



Independent Review Panel

Decision No. 07/17

In the matter of:

Sotravic Ltee

(Applicant)

v/s

**Ministry of Social Security, National Solidarity, and
Environment and Sustainable Development (Environment
and Sustainable Development Division)**

(Respondent)

(Cause No. 05/17/IRP)

Decision

A. History of the case

This is a case where the Ministry of Social Security, National Solidarity, and Environment and Sustainable Development (Environment and Sustainable Development Division) (hereinafter referred as the Respondent) issued bidding documents for the Procurement of “Operation and Maintenance” of Roche Bois Transfer Station and Transportation of Waste from Roche Bois Transfer Station to Mare Chicose Landfill bearing procurement no: CPB/57/2016.

On 20 February 2017, Sotravic Ltee (hereinafter referred as the Applicant) challenged the said procurement proceedings. By way of letter dated 23 February 2017, the Respondent informed the Applicant that its challenge could not be entertained as it has been received outside the prescribed delay of five days as provided under Section 48(2) of the Regulations. Feeling aggrieved with the decision of the Respondent the Applicant applied for review on 28 February 2017 at the Independent Review Panel pursuant to Section 45 of the Public Procurement Act 2006.

B. The Challenge

On 20 February 2017, the Applicant challenged the award on the following grounds:

“ITB 5.5(b)(iii) of Section II: Bidding Data Sheet of the Bidding Document provides that:

“The bidder shall have at least 3 years of experience as contractor over the last 5 years in providing logistics for transportation of goods or wastes using heavy vehicles”.

From the above ITB 5.5(b)(iii), bidders with no experience in waste management may be qualified with the experience provided in ITB 5.5(b)(iii) of Section II: Bidding Data Sheet in the Bidding document whilst the procurement is for the operation and maintenance of Roche Bois Transfer Station and Transportation of wastes from Roche Bois Transfer Station to Mare Chicose Landfill.

A handwritten signature in blue ink, appearing to be the initials 'S' and 'L'.A handwritten signature in blue ink, appearing to be the initials 'R' and 'B'.A handwritten signature in blue ink, appearing to be the initials 'A' and 'L'.

In view of the nature of the services, it is essential that the bidders have experience in waste management so that only bidders which have experience and qualification in waste management are eligible for the said procurement. In all the previous procurements for the operation and maintenance of Transfer Station and Transportation of Wastes from a Transfer Station to Mare Chicose Landfill, the experience criteria usually provided at ITB 5.5(b) refers to experience of services of similar nature and/or transportation of wastes and/or waste management. In the present procurement, it is the first time that the words ‘transportation of goods’ are used, which opens the door for bidders that do not have experience in waste management, to be qualified and there is a risk that the latter will not be able to fulfil their obligations under the contract for lack of experience in waste management.”

C. The Reply to Challenge

On 23 February 2017, the Public Body made the following reply to the challenge:

“I regret to inform you that the challenge cannot be entertained as it has been received outside the prescribed delay of 5 days, as provided for under section 48(2) of the PPA Regulations.”

D. Grounds for Review

On 28 February 2017, the Applicant seized the Independent Review Panel for review on the following grounds:

- “I. The stand of the Public Body in its letter dated 23rd February 2017 in reply to the Applicant’s challenge dated 20th February 2017 to the effect that the challenge could not be entertained as it has been received outside the prescribed delay of 5 days as provided for under Section 48(2) of the Public Procurement Regulations is erroneous and wrong in law. The Applicant avers that:*
- (i) The invitation for bids was issued on Wednesday 15th February 2017;*
 - (ii) The last day to file its challenge was on the 19th February 2017, however given that the 19th February 2017 was a SUNDAY, the last day for the Applicant to file its challenge was therefore Monday the 20th February 2017, the following day that is not a public holiday.*
 - (iii) The Applicant relies on:*



- (a) Section 38(1)(c) of the Interpretation and General Clauses Act 1974 which provides that: “where an act or proceeding is directed or allowed to be done or taken on a certain day, then, if that day is a Saturday or a public holiday, the act or proceeding may be considered as done or taken in due time if it is done or taken on the following day that is not a public holiday”; and
- (b) Schedule of the Public Holidays Act 1968 which includes SUNDAYS as a public holiday.
- II. The Applicant submits that the refusal of the Public Body not to entertain the its challenge whilst it has clearly been filed within the prescribed delay of 5 days warrants the intervention of the Independent Review Panel to review the procurement proceedings.
- III. ITB 5.5(b)(iii) is wrongly drafted inasmuch as any bidder which has at least 3 years experience as contractor over the last 5 years in providing logistics for transportation of goods only may be qualified even if it does not have experience in waste management.
- IV. ITB 5.5(b)(iii) of Section II: Bidding Data Sheet of the Bidding Document provides that: “The bidder shall have at least 3 years of experience as contractor over the last 5 years in providing logistics for transportation of goods or wastes using heavy vehicles”.
- V. From the above ITB 5.5(b)(iii), bidders with no experience in waste management may be qualified with the experience provided in ITB 5.5(b)(iii) of Section II: Bidding Data Sheet in the Bidding document whilst the procurement is for the operation and maintenance of Roche Bois Transfer Station and Transportation of Wastes from Roche Bois Transfer Station and Transportation of Wastes from Roche Bois Transfer Station to Mare Chicose Landfill.
- VI. In view of the nature of the services, it is essential that the bidders have experience in waste management so that only bidders which have experience and qualification in waste management are eligible for the said procurement.
- VII. In all the previous procurements for the operation and maintenance of Transfer Station and Transportation of Wastes from a Transfer Station to Mare Chicose Landfill, the experience criteria usually provided at ITB 5.5(b) refers to experience of services of similar nature and/or transportation of wastes and/or waste management. In the present procurement, it is the first time that the words ‘transportation of goods’ are used, which opens the door for bidders that do not have experience



in waste management, to be qualified and there is a risk that the latters will not be able to fulfill their obligations under the contract for lack of experience in waste management.”

E. The Hearing

Hearings were held on 06 and 21 March 2017. Written submission was made on 07 March 2017 by the Respondent.

The Applicant was represented by Mr G. Glover, SC together with Ms S. Chuong, Counsel whereas the Respondent was represented by Mrs A. Pillay Nababsing, State Counsel together with Mr D. K. Manikaram, State Attorney.

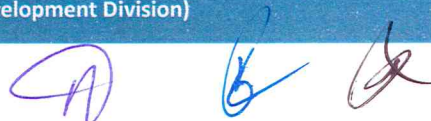
F. Ruling

At the very outset of the hearing, Learned Counsel appearing for the Respondent informed the Panel that she would not be insisting on the ground that the Applicant submitted its application outside delay but she will take a preliminary objection in law to the effect that the Panel does not have jurisdiction and the Applicant does not have a *locus standi* to enter the present application under section 45 of the Public Procurement Act, in view of the fact that there has been no decision as yet from the Respondent and all proceedings have been suspended.

We are in a situation where a prospective bidder, that is the Applicant, who is submitting that he is likely to suffer loss by reason of a breach on the part of the Respondent. It is important to note that the definition of bidder under Section 2 of the Public Procurement Act means “*a participant or potential participant in procurement proceedings.*”

Section 43 of the Public Procurement Act stipulates that:-

A bidder who claims to have suffered, or to be likely to suffer, loss or injury due to a breach of a duty imposed on a public body or the Board by this Act may, subject to subsections (2) and (3), challenge the procurement proceedings before the entry into force of the procurement contract.



Regulation 48(1) of the Act stipulates that “A challenge under section 43 of the Act shall be made in the form set out in the Second Schedule.” The Panel observes that there has been no objection nor any point raised as regards to the manner in which the challenge was made.

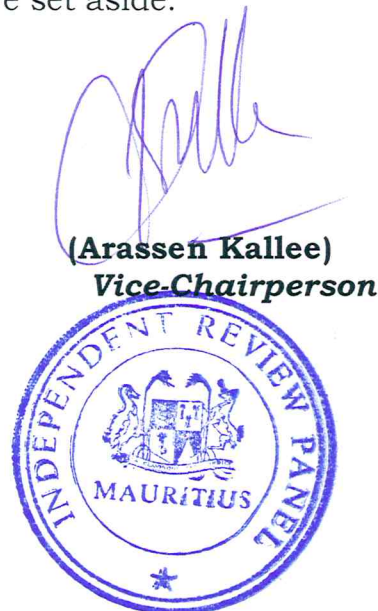
It is noted that section 43 should be read in conjunction with Regulation 48(1). The Panel therefore is of the view that there exists a right for the Applicant in this present case as a prospective bidder to challenge the bid within the prescribed delay.

G. Merits

The main contention of the Applicant is that from a technical prospective, the clause in ITB5.5 has been wrongly drafted. The Panel is of the view that each procurement exercise is a different process altogether. It is a fact that the criteria set by the Respondent has changed from previous one. The Panel therefore concludes that this is not material in as much as the Respondent has the absolute right to set their own criteria if they believe that it will be in their best interest.

The Application is therefore set aside.


(Ramsamy Rajanah)
Member




(Rajsingh Ragnuth)
Member

Dated 10 April 2017