



Independent Review Panel

Decision No. 03/17

In the matter of:

Medical Gases JV

(Applicant)

v/s

Ministry of Health & Quality of Life

(Respondent)

(Cause No. 23/16/IRP)

Decision

A. Background

- **Name of Project: Procurement of Medical Gases for year 2017**
- **Public Body Ref: OAB MHPQ/MDIS/2015-2016/Q21**
- **CPB Ref. Number: CPB/12/2016**

A.1

This project consists of the procurement of items of medical gases such as oxygen gas, liquid oxygen, nitrous oxide gas, compressed air, carbon dioxide gas and liquid nitrogen. The scope includes the purchase of these items in gaseous and liquid forms for use in the Community Health Centres, Area Health Centres, Wards and Operating Theatres of all the public health institutions. The objective of this procurement is to make readily available in all public health institutions the abovementioned items, so that patients receive the right treatment at the right time and the Ministry gets value for money.

A.2

Bids were invited on 22 July 2016 for the procurement of medical gases (21 items) for year 2017 through the Open Advertised Bidding method with closing date on 01 September 2016 at the Central Procurement Board (CPB), Rose-Hill

A.3

Following the approval of the CPB on 25 August 2016, Addendum No. 1 was uploaded on the Government Procurement Website of the Procurement Policy Office and same was issued to all potential bidders by email on same date, i.e. 7 days prior to the closing date for submission of bids

A.4

The opening of bids took place at the CPB on 01 September 2016. Three bidders responded positively and submitted their bids.

A.5

The read-out prices at tender opening were as follows:

Bidder Identification			Read-out Bid Price(s) ¹	
Name	Address	Country	Currency(ies)	Amount(s)
1. Samlo Koyenco Steel Co Ltd	La Pipe	Mauritius	MUR	66,613,904.10
2. Compagnie Mauricienne de Commerce Ltee	Pailles	Mauritius	MUR	6,990,195.00
3. Medical Gases JV	Phoenix	Mauritius	MUR	111,708,623.07

(The first two bidders did not quote for all items).

B. Evaluation

B.1

Bid Evaluation Committee:

Dr. N. Jaypaul	Retired Director Health Services (Team Leader & registered evaluator)
Dr. Woodalsing Gopal	Consultant Anaesthesiology, Victoria Hospital (Member & registered evaluator).
Mr. Harry Krishna Bucktowar	Principal Pharmacist, Ministry of Health and Quality of Life (Member & registered evaluator).
Mr. Pradeep Gokhool	Assistant Manager Procurement and Supply, Ministry of Health and Quality of Life (Acting as Secretary).

B.2

The Bid Evaluation Committee found that the following bidders have fulfilled the mandatory requirements and are therefore qualified for technical evaluation.

1. Samlo Koyenco Steel Co. Ltd
2. Compagnie Mauricienne de Commerce Ltée
3. Medical Gases JV

B.3

Technical Evaluation

The Bid Evaluation Committee found, after clarification, that the Applicant's bid conformed to technical specifications in all respects, and that the bid of the

Selected Bidder conformed to specifications in respect of all items for which he has provided a bid.

B.4

Financial Evaluation

In Financial Evaluation, Samlo Koyenco Steel Co Ltd (Samlo) was found to be the lowest bidder for all items for which that company had provided a bid, except for item 14 where it was ranked second after Compagnie Mauricienne de Commerce Ltée.

For some items, the price differential between the Selected Bidder and the Applicant is ten-fold. However, bids of Samlo were also much less than the estimated costs as evidenced in the table below:

Item No.	Bid No.	Bidder	Quoted Price Selected Bidder (Rs.)	Estimated Cost (Rs.)	% Deviation (Selected Bidder)	Quoted Price Applicant
1.	1.	Samlo Koyenco Steel Co Ltd	756.00	2,673.00	-71.72%	7,826.00
2.	1.	Samlo Koyenco Steel Co Ltd	6,199.20	21,918.60	-71.72%	64,173.20
3.	1.	Samlo Koyenco Steel Co Ltd	26,429.76	93,448.08	-71.72%	93,448.08
4.	1.	Samlo Koyenco Steel Co Ltd	124,346.88	439,655.04	-71.72%	1,287,261.60
5.	1.	Samlo Koyenco Steel Co Ltd	119,568.96	422,761.68	-71.72%	1,237,733.80
6.	1.	Samlo Koyenco Steel Co Ltd	7,257.60	25,660.80	-71.72%	75,132.00
7.	1.	Samlo Koyenco Steel Co Ltd	877,640.40	3,103,085.70	-71.72%	1,184,118.00
8.	1.	Samlo Koyenco Steel Co Ltd	504,403.20	1,783,425.60	-71.72%	680,544.00
9.	1.	Samlo Koyenco Steel Co Ltd	994,140.00	3,514,995.00	-71.72%	1,341,300.00
10.	1.	Samlo Koyenco Steel Co Ltd	21,889,224.00	77,394,042.00	-71.72%	29,533,080.00
11.	3.	Medical Gases JV	24,366,572.00	30,757,804.00	-20.78%	
12.	1.	Samlo Koyenco Steel Co Ltd	31,752.00	72,765.00	-56.36%	102,263.00
13.	1.	Samlo Koyenco Steel Co Ltd	2,736.00	6,270.00	-56.36%	8,696.00
14.	2.	CompagnieMauricienne de Commerce Ltée	6,037,500.00	14,743,575.00	-59.05%	6,804,021.00
15.	1.	Samlo Koyenco Steel Co Ltd	19,440.00	52,272.00	-62.81%	112,698.00
16.	1.	Samlo Koyenco Steel Co Ltd	26,887,680.00	40,749,772.80	-34.02%	29,875,200.00
17.	3.	Medical Gases JV	59,651.13	76,403.25	-21.93%	
18.	3.	Medical Gases JV	34,892.00	35,428.80	-1.52%	
19.	3.	Medical Gases JV	27,391.35	34,650.00	-20.95%	
20.	3.	Medical Gases JV	11,269.80	14,256.00	-20.95%	
21.	3.	Medical Gases JV	50,504.52	63,888.00	-20.95%	

A column has been added to this table to show the bid of the Applicant for each item, which also demonstrates a disparity with estimates, (except for

item 3, where the figures are too bizarre to be correct). The Bid Evaluation Committee did not comment on the facetious nature of the estimates.

B.5

The Bid Evaluation Committee recommended award as follows:

Item No.	Bid No.	Bidder	Quoted Price (Rs.)
1.	1.	Samlo Koyenco Steel Co Ltd	756.00
2.	1.	Samlo Koyenco Steel Co Ltd	6,199.20
3.	1.	Samlo Koyenco Steel Co Ltd	26,429.76
4.	1.	Samlo Koyenco Steel Co Ltd	124,346.88
5.	1.	Samlo Koyenco Steel Co Ltd	119,568.96
6.	1.	Samlo Koyenco Steel Co Ltd	7,257.60
7.	1.	Samlo Koyenco Steel Co Ltd	877,640.40
8.	1.	Samlo Koyenco Steel Co Ltd	504,403.20
9.	1.	Samlo Koyenco Steel Co Ltd	994,140.00
10.	1.	Samlo Koyenco Steel Co Ltd	21,889,224.00
11.	3.	Medical Gases JV	24,366,572.00
12.	1.	Samlo Koyenco Steel Co Ltd	31,752.00
13.	1.	Samlo Koyenco Steel Co Ltd	2,736.00
14.	2.	Compagnie Mauricienne de Commerce Ltée	6,037,500.00
15.	1.	Samlo Koyenco Steel Co Ltd	19,440.00
16.	1.	Samlo Koyenco Steel Co Ltd	26,887,680.00
17.	3.	Medical Gases JV	59,651.13
18.	3.	Medical Gases JV	34,892.00
19.	3.	Medical Gases JV	27,391.35
20.	3.	Medical Gases JV	11,269.80
21.	3.	Medical Gases JV	50,504.52

C. Notification of Award

The Ministry of Health & Quality of Life through a letter dated 10 October 2016, informed the Applicant of the particulars of the successful bidders as follows:

“Please refer to your bid dated 01 September 2016 which you submitted in response to the Invitation for Bids for the procurement of Medical Gases (MHPQ/MDIS/2015-2016/Q21).

Pursuant to section 40(3) of the Public Procurement Act, I am to inform you that an evaluation of the bids received has been carried out, and your bid has not been retained for award. The successful bidder is Samlo Koyenco Steel Co. Ltd of 15th Floor, Hennessy Court, Pope Hennessy Street, Port Louis.”

D. The Challenge

On 14 October 2016, the Applicant challenged the award on the following grounds:

“Failure to reply to clarifications and certificate of conformity

It is provided in section VII, Special conditions of Contract, in relation to GCC 13.1 that the successful bidder which is awarded the contract will have to provide, at each delivery, for each batch of cylinders supplied:

“(c) Document that Medical Gases are in conformity with the purity stated and issued by a recognized institution, i.e. an institution in conformity with South African, BP, European (EU) or USP standards.”

2. *By way of letter dated 16 August 2016, Medical Gases JV requested for clarifications on the following matters:*
 - a. *Final Destinations;*
 - b. *Stock of medical gases;*
 - c. *Conformity;*
 - d. *Recognised Institutions;*
 - e. *Imported v/s Locally Manufactured Medical Oxygen;*
 - f. *Site visits;*
 - g. *Lost cylinders.*

3. *The letter was sent within the delay prescribed as per section II, Bidding Data Sheet, ITB 8.1, Clarification of bidding documents, i.e. more than 14 days before the closing date for submission of bids (the closing date for submission of bids being 01 September 2016).*

4. *The Public Body sent a reply to the request for clarifications in the form of an addendum dated 25 August 2016. Medical Gases JV is of the view that the Public Body failed to answer some of the clarifications requested, in particular:*
 - a. *The Public Body did not properly answer question 4 regarding recognised institutions, in that it did not specify who is allowed by the Public Body to accredit bodies who can issue certificates of conformity required.*

- b. The Public Body did not properly answer question 7 regarding lost cylinders. This is clearly a question regarding what will happen when a cylinder is lost, i.e. compensation for the lost cylinders. The answer of the Public Body is that the hospital (which is not a legal entity, is not the one issuing the invitation for bids, and will not be entering into any agreement with the successful bidder) will be responsible for the safe custody thereof. The Public Body has not stated and/or clarified what it would do if cylinders are lost whilst in its care.*
- 5. On 26 August 2016, the representative of Medical Gases JV wrote back to the Public Body and insisted that questions 4 and 7 in the letter dated 16 August 2016 be properly answered by the Public Body.*
- 6. On 29 August 2016, the Public Body replied to Medical Gases JV and stated that Medical Gases JV's request for clarification should have reached the Ministry not later than 14 days prior to the closing date for submission of bids. Such a stand is patently incorrect inasmuch as the request for clarifications were sent on 16 August 2016 and was simply not answered by the Public Body, the answer provided being so far off the mark so as to constitute no answer whatsoever.*
- 7. By letter dated 30 August 2016, Medical Gases JV explained why it disagreed with the stand of the Public Body.*
- 8. On 01 September 2016, the bid opening took place. Medical Gases JV is of the view that the bid opening and the bidding process is flawed inasmuch as the Public Body failed to answer/properly answer the clarifications. The failure to answer the clarifications is a material failure and constitutes a serious breach of the procurement rules inasmuch as the clarification would have a major impact on the price quoted by a bidder and the responsiveness of its bid as follows:*
 - a. The cost of certification by accredited bodies/recognised institutions and the type of certification will affect substantially the cost per batch of cylinders to be delivered to the Public Body.*
 - b. Failure to identify precisely which body is a recognised institution would lead to ambiguity when determining whether a bidder has complied with the requirements of the invitation to bid inasmuch as it*

is not clear which institution is being referred to and a bidder must provide evidence that it has approached an accredited body/recognised institution and has taken necessary steps to ensure that should it be awarded the contract, it will be able to secure the necessary certificates of conformity.

- c. The cost of a cylinder is an extremely material part of the bid. Cylinders are a huge investment, especially given that a bidder needs to have at least one month's stock of any item it has been awarded (Section VII, Special conditions of contract, GCC 13.1 Delivery & Documents refers). The Public Body has, up to now, lost dozens of cylinders belonging to the JV partners. The Public Body cannot evade the issue by saying that no cylinders will be lost when cylinders have in fact been lost by Public Body. There is also the issue of traceability which is of prime importance to any bidder. In the past, cylinders belonging to Medical Gases JV partners on the premises of the Public Body have been illegally and unlawfully taken and filled by other medical gas suppliers, which is unacceptable particularly from a security and health perspective. Further, a police case is ongoing in Rodrigues (OB number: 623/16) concerning stolen cylinders from the JV partners which has been delivered by another gas supplier to the Public Body in Rodrigues.*
- 9. The failure of the Public Body to provide the clarifications sought by Medical Gases JV has had a material impact on the evaluation of the bids. There were no clarifications provided by the Public Body to allow bidders to identify which body is a recognized institution or which body can give accreditation to recognised institutions. Medical Gases JV therefore suffered prejudice in submitting its bid and calculating the lowest price it would be able to quote for a bid because it would need to leave sufficient and reasonable margin for such measurement equipment and/or certificates of conformity in its bid price without being able to precisely quantify such costs. Medical Gases JV would also have to include an estimate of cost of potential cylinders lost in its bid.*
- 10. Following the opening of bids, on 21 September 2016, the Central Procurement Board (the CPB) requested clarifications, inter alia, on the certificate of analysis of oxygen purity for items 1 to10 and purity of*

nitrous oxide for items 12 to 14. The CPB asked for clarifications but did not specify whether a certificate from Afrox would be acceptable or not. To the knowledge of Medical Gases JV, there is no recognised accreditation body in Mauritius or any recognised body in Mauritius which has been accredited by a recognised accreditation body. Medical Gases JV replied by way of letter dated 26 September 2016.

11. *Without having an indication as to the body which would be able to issue the certificates, the costing exercise for the bid and therefore the bid value had to be estimated by the Medical Gases JV and has been unfairly penalized in the bidding exercise. Furthermore, it is unlikely that either Samlo Koyenco Steel Co. Ltd or Compagnie Mauricienne de Commerce Ltee have the technical knowhow or equipment or facilities to obtain such certificates or the quality control processes to guarantee compliance with this requirement over the duration of the contract.*

Non-compliance with requirements of the bidding documents

12. *There are various requirements in the Bidding Data Sheet – ref ITB 12.1 (h) which a bidder should comply with and a bidder should submit various documents in support of its bid:*

- a. *“(iii) Valid Manufacturing licence issued by the competent authorities where the bidder is an established manufacturer of Medical Gases.”*

Samlo Koyenco Steel Co. Ltd is not an established manufacture of Medical Gases and has no public record of supply of medical gas.

- b. *“(iv) Documentary evidence of bidder’s technical capability in the field and experienced workforce;”*

As per ITB 19.1 and 19.2, a bidder has to provide documentary evidence that it can conform to the standards specified in Section V, Schedule of Requirements and the bidder has to provide evidence of its technical capability in the field and experienced workforce in its bid.

When reading GCC 13.1 and the SCC which is in relation to GCC 13.1, one can conclude that the “technical capability” is that of:

- i. *“the Delivery of the Goods and Completion of the Related Services ... in accordance with the Delivery and Completion Schedule specified in the Schedule of Requirements” (GCC 13.1);*
- ii. *the capability of maintaining “ an uninterrupted supply of Medical Oxygen and Nitrous Oxide Gases on a 24-hour, 7-day service in case of emergencies” (SCC in relation to GCC 13.1); and*
- iii. *the capability of holding “a stock equivalent to one month’s consumption of Medical gas either in cylinder or in storage tank to meet any unforeseen demand” (SCC in relation to GCC 13.1).*

The schedule of requirements not only sets out standards for the purity of the Medical Gas itself but also standards for delivery, namely:

“Delivery to be effected on an “as and when required basis” in consultation with user departments starting as from 01 January 2017 to 31 December 2017.”

Based on its field experience, Medical Gases JV believes that Samlo Koyenco Steel Co. Ltd does not have the required facilities, equipment, system and quality control processes to guarantee compliance with this requirement over the duration of the contract and therefore could not have provided evidence in its bid with regard to such a matter. Furthermore, Samlo Koyenco Steel Co. Ltd, to the knowledge of Medical Gases JV, has not been previously involved in the manufacture of medical gases and it cannot therefore have any technical capability or experienced workforce in this field.

The Applicant, therefore, seriously doubts, inter alia based on past experience, that Samlo Koyenco Steel Co. Ltd or Compagnie Mauricienne de Commerce Ltee have demonstrated or provided to the Public Body in their bid the necessary documentary evidence in relation to technical capability, as defined above, whether it be in terms of logistics or cylinder stock or otherwise, and experienced workforce to be substantially responsive. Furthermore, the location of the production site of Samlo Koyenco Steel Co. Ltd, which is a matter of public knowledge, is not appropriate for production and filling of Medical Oxygen due to its proximity to a furnace with high levels of pollutants emission (specifically CO AND CO2).

- c. *“(v) undertaking from the bidder on adequate gas cylinders for delivery and reserve storage and available logistics for distribution and supply” Further reference can be made to Addendum no. 1 – MHPQ/MDIS/2015-2016/Q21 and GCC 13.1*

One month stock for items 1 to 10, 12, 13, 15 and 16 represent a substantial amount of stock of Medical Gases over and above the cylinders being used at hospitals, which has a substantial cost to be factored in. Medical Gases JV estimates this to be as follows as per the bidding documents (should a bidder keep its stock in cylinders):

- i. Item 1 (Medical Oxygen gas 0.42 m³ cylinder pin index) : 2 cylinders*
- ii. Item 2 (Medical Oxygen gas 0.42 m³ cylinder pin normal) : 14 cylinders*
- iii. Item 3 (Medical Oxygen gas 0.68 m³ cylinder pin index) : 37 cylinders*
- iv. Item 4 (Medical Oxygen gas 0.68 m³ cylinder pin normal) : 172 cylinders*
- v. Item 5 (Medical Oxygen gas 1.02 m³ cylinder pin normal) : 110 cylinders*
- vi. Item 6 (Medical Oxygen gas 1.36 m³ cylinder : 5 cylinders*
- vii. Item 7 (Medical Oxygen gas 3.23 m³ cylinder : 255 cylinders*
- viii. Item 8 (Medical Oxygen gas 3.40 m³ cylinder : 139 cylinders*
- ix. Item 9 (Medical Oxygen gas 4.25 m³ cylinder : 220 cylinders*
- x. Item 10 (Medical Oxygen gas 8.50 m³ cylinder : 2413 cylinders*
- xi. Item 12 (Nitrous Oxide gas 0.818 m³ cylinder pin index) : 5 cylinders*
- xii. Item 13 (Nitrous Oxide gas 1.727 m³ cylinder pin index) : 1 cylinder*
- xiii. Item 15 (Compressed Air 0.660m³ cylinder) ; 15 cylinders*
- xiv. item 16 (Compressed Air 0.600 m³ cylinder) : 2075 cylinders*

Medical Gases JV seriously doubts, based on its knowledge of the market, that Samlo Koyenco Steel Co. Ltd has the required stock (i.e. some 5, 463 cylinders to cater for unforeseen demand over and above the cylinders being used in hospitals) to fulfill the above requirements of the bidding documents.”

E. The Reply to Challenge

On 20 October 2016, the Public Body made the following reply to the challenge:

“(a) This Ministry maintains that a proper reply has been made to your company following the request for clarifications dated 16 August 2016 regarding questions 4 and 7

- (i) *Regarding question 4, the bidding documents and the Addendum did not impose the choice of any independent accredited body to issue certificates of conformity on bidders, as long as the recognized institution is compliant with the requirements stipulated on page 77 of the bidding documents, namely item GCC 13.1, which provides without ambiguity enough information for bidders to identify which body is a recognized institution, i.e. an institution in conformity with South African, BP, European (EU) or USP Standards.*
 - (ii) *As for question 7, it was stated that each Hospital will be requested to strictly monitor the movement of cylinders falling under their custody and will be responsible for the safe custody thereof. Being responsible for the safe custody of gas cylinders implied bearing responsibility for lost cylinders.*
 - (iii) *This Ministry has therefore replied to all queries received by the deadline for submission of queries in compliance with ITB 8.1 of the bidding document. The letter from your company dated 26 August 2016, received outside the deadline for submission of queries, cannot be linked to the initial queries, which were adequately answered.*
- (b) *As you aware, the evaluation of bids has been carried out at the level of the Central Procurement Board.*

Bids have been evaluated according to criteria and methodology set out in the bidding document by a Bid Evaluation Committee composed of qualified evaluators in compliance with Section 37 of the Public Procurement Act 2006. The determination of substantial responsiveness of bids rests exclusively in the hands of the Bid Evaluation Committee. Therefore the serious doubts and allegations from your company about the competencies and capability of delivery of other bidders are unwarranted.

Furthermore, elements of the challenge relevant to bidder Compagnie Mauricienne de Commerce Ltee is not being entertained in compliance with Section 43(3)(a) of the Public Procurement Act 2006.

- (i) *Following the above, this Ministry views that the grounds for challenge cannot stand.*

Having assured that the procurement exercise has been carried out strictly as per provisions of the Public Procurement Act 2006, we now hope that the matter is closed and that there would be no further delay in the awarding process of all the critical and lifesaving items of this particular procurement exercise.”

F. Grounds for Review

On 26 October 2016, the Applicant seized the Independent Review Panel for review on the following grounds:

“Failure to reply to clarifications and certificate of conformity

1. *It is provided in section VII, Special conditions of Contract, in relation to GCC 13.1 that the successful bidder which is awarded the contract will have to provide, at each delivery, for each batch of cylinders supplied:

“(c) Document that Medical Gases are in conformity with the purity stated and issued by a recognized institution, i.e. an institution in conformity with South African, BP, European (EU) or USP standards.”*
2. *By way of letter dated 16 August 2016, Medical Gases JV requested for clarifications on, inter alia, conformity, recognised institutions and lost cylinders.*
3. *The letter was sent within the delay prescribed as per section II, Bidding Data Sheet, ITB 8.1, Clarification of bidding documents, i.e. more than 14 days before the closing date for submission of bids (the closing date for submission of bids being 01 September 2016).*
4. *The Public Body sent a reply to the request for clarifications in the form of an addendum dated 25 August 2016. Medical Gases JV is of the view that the Public Body failed to answer some of the clarifications requested, in particular:

a. *The Public Body did not properly answer question 4 regarding recognised institutions, in that it did not specify who is allowed by the Public Body to accredit bodies who can issue certificates of conformity required.**

- b. The Public Body did not properly answer question 7 regarding lost cylinders. This is clearly a question regarding what will happen when a cylinder is lost, i.e. compensation for the lost cylinders. The answer of the Public Body is that the hospital (which is not a legal entity, is not the one issuing the invitation for bids, and will not be entering into any agreement with the successful bidder) will be responsible for the safe custody thereof. The Public Body has not stated and/or clarified what it would do if cylinders are lost whilst in its care.*
- 5. On 26 August 2016, the representative of Medical Gases JV wrote back to the Public Body and insisted that questions 4 and 7 in the letter dated 16 August 2016 be properly answered by the Public Body.*
- 6. On 29 August 2016, the Public Body replied to Medical Gases JV and stated that Medical Gases JV's request for clarification should have reached the Ministry not later than 14 days prior to the closing date for submission of bids. Such a stand is patently incorrect inasmuch as the request for clarifications was sent on 16 August 2016 and was simply not answered by the Public Body, the answer provided being so far off the mark so as to constitute no answer whatsoever.*
- 7. By letter dated 30 August 2016, Medical Gases JV explained why it disagreed with the stand of the Public Body.*
- 8. On 01 September 2016, the bid opening took place. Medical Gases JV is of the view that the bid opening and the bidding process is flawed inasmuch as the Public Body failed to answer/properly answer the clarifications. The failure to answer the clarifications is a material failure and constitutes a serious breach of the procurement rules inasmuch as the clarification would have a major impact on the price quoted by a bidder and the responsiveness of its bid as follows:*
 - a. The cost of certification by accredited bodies/recognised institutions and the type of certification will affect substantially the cost per batch of cylinders to be delivered to the Public Body. Failure to identify precisely which body is a recognised institution would lead to ambiguity when determining whether a bidder has complied with the requirements of the invitation to bid inasmuch as it is not clear which*

institution is being referred to and a bidder must provide evidence that it has approached an accredited body/recognised institution and has taken necessary steps to ensure that should it be awarded the contract, it will be able to secure the necessary certificates of conformity. Medical Gases JV suffered prejudice in submitting its bid and calculating the lowest price it would be able to quote for a bid because it would need to leave sufficient and reasonable margin for such measurement equipment and/or certificates of conformity in its bid price without being able to precisely quantify such costs.

- b. The cost of a cylinder is an extremely material part of the bid. Cylinders are a huge investment, especially given that a bidder needs to have at least one month's stock of any item it has been awarded (Section VII, Special conditions of contract, GCC 13.1 Delivery & Documents refers). The Public Body has, up to now, lost dozens of cylinders belonging to the JV partners. The Public Body cannot evade the issue by saying that no cylinders will be lost when cylinders have in fact been lost by Public Body. There is also the issue of traceability which is of prime importance to any bidder. In the past, cylinders belonging to Medical Gases JV partners on the premises of the Public Body have been illegally and unlawfully taken and filled by other medical gas suppliers, which is unacceptable particularly from a security and health perspective. Further, a police case is ongoing in Rodrigues (OB number: 623/16) concerning stolen cylinders from the JV partners which has been delivered by another gas supplier to the Public Body in Rodrigues. Medical Gases JV suffered prejudice in submitting its bid as Medical Gases JV would also have to include an estimate of cost of potential cylinders lost in its bid.*
- 9. Following the opening of bids, on 21 September 2016, the Central Procurement Board (the CPB) requested clarifications, inter alia, on the certificate of analysis of oxygen purity for items 1 to 10 and purity of nitrous oxide for items 12 to 14. The CPB asked for clarifications but did not specify whether a certificate from Afrox would be acceptable or not. To the knowledge of Medical Gases JV, there is no recognised accreditation body in Mauritius or any recognised body in Mauritius which*

has been accredited by a recognised accreditation body. Medical Gases JV replied by way of letter dated 26 September 2016.

10. *Without the clarifications as to the body which would be able to issue the certificates, not only has Medical Gases JV been unfairly penalised in the bidding exercise but furthermore, it is unlikely that Samlo Koyenco Steel Co. Ltd (Samlo) has the technical knowhow or equipment or facilities to obtain such certificates or the quality control processes to guarantee compliance with this requirement over the duration of the contract. Given the price quoted by Samlo, it is also unlikely that Samlo included any adequate cost for the certification of medical gases by an “accredited body” in its bid. Medical Gases JV refers to the previous successful bidder which had issued fake certificates which could have had disastrous consequences on users of these life-saving items. Following queries made, Medical Gases JV received an email from Apragaz showing that last year’s successful bidder did not have the permission of the attesting body which clearly stated in an email dated 18 January 2016 that “This document is misleading the user of the gas cylinders”.*
11. *Medical Gases JV issued a challenge dated 14 October 2016 which covered inter alia the costs of lost cylinders and the question of recognised institutions. The Public Body replied on 20 October 2016 (an illegible fax copy was received on 20 October 2016 – the legible copy was received by post on 21 October 2016). The Public Body took the view, in its reply that it had properly replied to the request for clarifications.*
 - a. *With regard to recognised institutions, the question was which body could give accreditation to recognised institutions. This question is of prime importance to determine which standards would be relevant and which body could be a recognised institution. Simply put, although standards for medical gases are well set, it is not clear to Medical Gases JV what the standards would be for a body to be recognised and be able to issue conformity certificates. The reply of the Public Body to the challenge was that the bid documents did not impose the choice of any independent accredited body. This is beside the point. Medical Gases JV is of the view that the question was clearly warranted as it is not clear who can accredit these institutions*

- and what accreditation standards are relevant. The failure of the Public Body to provide the clarifications has prevented Medical Gases JV from being able to estimate with precision the exact amount to be disbursed for the certification. Furthermore, given the price quoted by Samlo, it is unlikely that Samlo included any adequate cost of certification in its bid.*
- b. With regard to lost cylinders, hospitals cannot take responsibility inasmuch as they are not legal entities and are not a party to any contract and cannot indemnify anyone.*
- 12. Medical Gases JV maintains that the clarifications were not properly replied to and the failure to reply to clarifications has a material impact on the price which a bidder would quote and, therefore, the whole bidding process is flawed.*

Bid responsiveness - Non-compliance with requirements of the bidding documents

- 13. There are various requirements in the Bidding Data Sheet – ref ITB 12.1 (h) which a bidder should comply with and a bidder should submit various documents in support of its bid:*

- a. “(iii) Valid Manufacturing licence issued by the competent authorities where the bidder is an established manufacturer of Medical Gases.”*

Samlo is not an established manufacture of Medical Gases and has no public record of supply of medical gas.

- b. “(iv) Documentary evidence of bidder’s technical capability in the field and experienced workforce;”*

As per ITB 19.1 and 19.2, a bidder has to provide documentary evidence that it can conform to the standards specified in Section V, Schedule of Requirements and the bidder has to provide evidence of its technical capability in the field and experienced workforce in its bid. Based on the Applicant’s field experience, the Applicant believes that Samlo does not have the required facilities, equipment, system and quality control processes in place to guarantee compliance with

this tender requirement over the duration of the contract. It is unlikely that Samlo has provided evidence or adequate evidence of such technical capability in its bid.

In addition, when reading GCC 13.1 and the SCC which is in relation to GCC 13.1, one can conclude that, in addition to compliance with the standards set out in Section V “technical capability” also includes:

- i “the Delivery of the Goods and Completion of the Related Services ... in accordance with the Delivery and Completion Schedule specified in the Schedule of Requirements” (GCC 13.1);*
- ii the capability of maintaining “ an uninterrupted supply of Medical Oxygen and Nitrous Oxide Gases on a 24-hour, 7-day service in case of emergencies” (SCC in relation to GCC 13.1); and*
- iii the capability of holding “a stock equivalent to one month’s consumption of Medical Gas either in cylinder or in storage tank to meet any unforeseen demand” (SCC in relation to GCC 13.1).*

The schedule of requirements not only sets out standards for the purity of the Medical Gas itself but also standards for delivery, namely:

“Delivery to be effected on an “as and when required basis” in consultation with user departments starting as from 01 January 2017 to 31 December 2017.”

Based on its field experience, Medical Gases JV believes that Samlo does not have the required facilities, equipment, system and quality control processes to guarantee compliance with this requirement over the duration of the contract and therefore could not have provided evidence in its bid with regard to such matters. Furthermore, Samlo, to the knowledge of Medical Gases JV, has not been previously involved in the manufacture of medical gases and it cannot therefore have any technical capability or experienced workforce in this field.

The Applicant, therefore, seriously doubts, inter alia based on past experience, that Samlo has demonstrated or provided to the Public Body in their bid the necessary documentary evidence in relation to technical

capability, as defined above, whether it be in terms of logistics or cylinder stock or otherwise, and experienced workforce to be substantially responsive. Furthermore, the location of the production site of Samlo, which is a matter of public knowledge, is not appropriate for production and filling of Medical Oxygen due to its proximity to a furnace with high levels of pollutants emission (specifically CO and CO₂).

- c. *“(v) undertaking from the bidder on adequate gas cylinders for delivery and reserve storage, and available logistics for distribution and supply” Further reference can be made to Addendum no. 1 – MHPQ/MDIS/2015-2016/Q21 and GCC 13.1*

One month’s stock for items 1 to 10, 12, 13, 15 and 16 represent a substantial amount of stock of Medical Gases over and above the cylinders being used at hospitals, which has a substantial cost to be factored in. Medical Gases JV estimates this to be as follows as per the bidding documents (should a bidder keep its stock in cylinders):

- i. Item 1 (Medical Oxygen gas 0.42 m³ cylinder pin index) : 2 cylinders*
- ii. Item 2 (Medical Oxygen gas 0.42 m³ cylinder pin normal) : 14 cylinders*
- iii. Item 3 (Medical Oxygen gas 0.68 m³ cylinder pin index) : 37 cylinders*
- iv. Item 4 (Medical Oxygen gas 0.68 m³ cylinder pin normal) : 172 cylinders*
- v. Item 5 (Medical Oxygen gas 1.02 m³ cylinder pin normal) : 110 cylinders*
- vi. Item 6 (Medical Oxygen gas 136 m³ cylinder : 5 cylinders*
- vii. Item 7 (Medical Oxygen gas 3.23 m³ cylinder : 255 cylinders*
- viii. Item 8 (Medical Oxygen gas 3.40 m³ cylinder : 139 cylinders*
- ix. Item 9 (Medical Oxygen gas 4.25 m³ cylinder : 220 cylinders*
- x. Item 10 (Medical Oxygen gas 8.50 m³ cylinder : 2413 cylinders*
- xi. Item 12 (Nitrous Oxide gas 0.818 m³ cylinder pin index) : 5 cylinders*
- xii. Item 13 (Nitrous Oxide gas 1.727 m³ cylinder pin index) : 1 cylinder*
- xiii. Item 15 (Compressed Air 0.660m³ cylinder) ; 15 cylinders*
- xiv. item 16 (Compressed Air 6.600 m³ cylinder) : 2075 cylinders*

Medical Gases JV seriously doubts, based on its knowledge of the market, that Samlo has the required stock (i.e. some 5,463 cylinders to cater for unforeseen demand over and above the cylinders being used in hospitals) to fulfil the above requirements of the bidding documents.

14. *Medical Gases therefore challenged the bid of Samlo on the basis that the bid of Samlo was unlikely to be substantially responsive by way of the challenge dated 14 October 2016.*
15. *The Public Body replied as follows:*

“b) As you aware, the evaluation of bids has been carried out at the level of the Central Procurement Board.

Bids have been evaluated according to criteria and methodology set out in the bidding document by a Bid Evaluation Committee composed of qualified evaluators in compliance with Section 37 of the Public Procurement Act 2006. The determination of substantial responsiveness of bids rests exclusively in the hands of the Bid Evaluation Committee. Therefore the serious doubts and allegations from your company about the competencies and capability of delivery of other bidders are unwarranted.”

16. *Medical Gases JV is not satisfied with the decision of the Public Body in this regard for the following reasons:*
 - a. *The Public Body has a duty to reply to the challenge with all cards on the table. This is known as the duty of candour. The Public Body has evaded the issues raised by Medical Gases JV and has refused to give proper explanations in relation to the bidding process and evaluation of bids. Instead of carrying out an exercise to determine whether the matters raised by Medical Gases JV are warranted, it appears than the Public Body has simply blindly relied on the Central Procurement Board and the Bid Evaluation Committee.*
 - b. *The Public Body has not even considered the merits of the challenge of Medical Gases JV with respect to the bid responsiveness of Samlo and has, therefore, failed to reply to the merits of the challenge made by Medical Gases JV.*

- c. *Medical Gases JV has raised serious concerns about the responsiveness of Samlo's bid, none of which have been addressed by the Public Body.*
- d. *The fact that the Bid Evaluation Committee carried out the evaluation exercise does not mean that, ipso facto, the evaluation exercise cannot be flawed. In fact, the events of the last bidding exercise culminating in the award of the IRP in matter bearing cause no. 26/15/IRP bear testimony to the fact that the Bid Evaluation Committee and the Central Procurement Board had wrongly found that last year's successful bidder had the necessary equipment, qualifications, experience and capability to comply with the requirements of the bidding documents. The successful bidder, which had been awarded the contract by the Public Body by the time the Independent Review Panel had given its decision (on 2 March 2016), had already, by 17 January 2016, failed in its obligations to supply medical gases because, inter alia, it did not have the required production capacity and quality control process to ensure compliance with technical requirements, did not have the required number of cylinders and did not have the logistics to deliver the medical gases. As a result, Medical Gases JV was required, on Sunday 17 January 2016, to step in and start supplying medical oxygen in emergency to the hospitals to avoid a national catastrophe as some hospitals were within hours of shortage of medical oxygen."*

G. The Hearing

Hearings were held on 08, 17, 22 and 30 November, 13, 20 and 22 December 2016. Notice of Motion and Written submissions were made on 21 November 2016, 12 January 2017 and 26 January 2017 by Applicant. Replies were made on 17 and 25 November 2016 and 25 January 2017 by Respondent.

The Applicant was represented by Mr H. Dhanjee and Ms B. Bhagwan Counsel whereas the Respondent was represented by Mr L. Aujayeb, Assistant Solicitor General.

H. Issues

H.1

Issues raised by the Applicant may be summarised as follows:

1. That the Bidding Documents were vague and ambiguous in certain respects
2. That the Selected Bidder is not capable technically and legally to produce and supply medical gasses to the required standards
3. Failure of the Selected Bidder to submit adequate documentation to certify the quality of his proposed products.

H.2

The Respondent's position may also be broadly summarised as follows:

1. That the contents of the Bidding Documents are self-explanatory, and clarifications provided thereto by the Public Body are sufficient to provide a complete and unambiguous understanding thereof.
2. That the *"Applicant's grounds for review are speculative, exploratory and devoid of any factual basis upon which to stand"*
3. That *"the arguments put forward on behalf of the applicant do not stand as same relate primarily to the execution of the contract, which is outside the purview of the present application"*

I. Findings

I.1

Part of the subject matter of this tender exercise is the supply of Nitrous Oxide gas, better known as Laughing Gas. However, this exercise is no laughing matter: in the words of the Public Body the objective of the procurement exercise was the acquisition of *"critical and lifesaving items."* It is expected therefore that in such circumstances, the Public Body would demonstrate the highest degree of vigilance, both in the drafting of the Bidding Documents, and subsequently in the tender process, and evaluation. The Panel has adopted a like attitude in hearing and determining this Application for Review.

I.2

The Panel would like to deal first of all with an issue which has proved to be a continually recurring feature.

Regulation 56 made under the Public Procurement Act states *inter alia*:

56. Dismissal of application for review

An application for review may be dismissed for –

[----]

(d) contract implementation or administration instead of contract award.

In many cases, Respondents have relied on this Regulation to counter any argument brought forward by Applicants as to the incapacity of the Selected Bidder to carry out his obligations under the contract.

It is important to understand that any bid represents a statement of intent on the part of the bidder to implement a contract under pre-determined conditions, and to specified standards, for a price which is the bid price. Any contest of the suitability of the Selected Bidder, would, of necessity, involve his capacity to perform the contract as stated in his bid.

The Regulation quoted above refers to actual, rather than intended, implementation. In cases where the contract has been awarded (as is indeed the case in these proceedings), the Applicant may not refer to any actual shortcoming in contract implementation. However, even if the contract has been awarded, the Applicant may still contest the ability of the Selected Bidder to perform the contract, based on information at the time of award, to show that the Public Body has erred in evaluation of bids and award.

1.3

This being the case, it stands to reason that the Public Body would request for evidence, to be submitted before award, that a bidder is capable of performing the contract. Thus, the Public Body may request for the submission, along with the tender, of bank certificates, evidence of experience of the bidder and of his staff, certificates of conformity of goods proposed etc. An Applicant, in an Application for Review, may legitimately contest an award to a Selected Bidder where he suspects that any document or evidence requested has not been submitted. Furthermore, if the Panel finds that any mandatory documentation or information has not been submitted, it would not take it lightly if such omission has simply been ignored by the Bid Evaluation Committee, the more so, with regard to the procurement of such vital items.

I.4

In the Bidding Documents, in this exercise, the Public Body had specified the following to be submitted with the bid:

ITB 12.1(h) of BDS

- (i) VAT registration Certificate, if applicable*
- (ii) Document certifying that Gas Cylinder's colour coding for each type of gas is in conformity with South African or BP or US or European Standards.*
- (iii) Valid manufacturing license issued by the competent authorities where the bidder is an established manufacturer of Medical Gases.*
- (iv) Documentary evidence of bidder's technical capability in the field and experienced workforce; and*
- (v) Undertaking from the bidder on adequate gas cylinders for delivery and reserve storage, and available logistics for distribution and supply.*

ITB 20.1 (a) of BDS

Where the bidder is not a manufacturer of Medical Gases, it shall submit the following:

- (a) Manufacturer's authorization.*
- (b) Copy of valid manufacturing license of the manufacturer issued by competent authorities in the manufacturer's country.*

Moreover, the documents require that **at the time of supply**, the supplier should submit *"(iii) Document that Medical gases are in conformity with the purity stated and issued by a recognized institution, i.e. an institution in conformity with South African, BP, European (EU) or USP standards."* There is no specific requirement for submission of any evidence of the quality of proposed supplies at the time of tender, except that under Clause 19 of the ITB, (sub-clauses 19.1 and 19.2), the Bidder is required to submit, along with his tender, documents establishing the conformity of goods intended to be supplied:

"19.1 To establish the conformity of the Goods and Related Services to the Bidding Documents, the Bidder shall furnish as part of its Bid the documentary

evidence that the Goods conform to the technical specifications and standards specified in Section V, Schedule of Requirements.

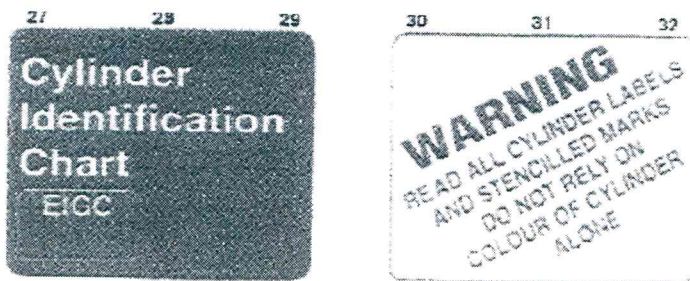
19.2 The documentary evidence may be in the form of literature, drawings or data, and shall consist of a detailed item by item description of the essential technical and performance characteristics of the Goods and Related Services, demonstrating substantial responsiveness of the Goods and Related Services to the technical specification, and if applicable, a statement of deviations and exceptions to the provisions of the Schedule of Requirements.”

1.5

The Bidding Documents lay much emphasis on the colour coding of cylinders, which the Public Body requires to be in conformity with certain named standards. It also requires that documentary evidence of such conformity be submitted with the tender:

(ii) Document certifying that Gas Cylinder’s colour coding for each type of gas is in conformity with South African or BP or US or European Standards.

In fact, this requirement is repeated in several places in the Bidding Documents. It is therefore surprising that such documentary evidence could not be found anywhere in the bid of the Selected Bidder, and this did not elicit any comment from the Bid Evaluation Committee. What the Selected Bidder submitted is a colour coding chart, bearing the following notes:



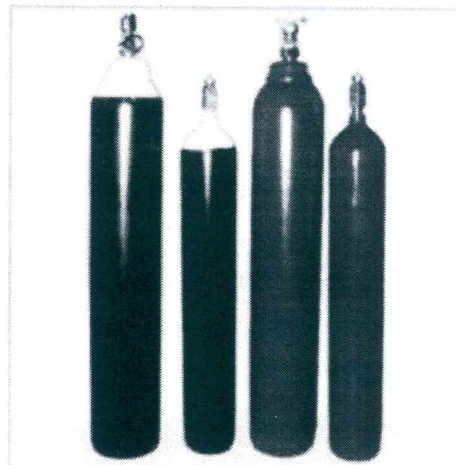
The Panel has been unable to find out what, if anything, EIGC stands for, but can say for sure that it does not stand for any of the standards institutions listed in the Bidding Documents.

What would be the significance of non-standard colour coding? The following extract from Airtec’s (the Selected Bidder’s supplier), website gives an idea of

how failure to adopt an internationally accepted colour code may be dangerous.

Colour Coding of Cylinders

- Accidental confusion of cylinders has been a significant cause of mortality. Colour can be used to help identify gases.
- **The top and shoulder** (the part sloping up to the neck) of each cylinder are painted the colour assigned to the gas it contains or the entire cylinder may be covered by using a nonfading, durable, water-insoluble paint.



- In the case of a **cylinder containing more than one gas**, the colours must be applied in a way that will permit each colour to be seen when viewed from the top. In some countries, the body of the cylinder is painted with the colour of the major gas and the shoulder the colour of the minor gas.
- An international colour code has been adopted by several countries.

There is no evidence that the Selected Bidder's cylinders will conform to the "international colour code [---] adopted by several countries." Yet, the Bid Evaluation Committee did not find it necessary to clarify, but found that:

<i>S.No.</i>	<i>Technical Requirements</i>	<i>Bidder 1 Samlo</i>	<i>Bidder 2 CMC</i>	<i>Bidder 3 MGJV</i>	<i>Remarks</i>
2.	<i>Document certifying that Gas Cylinder's colour coding for each type of gas is in conformity with South African or BP or US or European Standards.</i>	✓	✓	✓	

For the record, the appropriate European Standard is EN 1089-3, and that in the US, colour coding is not regulated by Law.

I.6

The Bidding Documents also request for the submission at the time of tender of:

(iii) Valid manufacturing license issued by the competent authorities where the bidder is an established manufacturer of Medical Gases.

The Selected Bidder did submit evidence of trade and other licenses issued by relevant bodies in Mauritius. However, not only did he not submit any evidence of being “*an established manufacturer of Medical Gases*” in Mauritius, documents submitted may lead to the conclusion that the Selected Bidder is in fact a newcomer in the field.

The Selected Bidder has submitted along with his tender a statement as evidence of technical capability:

“EVIDENCE OF SAMLO KOYENCO LTD TECHNICAL CAPABILITY IN THE FIELD AND EXPERIENCED WORKFORCE

Our Technical Capabilities and Experienced Workforce

Samlo Koyenco Steel Co. Ltd started its operations back in 2000 and is engaged in the manufacture of Oxygen gas in Mauritius since 2007.

Indeed, in 2007 we acquired an Air Separation Unit (ASU) of a capacity of 125 cubic metre per hour. Since then we have been consistently producing Oxygen of the highest purity (99.8%) in conformity with the stringent UE and US standards under the supervision of trained and certified Machine Inspectors and Chemical Engineers. Air Separation Units are today the most dependable technology available worldwide for the production of Oxygen of Medical Grade in excess of 99.6% purity and has been adopted by all the major gas manufacturers worldwide for the supply of Medical Oxygen to Hospitals.

We have been supplying few trading companies in Mauritius with Medical Oxygen. We have also directly supplied hospitals in Republic of the Congo with Medical Oxygen since 2014.

[---]”

The assertions of the Selected Bidder in the above statement are not supported by any documentary evidence.

Trade licenses (or, more appropriately, exemption therefrom), and authorisations date back to December 2015 and August 2016 respectively. However, the letter dated 21st December 2015 from the District Council of Moka giving authorisation for the running of the Oxygen Plant states:

“Re.: Trade Licence for Existing and Running Oxygen Plant

Please refer to your letter dated 14 December 2015 and letter from Ministry of Housing and Lands dated 18 December 2015.

This is to inform you that this Council has taken cognizance that there will be no building construction involved and the Oxygen Gas Plant is already operational within the existing factory.

[---]”

In the Panel’s opinion, none of the information submitted by the Selected Bidder provides evidence that he is an established manufacturer of medical gasses. The letter from the District Council is based on information submitted by Samlo, and cannot therefore be considered evidence that the manufacture of oxygen is an on-going activity. But it does invalidate any subsequent attempt to claim that Samlo is not a manufacturer of medical gasses, but intends to import the totality of goods to be supplied under this contract. In spite of the foregoing, the Selected Bidder has nevertheless managed to convince the Bid Evaluation Committee who found that:

S.No.	Technical Requirements	Bidder 1 Samlo	Bidder 2 CMC	Bidder 3 MGJV	Remarks
3.	<i>Valid manufacturing license issued by the competent authorities where the bidder is an established manufacturer of Medical Gases.</i>	✓	✓	✓	

Surprisingly, in his latest submission, the Respondent claims that *“The successful bidder, not being a manufacturer of Medical Gases, is subject to ITB*

20.1 and has submitted manufacturing authorisation of the sources of supply by competent authority of the country, i.e. Dubai;”

The Panel will nevertheless address this claim further below.

1.7

(iv) Documentary evidence of bidder’s technical capability in the field and experienced workforce; and

As seen above, the Selected Bidder has submitted a statement, without any evidence, of the manufacture and supply of oxygen. It is however, a verifiable and uncontested fact that the Selected Bidder and his staff have wide industrial and manufacturing experience. Whether the manufacture, storage and on-schedule distribution of medical gasses require the same type of experience as *“Foundry, Smelting Plant or Metallurgical Workshop and Galvanising and Electroplating Activities”* is something that is yet to be determined, and the Bid Evaluation Committee did not at any time attempt to clarify this issue.

1.8

(v) Undertaking from the bidder on adequate gas cylinders for delivery and reserve storage, and available logistics for distribution and supply.

The Bidding Documents require only an undertaking from bidders, and do not require the submission of any methodology or evidence that he shall be able to do so. The Selected Bidder has submitted a method statement in this regard:

“We presently have a park of over 1000 cylinders and have already taken all the necessary steps to be supplied with over more than 2000 additional cylinders before the end of December 2016 to meet the exact needs of Mauritian Hospitals.”

The Bid Evaluation Committee has not attempted any calculations to assess whether these quantities would be sufficient, nor would such calculations be possible in view of the uncertain schedule of deliveries. At any rate, the undertaking would be sufficient to request mobilisation of additional cylinders, should the need arise. The Panel shall not therefore consider this issue further.

I.9

More importantly, the Respondent, in his submissions of 25th January 2017, states that: “(i) *The successful bidder, not being a manufacturer of Medical Gases, is subject to ITB 20.1 and has submitted manufacturing authorisation of the sources of supply by competent authority of the country, i.e. Dubai;*”.

Throughout his bid, and subsequent clarification and correspondence, evidence abounds of the intention of the Selected Bidder to manufacture oxygen locally, after an initial shipment of full cylinders from Dubai, whereas it is not stated anywhere in the bid that Oxygen will be imported throughout the currency of the contract. The Panel will give only a few examples of statements made by the Selected Bidder:

The Statement to show “*EVIDENCE OF SAMLO KOYENCO LTD TECHNICAL CAPABILITY IN THE FIELD AND EXPERIENCED WORKFORCE*”

Samlo Koyenco Steel Co. Ltd started its operations back in 2000 and is engaged in the manufacture of Oxygen gas in Mauritius since 2007.

*Indeed, in 2007 we acquired an Air Separation Unit (ASU) of a capacity of 125 cubic metre per hour. Since then we have been consistently **producing Oxygen** of the highest purity (99.8%) in conformity with the stringent UE and US standards under the supervision of trained and certified Machine Inspectors and Chemical Engineers. Air Separation Units are today the most dependable technology available worldwide for the production of Oxygen of Medical Grade in excess of 99.6% purity and has been adopted by all the major gas manufacturers worldwide for the supply of Medical Oxygen to Hospitals*

[---]

*With a capacity of 125 M3 of Oxygen per hour, i.e. nearly 13,000,000 cubic feet yearly (over 44% more than the annual requirement of the MOH&QL), **our manufacturing unit** is also equipped with a Liquid Oxygen Tank of a capacity of over 80,000 litres which represents more than 1 month stock as required by the Ministry of Health and Quality of Life.”*

Letter dated 26th September 2016 from Samlo to the CPB, in reply to a request for clarification:

“We indeed hold a stock of 1000 cylinders in Mauritius and an additional 2000 cylinders are on stand-by at our supplier in Dubai, ready to be shipped in the event the tender is awarded to us.

These cylinders will be shipped filled with Medical Oxygen (hence the submission of Airtec's Certificate of Analysis) ready to be delivered on the 1st of January 2017 to hospitals of the Ministry of Health and Quality of Life (MOH&QL)

After the few first deliveries have been made to the hospitals of the MOH&QL, these very same cylinders, once empty, will then be collected by our trucks and replaced with full cylinders. The empty cylinders will be returned to our plant facility in Mauritius for refill and re-delivered to the Mauritian hospitals on a rotation and on an as and when required basis every day to ensure continuous supply of medical gases to Mauritian hospitals. By the 15th of January 2017, we will therefore hold a stock of 3000 cylinders, 1300 of which shall be dedicated to supply of Compressed Air and the remaining 1700 cylinders to Medical Oxygen.

In this respect, please find attached the Certificate of Conformity emitted by the M/s Sanghi International, the manufacturer of our Oxygen Plant, who regularly inspects our equipment— “

To claim now that it was the intent of the Selected Bidder to import all medical gases to be supplied from Dubai, represents a major change of the Respondent's position. Looking at the record, from the Selected Bidder's bid to the latest submissions, the Respondent believes at the same time that the Selected Bidder is an established manufacturer of medical gasses, and its exact opposite. The Panel will refrain from making any reference to the simultaneous possession and ingestion of cakes, but need not comment any further on this most disturbing issue.

I.10

After consideration of the above issues raised by the Applicant, the Panel is convinced that the Respondent was irresponsible and imprudent, at best, to award to Samlo a contract for the supply of “critical and lifesaving” goods.

However, it is incumbent upon the Panel to consider, for future reference, other points raised by the Applicant.

1.10.1 Clarifications

The Public Body is not doing any favours to bidders by clarifying issues clouded in uncertainty and ambiguity. It is one of the basic tenets of procurement that bidders should bid on the same information, and, unless the needs of the purchaser are clear, and unambiguous, each bidder will bid according to his own understanding of the requirements. Public Bodies should therefore welcome any opportunity to provide clarification, by way of addenda accessible to all bidders, rather than treating bidders as adversaries, and their requests for clarification as a disturbance.

In the case under review, the Bidding Documents at 13.1 of the special conditions, specified that supplies should be accompanied *inter alia*, by (iii) *Document that Medical gases are in conformity with the purity stated and issued by a recognized institution, i.e. an institution in conformity with South African, BP, European (EU) or USP standards.*

The Applicant rightly queried what is a recognised institution. The Public Body replied by way of an addendum that *“The issuing body should be an independent accredited body.”*

This clarification does not add any more meaning to the original text. Accreditation by whom? In Mauritius, Mauritas is the only body empowered by Law to accredit laboratories and associated bodies, and provides accreditation to ISO/IEC 17025, 17021, 17020 and ISO 15189. It does not provide accreditation that Laboratories conform to *South African, BP, European (EU) or USP standards.* There is no evidence that the British and US Pharmacopoeia provide accreditation to Laboratories.

The Applicant therefore queried the clarification, but the Respondent refused to reply further on the grounds that this represented a new request for clarification and was submitted after the deadline for clarification.

It would have been a simple matter to state, for example, that a recognised institution is one which is certified to ISO 17025, or similar, or one which is accredited with the national accreditation agency in its country of operation,

instead of which, the Public Body allowed the issue of recognition of laboratories to remain clouded in mystery. As a result, bidders could not have sufficient information to price their bids correctly, as there was insufficient information to identify laboratories that could issue conformity certificates, and to assess the costs thereof.

Moreover, although certificates of conformity had to be submitted at the time of supply, ITB 19.1 and 19.2 provide that: *“To establish the conformity of the Goods and Related Services to the Bidding Documents, the Bidder shall furnish as part of its Bid the documentary evidence that the Goods conform to the technical specifications and standards specified in Section V, Schedule of Requirements.”* The Panel is of opinion that at least laboratories on which the bidder relies to provide certificates of conformity should be identified at this time.

I.10.2 Lost Cylinders

The same applies to the question raised about loss of cylinders. There is no doubt that, if there is indeed any loss or misplacement of cylinders, bidders would have to make due allowance by providing for an extra number of cylinders, thereby increasing the costs of performance of the contract. The Public Body could have replied that, from historical data, no such loss is anticipated, or that it is expected that x% of cylinders would be misplaced, instead of which it provided a reply that was beside the question.

I.10.3 Responsibility of the Public Body

In this Application for Review, the Respondent is the Public Body. The CPB is not a party to these proceedings, although it is invited to hearings, which it attends as an observer. Basically, an Application for Review is made against the Public Body for failure to reply satisfactorily to the Challenge.

It is therefore the responsibility of the Public Body to defend its decision to award to the Selected Bidder. It cannot shift this responsibility on to the CPB, on the grounds that the latter made the evaluation. Any statement by a Public Body that *“[---] it is for the Central Procurement Board to reply regarding the evaluation and selection of bidders”* and *“[---] the Respondent avers that the evaluation and selection of bidders were effected at the Central Procurement*

Board” can only mean that the Public Body is either unwilling or unable to support the decisions of the CPB.

J. Decision

J.1

The Applicant has amply demonstrated that the Bidding Documents were unclear in certain respects, and that the evaluation was flawed. For these reasons, the Panel finds merit in this Application for Review.

J.2

The Public Body having issued a Certificate of Urgent Public Interest, the suspension order was automatically lifted, and the Public Body proceeded to award the contested lots to the Selected Bidder. The Public Procurement Act does not empower the Panel to question or comment on, nor approve the Certificate of Urgent Public Interest.

J.3

However, the issue of this Certificate of Urgent Public Interest only leaves open one remedy in case of merit: *recommend payment of reasonable costs incurred in participating in the bidding process where a legally binding contract has been awarded which, in the opinion of the Review Panel, should have been awarded to the applicant. (S45.10(d) of the Public Procurement Act.)*

J.4

The Applicant has produced calculations whereby he estimates the cost of producing his bid at MUR 129 513, and the Respondent has not contested this figure. However, presumably, this represents the costs of bidding for all the items for which he has bid, whereas in this Application for Review, he is contesting only items 1 to 13 and 15-16. The Applicant has been awarded items 17-21.

Of the amount claimed by the Applicant to have been spent on the preparation of his bid, a sum of MUR 38 413 has been spent solely for the purposes of analysis of oxygen, which gas is to be supplied solely by Samlo. Of the balance, i.e. MUR 91 100, part is proportional to the number of items, part is

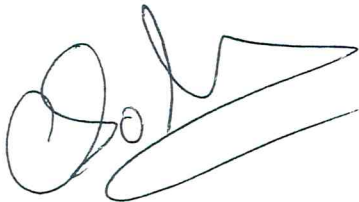
proportional to the bid price for each item, and a certain portion is fixed. However, for the purposes of estimating the costs of providing a tender, it may be considered that these costs are evenly distributed over all items.

J.5

The Panel therefore rules that a reasonable estimate of the cost of producing bids for the contested items is MUR 38 413 + $\frac{15}{21}$ of 91 100, i.e. a total of MUR 103 484.

J.6

The Panel therefore orders the payment of a sum of MUR 103 484 to the Applicant as representing his costs *incurred in participating in the bidding process for items where a legally binding contract has been awarded which, in the opinion of the Review Panel, should have been awarded to the applicant.*



(Mrs Christelle Sohun)
Member



(M. Reshad Lualloo)
Chairperson



(Virjanan Mulloo)
Member

Dated 23 February 2017

