public Body's request of vehicles and equipment to be deployed *specifically (as distinct from "exclusively")* on the Contract, as the technical assessment referred to above requires such a list.

If the vehicles and equipment listed in the tender are already deployed elsewhere, it is up to the bidder to produce a time-table whereby the vehicles and equipment would also be available for the performance of the Contract, for the frequencies and time durations specified in the tender. It is not up to the Public Body to establish such a time table from the list of vehicles and equipment provided.

In regard to the address for correspondence, the Applicant has deliberately sought to blur the demarcation lines between the South African and Mauritian entities. The BEC noted that *Interwaste (Pty) Ltd submitted constitution documents from South Africa and also local registration with the Registrar of Companies of Mauritius*. However, in regard to financial statements, *Inter-waste (Pty) Ltd submitted financial statements for years 2012, 13 and 14 for South Africa*. The Public Body therefore stated that it sent out requests for clarifications to *all known addresses* of the Applicant.

Also, after protracted correspondence, the Applicant requested and was given until 8th March 2016 to provide clarification to various issues, and on that date, the Applicant did submit replies to other issues, except that of deployment of vehicles and equipment.

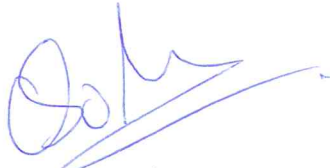
The Applicant therefore has no excuse for not providing the required clarification after having been given a deadline according to a schedule suggested by itself. The Public Body was fully justified to reject the Applicant's bid at this point. But even if all his subsequent submissions were taken into account, the Applicant has never been able to satisfy anybody that he will be able to deploy the required vehicles and equipment in the required number to the subject site. The Applicant has made assertions about vehicles and equipment ordered, or being manufactured or that can be otherwise made available, but has not submitted a shred of evidence (in the form of orders, contracts or invoices) in support thereof and even during review proceedings.


The Panel also wishes to stress that any alleged shortcoming of the Public Body in replying to the Challenge cannot be taken as an excuse for failure to respond in time to requests for clarifications. Even if it were proved that the Public Body failed to respond satisfactorily to the Challenge, this can only lead to a Review process, and cannot determine the outcome thereof.

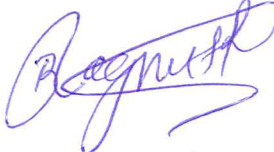
K. Decision

In view of the above, the Panel therefore finds that this Application has no merit, and has been made frivolously.

Not only is it obvious that the Applicant could not prove his assertions, but his attempts at providing such proof were tepid, at best. He has tried to divert attention to side issues, and sought to lose the Panel's time by insisting on processes that could not add value to these proceedings.


(Mrs C. Sohun)
Member


(R. Laulloo)
Chairperson


(R. Ragnuth)
Member

Dated ^{8th} August 2016



