



Independent Review Panel

Decision No. 01/17

In the matter of:

Leal Communications & Informatics Ltd

(Applicant)

v/s

Mahatma Gandhi Institute

(Respondent)

(Cause No. 20/16/IRP)

Decision

A. Background

A.1

The Mahatma Gandhi Institute invited bids through the Restricted Bidding method for the Supply, installation & commissioning of Computer Sets from Fourteen (14) suppliers namely:

1. Leal Communications and Informatics Ltd
2. Jacey Computer Systems
3. Zenith Computers Ltd
4. Harel Mallac Technologies
5. Softel Computer Services Ltd
6. Net Era Ltd
7. Connoisseur (Mauritius) Ltd
8. Cybersys Computer Ltd
9. BBC WYSE Technology Ltd
10. Crains Technology Ltd
11. Data Communications Ltd
12. State Informatics Ltd
13. Pascal Computers Ltd
14. Infogil Ltd

A.2

All invitations for bids were sent by registered post on 29 June 2016.

A.3

Bidders were required to deposit their quotations in sealed envelopes and to deposit their respective bid in the Quotation Box No. 2 located in the SMAS Building, Mahatma Gandhi Institute, Moka not later than 13.30 hours on Wednesday 20th July 2016.

A.4

All bids received were opened internally at SMAS Building, Moka at 13.35 hours on Wednesday 20th July 2016.

A total of seven bids were received from the following:



1. Leal Communications and Informatics Ltd
2. Zenith Computers Ltd
3. Softel Computer Services Ltd
4. BBCWYSE Technology Co. Ltd
5. Crains Technologies Ltd
6. Data Communications Ltd
7. Pascal Computer Services Ltd

Seven (7) bidders did not submit their quotation for the project.

B. Evaluation

B.1

A Bid Evaluation Committee was set up and the committee met on 16 August, 17 August, 19 August and 22 August 2016. It comprised the following members:

Mr. B. Beedasy	IT Administrator (Chairperson)
Mr. D. Sewock	Senior Accounts Officer (Member)
Mr. K. Ramessur	Computer Technician (Member)
Mrs. H. Chudoory	Administrative Officer (Secretary of Meeting)

B.2

The findings of the Bid Evaluation Committee may be summarised as follows:



OVERALL RESPONSIVENESS FOR PERSONAL COMPUTERS (QTY: 12)

SN	Name of Bidder	Technically Responsive	Commercially Responsive	Overall Responsive	Qualify for Margin of Preference
1	Leal Communications and Informatics Ltd	Not Compliant	Compliant	Not Compliant	Not Qualify
2	Zenith Computers Ltd	Not Compliant	Compliant	Not Compliant	Qualify
3	Softel Computer Services Ltd	Compliant	Compliant	Compliant	Not Qualify
4	BBCWYSE Technology Co. Ltd	Not Compliant	Compliant	Not Compliant	Not Qualify
5	Crains Technologies Ltd	Not Compliant	Compliant	Not Compliant	Not Qualify
6	Data Communications Ltd	Not Compliant	Compliant	Not Compliant	Not Qualify
7	Pascal Computer Services Ltd	Not Compliant	Compliant	Not Compliant	Qualify

OVERALL RESPONSIVENESS FOR COMPUTER SETS (QTY: 33)

SN	Name of Bidder	Technically Responsive	Commercially Responsive	Overall Responsive	Qualify for Margin of Preference
1	Leal Communications and Informatics Ltd	Compliant	Compliant	Compliant	Not Qualify
2	Zenith Computers Ltd	Compliant	Compliant	Compliant	Qualify
3	Softel Computer Services Ltd	Compliant	Compliant	Compliant	Not Qualify
4	BBCWYSE Technology Co. Ltd	Compliant	Compliant	Compliant	Not Qualify
5	Crains Technologies Ltd	Compliant	Compliant	Compliant	Not Qualify
6	Data Communications Ltd	Compliant	Compliant	Compliant	Not Qualify
7	Pascal Computer Services Ltd	Compliant (Option 1) Compliant (Option 2)	Compliant	Compliant	Qualify

B.3

The Bid Evaluation Committee noted that: “Zenith Computers Ltd and Pascal Computer Services Ltd declared that they are eligible for Margin of Preference in their Quotation Letter. Hence a 10 % margin of preference rate adjustment was applied for comparison/selection process. Financial submission after

adjustment for 10% margin of preference was considered for ranking (lowest bid) to all items in the bid where applicable.”

Personal Computers

SN	Name of Bidder	Qty	Proposal	Amount (Rs) (INCL VAT)	Amount After Arithmetical Check (INCL VAT)	Adjusted for Margin of Preference Amount (Rs) INCL VAT	Ranking
1	Leal Communications and Informatics Ltd	33	26,200.00	994,290.00	994,290.00	1,093,719.00	2
2	Zenith Computers Ltd	33	29,850.00	1,132,807.00	1,132,807.00	1,132,807.00	3
3	Softel Computer Services Ltd	33	27,190.00	1,031,860.50	1,031,860.50	1,135,046.55	4
4	BBCWYSE Technology Co. Ltd	33	33,485.00	1,270,755.75	1,270,755.75	1,397,831.325	6
5	Crains Technologies Ltd	33	46,800.00	1,776,060.00	1,776,060.00	1,953,666.00	8
6	Data Communications Ltd	33	41,000.00	1,555,950.00	1,555,950.00	1,711,545.00	7
7	Pascal Computer Services Ltd	33 (option 1)	27,600.00	1,047,420.00	1,047,420.00	1,047,420.00	1
		33 (option 2)	32,365.22	1,228,260.00	1,228,260.10	1,228,260.10	5

C. Notification of Award

The Mahatma Gandhi Institute through a letter dated 29 September 2016, informed the Applicant of the particulars of the successful bidders as follows:

Item Number	Description	Name of Bidder	Address	Contract Price (Including VAT) Rs
1	12 Computer Sets <ul style="list-style-type: none"> • 6th Gen Intelcore i7 6700 • 8GB RAM • 240 GB SSD Drive • 2GB DDR5 Graphics • 28" LED Monitor/Windows 10 Pro/Linux Ubuntu studio • Office 2016 Symantec Endpoint Protection 	Softel Computer Services Ltd	22, Wellington Street, Port Louis	758,862
2	33 Computer Sets Intelcore i5 6500 <ul style="list-style-type: none"> • 4GB DDR3 	Pascal Computers Services Ltd	40/42 St. Georges Street, Port Louis	1,047,420

- 500GB data/
- Onboard Graphics (1024 MB or better)
- 22" LED Monitor
- Windows 10 Pro
- Office 2016 Symantec Endpoint Protection

D. The Challenge

On 05 October 2016, the Applicant challenged the award on the following grounds:

- (a) *The Applicant is the lowest substantially responsive bid;*
- (b) *The procurement is for the supply, installation and commissioning of Computer sets. The Applicant avers that all the components such as hard disk, cpu, mother board which are used to assemble a computer are manufactured abroad. Computers are simply assembled and not manufactured in Mauritius. It stands to reason that the value of local inputs in terms of labour and/or materials cannot account for at least 30% of the cost of production of the goods and therefore the margin of preference cannot apply.*
- (c) *Should the margin of preference be applicable in respect of such procurement proceedings, the Public Body failed to properly assess and evaluate the bid of the successful bidder when it applied the margin of preference to the bid of the successful bidder given that the latter does not meet the eligibility criteria for such benefit in as much as:*
 - (i) *the successful bidder failed to provide financial statements certified by a certified accountant;*
 - (ii) *the annual turn over for the year ending December 2012 was Rs56,880,740;*
 - (iii) *according to the records at the Registrar of Companies, it is only in February 2016 that the successful bidder submitted its financial statements for the year ending December 2010, 2011, 2012 and 2013. It is noted that the successful bidder has failed to submit its financial statements for the year ending December 2015 therefore*

we have no indication of the annual turnover of the successful bidder for the two preceding years prior to this tender exercise – thus it was impossible for the Public Body to ascertain an essential criteria for the margin to apply;

- (iv) *The Public Body ought not to have relied on the Small and Medium Enterprise Certificate of the successful bidder to apply the margin of preference but ought to be in presence of the financial statements of the successful bidder certified by a certified accountant.”*

E. The Reply to Challenge

The Public Body did not reply to the Challenge, nor did it have to under the provisions of the Public Procurement Act for tenders resulting in contract values of less than 15 million rupees.

F. Grounds for Review

On 17 October 2016, the Applicant seized the Independent Review Panel for review on the following grounds:

- “1. *The Applicant is the lowest substantially responsive bid;*
2. *The procurement is for the supply, installation and commission of Computer sets. The Applicant avers that all the components such as hard disk, cpu, mother board which are used to assemble a computer are manufactured abroad. Computers are simply assembled and not manufactured in Mauritius. It stands to reason that the value of local inputs in terms of labour and/or materials cannot account for a t least 30% of the cost of production of the goods and therefore the margin of preference cannot apply;*
3. *Should the margin of preference be applicable in respect of such procurement proceedings, which is denied, the Public Body failed to properly assess and evaluate the bid of the successful bidder given that the latter does not meet the eligibility criteria for such benefit in as much as:*
 - (i) *the successful bidder failed to provide financial statements certified by a certified accountant;*

(ii) *the annual turnover for the year ending December 2012 was Rs56,880,740; and*

(iii) *according to the records at the Registrar of Companies, it is only in February 2016 that the successful bidder submitted its financial statements for the year ending December 2010, 2011, 2012 and 2013. It is noted that the successful bidder has failed to submit its financial statements for the years ending December 2014 and December 2015 therefore we have no indication of the annual turnover of the successful bidder for the two preceding years prior to this tender exercise – thus it was impossible for the Public Body to ascertain an essential criteria for the margin to apply.*

4. *The Public Body ought not to have relied on the Small and Medium Enterprise Certificate of the successful bidder to apply the margin of preference but ought to be in presence of the financial statements of the successful bidder certified by a certified accountant.”*

G. The Hearing

Hearings were held on 26 October, 24 November and 13 December 2016.

The Applicant was represented by Mr G. Glover, SC together with Ms S. Chuong, Counsel whereas the Respondent was represented by Mr L. Aujayeb, Assistant Solicitor General.

H. Issues

H.1

The Applicant is contesting only the award of item 2: personal computers to Pascal Computer Services Ltd. The contract value of this component exceeding 1 million rupees, the Panel is entitled to hear and determine this Application for Review. However, the *threshold* of MUR 15 million not having been reached, the Applicant may only contest the award to the Selected Bidder under S 45 (1) (c) of the Public Procurement Act:

(1) An unsatisfied bidder shall be entitled to ask the Review Panel to review the procurement proceedings where -

(a) the Chief Executive Officer of the public body does not issue a decision within the time specified in section 43(4);

(b) he is not satisfied with the decision; or

(c) after the entry into force of the procurement contract, the value of which is above the threshold prescribed by regulations but does not exceed the prescribed threshold referred to in section 40(3), he is not satisfied with the procurement proceedings on a ground specified in section 43(1).

The prescribed *threshold* refers to the prescribed amounts in the schedule annexed to the Act, which specifies a uniform threshold of MUR 15 million for all Public Bodies for all types of Contract.

S 40 (3) of the Public Procurement Act is reproduced below:

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

Thus, under S 45 (1) (c), an Application for Review may only be made, and entertained after the entry into force of the Contract, and the Public Body does not have any obligation to reply to a Challenge.

H.2

The Applicant is contesting the application of the margin of preference to the bid of the Selected Bidder, on the grounds that:

- *The Applicant avers that all the components such as hard disk, cpu, mother board which are used to assemble a computer are manufactured abroad. Computers are simply assembled and not manufactured in Mauritius. It stands to reason that the value of local inputs in terms of labour and/or materials cannot account for at least 30% of the cost of*



production of the goods and therefore the margin of preference cannot apply;

➤ *Should the margin of preference be applicable in respect of such procurement proceedings, which is denied, the Public Body failed to properly assess and evaluate the bid of the successful bidder when it applied the margin of preference to the bid of the successful bidder given that the latter does not meet the eligibility criteria for such benefit in as much as:*

(i) the successful bidder failed to provide financial statements certified by a certified accountant;

(ii) the annual turnover for the year ending December 2012 was Rs.56,880, 740.; and

(iii) according to the records at the Registrar of Companies, it is only in February 2016 that the successful bidder submitted its financial statements for the year ending December 2010, 2011, 2012 and 2013. It is noted that the successful bidder has failed to submit its financial statements for the years ending December 2014 and December 2015 therefore we have no indication of the annual turnover of the successful bidder for the two preceding years prior to this tender exercise - thus it was impossible for the Public Body to ascertain an essential criteria for the margin to apply.

➤ *The Public Body ought not to have relied on the Small and Medium Enterprise Certificate of the successful bidder to apply the margin of preference but ought to be in presence of the financial statements of the successful bidder certified by a certified accountant.*

I. Findings

I.1

The Applicant seems to be contesting the provision of a preference clause in respect of SME's in the Bidding Documents, on the grounds that the very nature of the goods to be procured precludes that the conditions of entitlement to such preference could be met. It is a bit too late in the day for

such contest. The Applicant has participated in the bidding exercise, and has therefore implicitly agreed to its conditions, including those relating to preference entitlement.

1.2

The conditions listed in the Bidding Documents for entitlement to 10% preference are as follows:

“13. Margin of Preference

A Margin of Preference shall be applicable.

(1) For International Bidding: Not Applicable

Bidders meeting the following criteria shall be eligible for a 15 % Domestic Preference:

(a) be a Small and Medium Enterprise having an annual turnover not exceeding Rs 50m, incorporated in the Republic of Mauritius; or

(b) in case of a Joint Venture between Small and Medium Enterprises, or between Small and Medium Enterprises and foreign manufacturers, the entity should be incorporated in the Republic of Mauritius and the domestic manufacturers be individually eligible for the preference as per (a) above; and

(c) where the local manufacturing input in terms of material, labour and overhead accounts for at least 30 per cent of the cost of production of the goods

(2) For National Bidding:

Small and Medium Enterprises shall be eligible for a Margin of Preference of 10%, provided they satisfy the criteria mentioned in (1) above as applicable to domestic manufacturers.

(3) Bidders applying for Margin of Preference as Small and Medium manufacturing enterprises shall, upon request by the Mahatma Gandhi Institute, submit details of:

(a) their registration as enterprises within Mauritius;

(b) their Joint Venture Agreement, where applicable; and



(c) a Financial statement certified by a qualified Accountant showing that its annual turnover is less than Rs 50M and that the local input accounts for at least 30 % of the cost of production in the format provided in Schedule 3.

The Public Body has relied on (2) above for the determination of entitlement to the 10% preference. It is to be noted that 13(3) above refers to *manufacturing SME's*, but under 13(2), any commercial firm meeting the following conditions would be eligible to a 10% preference:

(a) be a Small and Medium Enterprise having an annual turnover not exceeding Rs 50m, incorporated in the Republic of Mauritius; [---]

(c) where the local manufacturing input in terms of material, labour and overhead accounts for at least 30 per cent of the cost of production of the goods

There is no set format for certification of annual turnover, nor for the cost structure. The requirement for submission of *“(c) a Financial statement certified by a qualified Accountant showing that its annual turnover is less than Rs 50M and that the local input accounts for at least 30 % of the cost of production in the format provided in Schedule 3”* applies only to *“Bidders applying for Margin of Preference as Small and Medium **manufacturing** enterprises”*.

It stands to reason, however, that the annual turnover should be verified from certified accounts. The Bidding Documents do not specify whether the turnover of less than 50 million rupees should be an average or a constant feature over a number of years, or should be the turnover for the past year, or for any year that the bidder chooses. In this case, the Selected Bidder has chosen to submit a certified financial statement relating to the year ending December 2015, which the Public Body had little choice but to accept. The format of this statement also leaves much to be desired, but in the absence of a specified format, the Public Body could not reject the financial document submitted. It could, however, have clarified with the Selected Bidder, and requested for a more “acceptable” statement, but the Public Body had no obligation to do so.

1.3

The same arguments apply to the cost structure. The Selected Bidder has submitted the schedule 3, applicable to *Small and Medium manufacturing enterprises*, duly filled in and countersigned by a certified accountant. The Panel has reservations as to the accuracy of figures stated therein. Costs

considered as “local” such as direct labour costs, management costs and overheads and utility charges do not bear the same ratio to the cost of the project as the same local charges bear to the annual turnover. However, there is no obligation on the Public Body to verify these figures, once they are certified by a public accountant.

1.4

The Applicant has repeatedly stated that his objective is to ensure that rules are laid out for the application of preference clauses, as he considers that his interests are jeopardised by the lack of standards in the application of such rules. Whereas the Panel does not think that in this particular exercise the Public Body has acted unfairly, yet it wishes to stress the need for standard and transparent procedures for comparison of bids, which are stated beforehand, and well understood by all prospective bidders. Clause 13 is a standard clause, and may therefore reappear in Bidding Documents for contracts of much higher value. Yet, it is very clumsily drafted, and very unlikely to meet its intended objective. It is not clear whether commercial SME’s should be given the same advantages as manufacturing SME’s. Also, parameters for entitlement to preference should be rational and fair, and should leave no opportunity for abuse. Moreover, if local input is to be a criterion for allocation of preference, then “local” costs should be defined. Is it sufficient that a cost be incurred locally, in rupees, for it to be considered “local”? If that is so, then any foreign cost could become “local” by purchasing from a related company, in rupees, goods which have been imported by the latter. What proportion of transport costs can be considered “local”? Vehicle depreciation costs, maintenance costs, fuel costs etc. which constitute the major part of transportation costs are all essentially foreign.

1.5

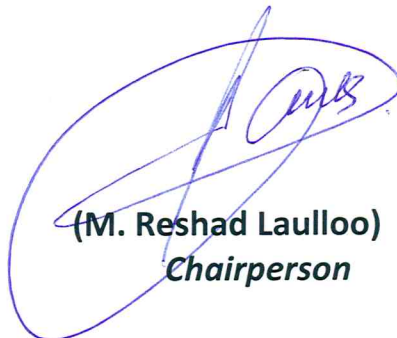
During the Hearing, the Applicant has also alleged that he has received an incomplete Bidding Document. It is of course impossible to prove such a negative statement, and the Panel therefore does not expect him to produce any such evidence. It is also not possible to disprove the Public Body’s statement that all bidders received the same document.



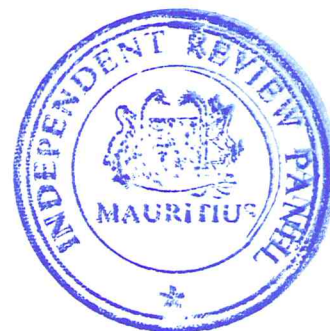
In this particular case, the allegedly missing page happens to be the schedule 3, which in fact was not needed at all in the Bidding Documents. Nevertheless, the Panel wishes to stress the need for all bidders to bid on the same information, and should therefore have access to the same documents. Admittedly, the change to e-procurement should resolve this issue, but otherwise, Public Bodies should have a Quality Control System to ensure, and be able to show, that communications to all bidders were identical.

J. Decision

The Applicant has not been able to prove any of his assertions. The Public Body has made use of standard preference clauses, as available, and in evaluation, has applied their content. The Panel therefore finds no merit in this Application for Review.



(M. Reshad Lalloo)
Chairperson



(Ramsamy Rajanah)
Member



(Mrs Christelle Sohun)
Member

Dated 10 January 2017