



## Independent Review Panel

Decision No. 06/18

In the matter of:

**Unik Construction Engineering (Mauritius) Ltd**

(Applicant)

v/s

**National Development Unit**

(Respondent)

(Cause No. 03/18/IRP)

**Decision**

**A. History of the case**

The present application for review, Unik Construction Engineering (Mauritius) Ltd (hereinafter referred as to the “Applicant”) challenging the National Development Unit (Prime Minister’s Office) (hereinafter referred to as the “Respondent”) the decision not to award the contract for the procurement of “ Framework Agreement for construction and upgrading of drains and associated works for the Period of two(2) years and from year 2018 bearing procurement reference : NDU/Q/2/2017-2018/OIB and CPB Ref number : CPB/60/2017.

Through an open advertised bid the Applicant applied for the procurement of a “Framework Agreement for construction and upgrading of drains and associated works for the Period of two (2) years and from year 2018 bearing procurement reference : NDU/Q/2/2017-2018/OIB and CPB Ref number: CPB/60/2017. On 02 April 2018, the Respondent informed the Applicant that its bid has not been retained for zones 4, 5 and 6 respectively. The Applicant challenged the Respondent’s decision on the 5 April 2018. The Respondent replied to the Applicant’s challenge on the 6 April 2018 and maintained its decision.

Feeling aggrieved of the Respondent’s decision the Applicant applied for review before the Independent Review Panel on the 12 April 2018 pursuant to section 45 of the Public Procurement Act.

**B. Notification of Award**

The National Development Unit through a letter dated 02 April 2018, informed the Applicant of the particulars of the successful bidders as follows:

SN	Bidders	Address	Zones for which Bidders are selected for the Framework Agreement	Limit of Awards - 50% of Average Annual Turnover (MUR) (Exclusive of VAT)
1	J. Dookhun & Sons Ltd	Royal Road, Petite Riviere	1	14,510,324.00

2	Safety Construction Co. Ltd	Camp de Masque Pave, Flacq	2 & 3	80,113,500.00
3	Rehm Grinaker Construction Co. Ltd	Royal Road, Arsenal	2 & 3	799,394,867.50
4	H. Padiachy Contractor Ltd	53, Emmanuel Anquetil St, Port-Louis	4 & 5	36,115,701.50
5	Phil Alain Didier Company Ltd	Motorway M3, Riche Terre	1, 2, 3, 4,5 & 6	458,223,208.00
6	Cimix Construction Co. Ltd	Royal Road, Plein Bois, L'escalier	5	17,165,127.50
7	Best Construct Co. Ltd	3rd Floor, Gallerie Evershine, Dr Roux Street, Rose-Hill	1, 3, 4, 5 & 6	195,414,370.50
8	Square Deal Multipurpose Cooperative Society Ltd	CEB Road, Goodlands	1, 2, 3, 4, 5 & 6	248,234,964.50

**C. The Challenge**

On 05 April 2018 the Applicant challenged the award on the following grounds:

- (i) *“The bidder quoted price is within 15% higher than the lowest quoted price*
- (ii) *Bidder is the second lowest responsive bidder for the zone 4, 5, 6.”*

**D. The Reply to Challenge**

On 06 April 2018 the Public Body made the following reply to the challenge:

*“You are, hereby informed that your bid has not been retained for the following reasons:*

*Clause 18.1 of the Instruction to Contractors in the Bidding Document stipulates: “Proposals shall remain valid for the period of one hundred and twenty (120) days i.e. valid up to.....2018. A proposal for a shorter period shall be rejected as non-responsive.”*

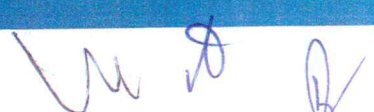
*The proposal submitted by Unik Construction Engineering (Mauritius) Ltd is valid up to 02 June 2018 instead of 07 June 2018.*

Accordingly, the proposal of Unik Construction Engineering (Mauritius) Ltd was non-responsive.”

**E. Grounds for Review**

On 12 April 2018, the Applicant seized the Independent Review Panel for review on the following grounds:

- (i) *“The Respondent and/or Central Procurement Board (the “Board”) have failed to take into consideration that the Applicant has in fact stated in its Letter of Proposal that **“our proposal shall be valid for a period of one hundred and twenty days (120) from the date fixed for the bid submission deadline”** which for all intents and purposes means up to 8<sup>th</sup> June 2018 taking into consideration that the bid submission deadline was 8<sup>th</sup> February 2018.*
- (ii) *The Respondent and/or the Board have failed to take into consideration that the date mentioned in figures in the Letter of Proposal i.e. 2<sup>nd</sup> June 2018 was an obvious or apparent typographical error on the face of the document.*
- (iii) *The Respondent or the Board have failed to take into consideration that on face of the wordings in the Letter of Proposal the date 2<sup>nd</sup> June 2018 was a minor human error and/or a minor deviation which should have been clarified with the Applicant and corrected during the examination of bids and the Respondent and/or the Board have failed in their duty, under section 37(1) of the Public Procurement Act 2006 (the “Act”) to seek clarification during the examination of bids from the Applicant to facilitate evaluation.*
- (iv) *The Respondent and/or the Board have failed to take into consideration that the date “2<sup>nd</sup> June 2018” is for all intents and purposes a minor informality or irregularity and as such is one that is a matter of form or pertains to some immaterial or inconsequential defect or variation of the bid from the exact requirement of the ITB, the correction or waiver of which would not be prejudicial to the Respondent i.e., the effect on price, quality, quantity, delivery or contractual conditions and would not unfairly affect the competitive position of the other contractor’s under the proposed framework agreement.*



- (v) *The Respondent and/or Board have failed to correct the error i.e “2<sup>nd</sup> June 2018” to that “8<sup>th</sup> June 2018” and notified the Applicant considering the discrepancy between the wordings “**our proposal shall be valid for a period of one hundred and twenty days (120) from the date fixed for the bid submission deadline**” and the words “2<sup>nd</sup> June 2018” where statement in words shall prevail as per section 37(6) of the Act.*
- (vi) *The Respondent or the Board have erred and acted in breach of section 40(1) of the Act inasmuch as the procurement contract shall be awarded to the Applicant for zone 4, 5 and 6 for having submitted the second lowest evaluated substantially responsive bid which meets the qualification criteria specified in the bidding documents.*
- (vii) *The Respondent and/or Board has breached section 4(5) of the Public Procurement (Regulation) 2008 inasmuch as the Appellant’s bid was amongst the lowest one and same was totally disregarded.*
- (viii) *The tender submitted by the other contractors and which were selected were grossly exaggerated and well above the Applicant’s bid which is unfair, unjustified and against the interest of the public body.*
- (ix) *The Applicant’s bid ought to have been declared substantially responsive in light with the requirement of fairness, equity, transparency, competitiveness and cost effectiveness.*
- (x) *The Applicant has complied with all the requirements of the tender documents save and except the abovementioned minor error and as such the Applicant’s bid is a substantially responsive bid and as the second lowest bidder for zone 4, 5, and 6 it ought to have been selected.”*

## **F. The Hearing**

The Hearing was held on 26 April 2018. The Applicant was represented by Mr. Robin Appaya of Counsel whereas the Respondent was represented by Mrs. Topsy-Sonoo, Assistant Solicitor General together with Ms. Domah of Counsel.

Counsel relied on their respective statement of case, a reply, written submissions and documents produced.

The core issue of this review is whether the Respondent was right to reject the Applicant's bid on the issue of the proposal's validity period which was for a period of 120 days from the date fixed for submission deadline that is 07 June 2018.

The Applicant stated the expiry of its proposal validity to be 02 June 2018, when the Addendum no. 2 clearly specified that the validity of the bids should be up to 07 June 2018. As a result of same the Applicant's proposal was not responsive and for all intents and purposes, this amounted to a material deviation.

It is not disputed that following an addendum dated 29 January 2018 sent by the Respondent to bidders, the validity of the Bids/proposal was extended to 07 June 2018.

### **The Law**

Section 37(6) of the Public Procurement Act provides that:-

*“where there is a discrepancy between figures and words, the amount in words shall prevail and the mistake shall be corrected and the bidder notified.*

The Panel finds that this section was meant to apply to sums/amounts and not to dates. Thus, the Applicant reliance on section 37(6) cannot substantiate the argument that the words of the Letter of Proposal should take precedence over the date stated by the Applicant.

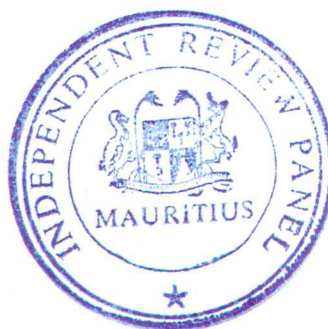
The Panel notes that in the first proposal the date inserted by the Applicant was correct. The mistake made by the Applicant only occurred when the Respondent extended the validity period to 07 June 2018. The Panel also took note that in **Annex B** the Respondent clearly mentioned that the



validity of the bids has been extended up to 07 June 2018. Therefore, it was clear to every bidder including the Applicant that the validity was up to 07 June 2018. In case if the Applicant has had to compute the number of days to reach the date in question i.e. 07 June 2018, then the onus would have been on the Applicant to insert the correct date. But since the Respondent already communicated the extension date to the Applicant, the Panel firmly believes that this is a minor deviation. It is purely and simply a typo and a genuine mistake from the part of the Applicant.

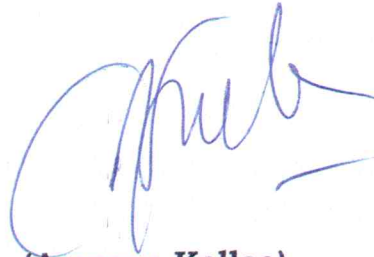
The form Letter of Proposal at Section III clearly stipulates that *“Our proposal shall be valid for a period of **one hundred and twenty (120) days** from the date fixed for the bid submission deadline i.e. up to.....2018 in accordance with the Framework Agreement Documents, and it shall remain binding upon us and may be accepted at any time before the expiration of that period.”* However, in **Annex B** the Respondent made no mention of validity of **one hundred and twenty (120) days** from the date fixed for the bid submission deadline instead they simply informed bidders of the extension date that is 7 June 2018. The Panel notes that the Applicant did mention in his proposal letter that its bid validity period remains valid until the submission of the deadline.

The Panel now turns to the issue of clarification. It is important to note that according to **Annex E** the bid submitted by selected bidders in respect of zones 4,5 and 6 are clearly above the Applicant’s bids. It is more than Rs 45M. We are dealing with public funds. The Panel believes that in all fairness and in the interest of Justice, Transparency and Good Governance, the Respondent should have clarified this issue with the Applicant.

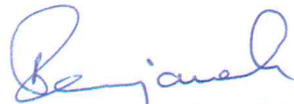


**G. Decision**

The Panel therefore finds merit in this application for review and hereby orders an annulment of the decision of the Respondent to award the contract to the Selected Bidders, and further orders a re-evaluation of the bids.



**(Arassen Kallee)**  
**Vice Chairperson**



**(Ramsamy Rajanah)**  
**Member**



**(Virjanan Mulloo)**  
**Member**

**Dated 03 May 2018**

