



Independent Review Panel

Decision No. 20/17

In the matter of:

Safety Construction Co. Ltd

(Applicant)

v/s

Wastewater Management Authority

(Respondent)

(Cause No. 19/17/IRP)

Decision

A. History of the case

A.1 Summary

Name of Project	:	Sewer Extension Works and Sewer Maintenance Works
Contract Name	:	Contract WW353W
Identification Number	:	IFB No WMA/06/2017
Closing date for submission of proposals	:	16 May 2017

A.2 Scope

The Wastewater Management Authority (WMA), on behalf of the Ministry of Energy and Public Utilities (MEPU), invited eligible and qualified contractors through Open Advertised Bidding method to apply for participation in a Framework Agreement for Contract WW353W – Sewer Extension Works and Sewer Maintenance Works over a period of one year on pre-determined rates.

The scope of Works shall consist of the Extension of Sewer Networks and Maintenance Works involving the upgrading, rehabilitation, repairs, replacement and diversion of existing sewer reticulation, including branch connections, construction of manholes and sewer works within private premises and areas where public sewer networks exist on an “as and when required” basis

A.3 Bidding Data

Further to the approval of the WMA Board, the invitation for proposals was launched on 14 April 2017. The closing date for the receipt of proposals was set for 16 May 2017.

Five proposals were received as follows:

<i>Applicant</i>	<i>Responsive or Not Responsive</i>	<i>Reasons why proposals were not responsive</i>
<i>H. Padiachy Co. Ltd</i>	<i>Responsive</i>	
<i>Onix Co. Ltd</i>	<i>Responsive</i>	
<i>PAD & Co. Ltd</i>	<i>Responsive</i>	



<i>Applicant</i>	<i>Responsive or Not Responsive</i>	<i>Reasons why proposals were not responsive</i>
<i>Square Deal Multi-Purpose Cooperative Society Ltd</i>	<i>Responsive</i>	
<i>Safety Construction Co. Ltd</i>	<i>Not Responsive</i>	<i>Does not possess 'Specialization in Sewerage Works' as defined under Reference CE19 in the Third Schedule of the Construction Industry Development Board (CIDB) Act of 2008.</i>

B. Evaluation

B.1 Evaluation Committee

Following the Public Opening exercise carried out on 16 May 2017, an Evaluation Committee was set up to evaluate and make recommendation for selection of contractors under Contract WW353W. The Evaluation Committee comprised the following members:

Mr. S. Seebah	Chairperson –Senior Engineer (Civil)
Mr. N. Banharally	Member – Engineer (Civil)
Mrs. N. Bengah	Member – Senior Financial Officer

B.2 Completeness of Proposals

In respect of completeness of proposals, the Bid Evaluation Committee found that: *Pad & Co. Ltd has submitted audited accounts for financial years 2013, 2014 and 2015. An unaudited account has been submitted for year 2016.*

Safety Construction Co. Ltd has submitted audited accounts for financial years 2013, 2014 and 2015. No audited accounts has been submitted for year 2016.

All other bidders have submitted all relevant information and supporting documents as per the requirements of the Bidding Document.

The Bid Evaluation Committee also noted various minor discrepancies in the wording of certain documents from tenderers PAD&CO and Safety Construction.



All bids were considered by the Bid Evaluation Committee as substantially responsive in respect of completeness.

B.3 Technical Evaluation

The Bid Evaluation Committee observed that: *Pad & Co. Ltd has submitted a Certificate of Registration with the CIDB with an expiry date of 08 May 2017. However, they have also submitted a letter from CIDB dated 10 May 2017, acknowledging the receipt of their application for renewal of their registration. The letter of CIDB also states the following:*

"Please note that the current Certificate with Registration Reference CT/CE/L/A-00351 issued to Phil Alain Didier Company Limited on 09 May 2016 shall be deemed to be valid until a new Certificate of Registration is issued."

In consequence, the Certificate of Registration with the CIDB, submitted by PAD & Co. Ltd is considered to be valid.

As per their Certificate of Registration with the CIDB, Safety Construction Co. Ltd do not have specialisation in 'CE19 – Sewerage Works'. In addition to their Certificate, Safety Construction Co. Ltd has also submitted a letter from CIDB dated 11 January 2017--- which confirms that the bidder "is registered with the CIDB as Grade B contractor in Civil Engineering Construction Works with area of specialization CE21".

Since CE21 relates to "General Civil Engineering Works", the letter of CIDB also gives to understand that the bidder is allowed to perform works in all areas pertaining to Civil Engineering Construction Works but not as a "specialist contractor".

In consequence, since specialisation in CE19 is a qualifying criterion to enter into the Framework Agreement, the bid of Safety Construction Co. Ltd do not meet a major requirement of the Qualification and Evaluation Criteria and is thus being considered as non-responsive and is not being retained for further evaluation.



All the remaining four bidders have a registration of at least Grade E in 'Civil Engineering Construction Works' and has specialisation in 'CE19 – Sewerage Works' and thus meet the requirement of the Evaluation and Qualification Criteria in this regard.

B.4 Conclusion of Bid Evaluation Committee

The Bid Evaluation Committee proceeded with the evaluation of the remaining 4 bidders in the normal manner, and concluded as follows:

Further to the evaluation of the proposals, the Evaluation Committee came to the conclusion that the following contractors may be selected to enter in a Framework Agreement under Contract WW353W – Sewer Extension Works and Sewer Maintenance Works:

1. *H. Padiachy Co. Ltd*
2. *Onix Co. Ltd, subject to confirming that they have the ability to provide a 'mobile generator' on site.*
3. *PAD & Co. Ltd*
4. *Square Deal Multi-Purpose Cooperative Society Ltd*

C. Notification of Award

The Wastewater Management Authority through a letter dated 07 July 2017, informed the Applicant of the particulars of the successful bidders as follows:

- H. Padiachy Contractor Ltd
- Onix Co. Ltd
- PAD & Co. Ltd
- Square Deal Multi-Purpose Cooperative Society Ltd

D. The Challenge

On 12 July 2017, the Applicant challenged the procurement on the following grounds:

"Safety Construction Co. Ltd has adequate past experiences and submitted out bid duly completed and signed together with all necessary required documents. We believe our bid is responsive and has unjustly not been selected."



E. The Reply to Challenge

On 17 July 2017, the Public Body made the following reply to the challenge:

“We wish you to inform you that your bid have been found non-responsive as you do not possess ‘Specialisation in Sewerage Works’ as required under the Framework Agreement.”

F. Grounds for Review

On 21 July 2017, the Applicant seized the Independent Review Panel for review on the following grounds:

“The Applicant is not satisfied with the decision of the abovementioned Public Body for the following reasons:

- a. While preparing the Framework Agreement, the said Public Body has failed to take into account the applicable law as it is required under Section 46(1)(k) of the Construction Industry Development Board Act 2008 inasmuch as the Construction Industry Development Board Act 2008 has been amended by Act No. 31 of 2016, i.e. by the Construction Industry Development Board(Amendment) Act 2016. The Framework Agreement as drafted is therefore not compliant with the law;*
- b. The said Public Body has further failed to take into account Regulation 3(6) of the Construction Industry Development Board (Registration of Consultants and Contractors) Regulations 2014 during its selection process.*
- c. The said Public Body was wrong to have determined that the Applicant’s bid was “non-responsive”, as stated in its letter dated 17/07/2017;*
- d. The said Public Body was wrong not to retain the Applicant’s bid for selection since the said Public Body has purposely omitted to consider contract successfully performed by the Applicant for the said Public Body itself which was for a Sewerage Project as well.”*



G. The Hearing

Hearings were held on 27 July and 10 and 16 August 2017. Statement of Reply from Respondent was made on 07 August 2017 and Reply to Respondent's Statement of case was made on 14 August 2017 by Applicant.

The Applicant was represented by Mr J. Maudarbaccus, Counsel whereas the Respondent was represented by Mr R. Daureeawoo, Counsel together with Mr R. Bucktowonsing, Attorney.

H. Findings

H.1

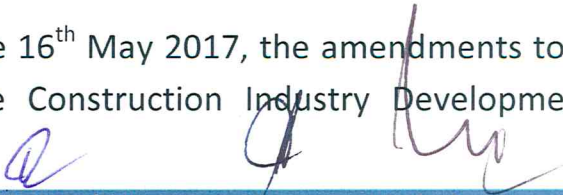
The sole reason given by the Bid Evaluation Committee for the elimination of the Applicant was: *“As per their Certificate of Registration with the CIDB, Safety Construction Co. Ltd do not have specialisation in 'CE19 – Sewerage Works'. In addition to their Certificate, Safety Construction Co. Ltd has also submitted a letter from CIDB dated 11 January 2017--- which confirms that the bidder "is registered with the CIDB as Grade B contractor in Civil Engineering Construction Works with area of specialization CE21".*

Since CE21 relates to "General Civil Engineering Works", the letter of CIDB also gives to understand that the bidder is allowed to perform works in all areas pertaining to Civil Engineering Construction Works but not as a "specialist contractor".

In consequence, since specialisation in CE19 is a qualifying criterion to enter into the Framework Agreement, the bid of Safety Construction Co. Ltd do not meet a major requirement of the Qualification and Evaluation Criteria and is thus being considered as non-responsive and is not being retained for further evaluation.”

H.2

At the date of tender, i.e. on the 16th May 2017, the amendments to the CIDB Act 2008, as contained in the Construction Industry Development Board



(Amendment) Act 2016 (Act No 31 of 2016), had become effective. At that date, (indeed, even at the date of floating of tenders in April 2017), the Third Schedule of the CIDB Act 2008 had been repealed and replaced by new classification contained in the new Schedules of the CIDB (Amendment) Act 2016

However, this same Amendment Act provided for the continued existence of the obsolete classification in the defunct Third Schedule of the CIDB Act (2008):

“Section 21 of principal Act repealed and replaced

Section 21 of the principal Act is repealed and replaced by the following section –

21. Duration and renewal of registration

(1) A registration under section 19, shall, unless previously suspended or cancelled, continue to be in force until 30 June next following the date when it was issued or last renewed, but shall, subject to section 22, be renewable for yearly periods ending 30 June.

It was therefore not unlawful for the Respondent to specify a requirement for specialisation CE19 under the obsolete Third Schedule of the CIDB Act (2008).

H.3

However, by specifying **solely** CE19 of the old classification, the Respondent excluded all tenderers who could have complied with the new classification under the new Schedules of the Amended Act in force at the time of tender. In fact, all relevant Bidding Documents, that is those specifying a tender submission date after the 1st March 2017, should specify as main requirement, specialisation under the new classification as contained in the new Schedules under the CIDB (Amendment) Act (2016), (in this case CE06), and also signify acceptance of relevant registration certificates from CIDB under the obsolete Third Schedule of the CIDB Act (2008), (in this case CE19). By excluding those registered, or qualifying for registration, under the relevant specialisation of the new Schedule of the **Legislation in force at the time of tender**, the Respondent committed an unlawful Act.



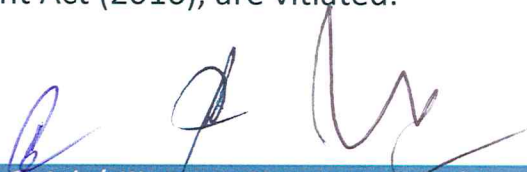
H.4

It is true that the Applicant had not contested the validity of the Bidding Documents before submission of bids, but, in his bid, has given an undertaking that he accepts, as valid, all conditions of tender. It has been the policy of this Panel not to entertain any contest of the Bidding Documents in the absence of any objection prior to submission of tenders. However, in this case, neither the absence of such contest, nor the statement of the Applicant in his bid that *"We have examined and have no reservations to the invitation to participate in Framework agreement Bidding Documents, including Addenda issued"* cannot validate an unlawful act.

H.5

It has also been argued by the Respondent that *"--- Respondent draws attention to the fact that at the time the bids were submitted and/or were being considered, the Applicant did not have the approval of the Construction Industry Development Board for the Areas of Specialization CE 19 or CE 06."* That the Applicant has never sought registration with the CIDB under CE19 cannot be held against him, as such speciality registration was not mandatory to perform the works under discussion, unless required by the Client. Thus, a bidder may seek speciality registration immediately prior to submitting a bid. In this case, however, it would have been impossible for him to obtain registration under CE19 after the coming into force of the Amendment Act on 1st March 2017. Since CE06 of the new schedule had not been specified in the Bidding Documents, the Applicant cannot be blamed for not seeking registration under CE06.

It has also been reported that the CIDB was not in a position to effect registration of contractors under the new classification immediately after the coming into force of the Amendment Act on 1st March 2017. That, in itself, cannot constitute a valid reason for Public Bodies to ignore the provisions of the Amendment Act 2016, after its coming into force, but may well mean that all tenders with a submission date after the 1st March 2017, and based solely on the obsolete classification of the CIDB Act (2008), in total disregard of the new schedules of the Amendment Act (2016), are vitiated.



H.5

The Public Procurement Act (2006), under S45(10), states:

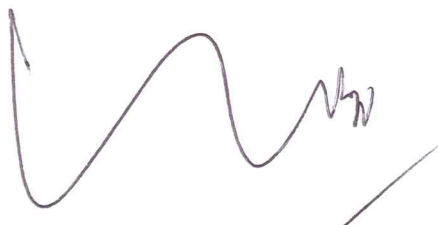
(10) The Review Panel may dismiss an application for review or may, if it determines that there is merit in it, order one or more of the following remedies -


(a) prohibit the public body from acting or deciding in an unauthorised manner or from following an incorrect procedure;

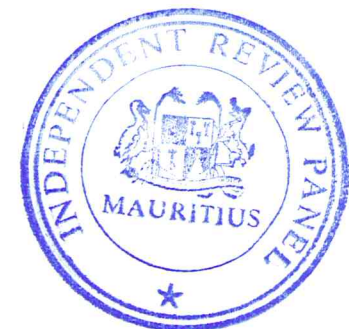
However, in this case, the Respondent has issued a Certificate of Urgent Public Interest, which, the same S45, under sub-section 7 qualifies as binding on the Panel. The latter, therefore, does not have the power to stop the Public Body from performing an unlawful act in the present circumstances.

I. Decision

For the above reasons, the Panel finds that there is merit in this Application for Review. However, it does not believe that the Applicant, or any other Bidder, should have been awarded any part of this framework contract, as the procedure was vitiated. The Panel, therefore, refrains from making any order as to compensation.


(Virjanan Mulloo)
Member


(Reshad Lalloo)
Chairperson




(Ramsamy Rajanah)
Member

Dated 23 August 2017