



Independent Review Panel

Decision No. 09/18

In the matter of:

RSL Security Services Ltd

(Applicant)

v/s

**Ministry of Education and Human Resources, Tertiary
Education and Scientific Research**

(Respondent)

(Cause No. 11 / 18 / IRP)

Decision

A. History of the case

The Ministry of Education and Human Resources, Tertiary Education and Scientific Research issued bidding documents on 18 July 2017 in respect of the procurement of watch and security services in schools and education institutions. Following evaluation, notifications were issued by the Ministry to the successful bidders and to the unsuccessful ones on 26 July 2018, which included the Applicant.

On 31 July 2018, the Applicant challenged the decision of the Ministry not to select its bid and this challenge was met with an unfavourable response from the Senior Chief Executive on 6 August 2018.

The Applicant then proceeded to apply for review before the Panel on 9 August 2018.

B. The Hearings

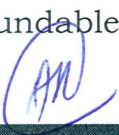
Hearings were held on 21 August, 28 August and 04 September, 2018.

The Applicant was represented by Mr G. Glover, Senior Counsel appearing together with Ms S. Chuong, Counsel whereas the Respondent was represented, at the hearings of 28 August and 04 September 2018, by Mrs P. Varma, Principal State Counsel.

The case was first called *pro forma* on 21st August 2018 and fixed for a hearing on the 28th August 2018. Meanwhile, the Panel was informed that the procurement proceedings had been cancelled and the public body would be issuing a fresh tender instead and the provisions of section 39 of the Public Procurement Act (the “Act”) were thereby triggered.

Accordingly, the Applicant withdrew its application for review before us on 28 August 2018. However, the Applicant moved, *inter alia*, for the refund of all the fees it has paid in respect of its application for review namely, the security deposit of Rs 25,000 and the non-refundable processing fee of Rs 50,000.

The matter was then fixed for Arguments on this sole issue on 4 September 2018. The Applicant put in written submissions together with oral arguments in favour of it being refunded the total sum of Rs 75,000. The Respondent conceded that the Rs 25,000 of security deposit should be refunded as has been the practice of this Panel but argued that the non-refundable processing fee should not be reimbursed to the Applicant.

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C. Findings

We have gone through the able submissions offered on both sides and we think that the present matter is a fit application for us to set out, for the benefit of litigants appearing before us, what the law is in respect of security deposits and of processing fees.

The relevant provisions in the Act can be found at section 45(3):

“(3) (a) An applicant for a review shall be required to make a deposit as may be prescribed for filing the application.”

(b) Where the Review Panel determines that the application was frivolous, the deposit made shall be forfeited.

(c) An applicant shall pay a non-refundable fee for processing the application in such amount, within such time and in such manner as may be prescribed.

(d) Where the Review Panel determines that there is no merit in the application, 50 per cent of the deposit under paragraph (a) shall be forfeited.”

Section 45(3) not only sets out the requirements to pay for a deposit and a non-refundable fee but sub-sections (b) and (d) also establish the powers of this Panel to reimburse part of the deposit or deemed it to have been forfeited by the applicant.

Indeed, pursuant to principles enshrined in section 45(3), an applicant whose case is deemed frivolous by the Panel shall find his deposit forfeited while an applicant whose application is set aside for being devoid of merit will forfeit 50% of his deposit.

In addition, the Public Procurement Regulations 2008 (the “Regulations”), at regulation 51, provides us with more details as to the amounts to be disbursed by applicants and describes the fee as being a processing fee and the deposit as being a security deposit. It states that:

“51. Security Deposit and processing fee”

(1) The submission of an application for review shall be accompanied by —

(a) a security deposit of an amount of—

(i) 100,000 rupees, in the case where the application relates to the bid opening process or the award of a major contract; or

(ii) 25,000 rupees, in any other case; and

(b) a non-refundable processing fee of 50,000 rupees.

(2) The security deposit shall be forfeited where the Review Panel dismisses the application as frivolous.”

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Regulation 51, paragraph 2 reiterates that the security deposit shall be wholly forfeited in cases where the Panel dismisses the application for being frivolous. In this respect, guidance may be found in regulation 56 that provides for which reasons an application for review may be dismissed.

We agree with the submissions of Learned Senior Counsel for the Applicant to the effect that the Act and the Regulations are silent regarding cases where an applicant wins the day or withdraws proceedings before us. We also subscribe with Learned Counsel's point that an *a contrario* approach should be used when interpreting section 45(3) of the Act and paragraph 51 of the Regulations- if the law is silent in respect of those two events but it sets out the outcome in respect of the other two possibilities, it follows that an applicant should be reimbursed the whole of his deposit (or, more precisely, his security deposit) where his application succeeds or is withdrawn. We note that this has also been the practice of this Panel to reimburse deposits fully in such cases and we find no reason to depart from it.

However, the Applicant is going further in its application before us by asking for a refund of the non-refundable fee, or processing fee, over and above the refund of its deposit to which it is fully entitled. To sustain this point, the Applicant argues, essentially, that the cancellation was made very late in the day and, more importantly, after it had lodged the present application. The Applicant contends that the reason advanced by the Respondent for cancelling the bidding exercise is one that could have been discovered or implemented before the application for review pursuant to section 45 of the Act, perhaps at the challenge stage (under section 43), if not at the bid evaluation stage. In summary, the Applicant's view is that it is most unfair that it has had to incur unnecessary expense which could have been easily avoided had the public body proceeded more diligently. Instead, it was placed, as Mr Glover puts it, '*devant un fait accompli*' and has found its right to have the bidding process reviewed defeated after it had duly exercised it.

The Applicant thus invites us to send a strong message to public bodies to act diligently and in full consideration of their duties and not make an abuse of their powers to cancel procurement processes, in particular, after a review has been applied for before this Panel.

The Respondent disagrees with the presentation of the facts by Senior Counsel for the Applicant. Learned Counsel for Respondent also rightly points out that the matter of refunding the processing fee is one for the Panel to address.

Although we do have some sympathy towards the Applicant, in particular, because of the timing of the cancellation we cannot turn a blind eye to section 39(1) of the Act which provides that:

"(1) A public body may, at any time prior to the acceptance of a bid, reject all bids, or cancel the public procurement proceedings [...]" **(emphasis added)**

Indeed, public bodies are empowered by Parliament to cancel procurement proceedings at any time before the acceptance and award of the contract.

Similarly, we cannot disregard the numerous occasions on which the Act and the Regulations refer to the processing fee as being 'non-refundable'. Therefore, we are of the view that going against these statutory provisions would be tantamount to acting *ultra vires*.

The Applicant's submission that granting such a prayer is within our discretion is flawed for we find that we can only order the reimbursement of security deposits and of reasonable costs incurred in bid preparation and participation in the procurement proceedings where the conditions of section 45(9) and 45(10) (d) – which do not apply in case of cancellation, pursuant to section 39(5)- are met but this clearly cannot extend to the non-refundable processing fee.

Accordingly, we order that the Applicant be reimbursed, in full, the security deposit of Rs 25,000 that it has paid but not the processing fee of Rs 50,000 it has incurred.

We wish, at this juncture, to make a few remarks in respect of the present matter. Indeed, the law is silent when it comes to the refund of the security deposit and the non-refundable processing fee of Rs. 50, 000 in cases whereby an application for review has already been duly lodged and, while the case is pending, the Public Body cancels the procurement exercise. We understand and sympathize with applicants who may feel outraged that in these circumstances, through no fault of theirs, the Public Body cancels the procurement exercise and they find themselves penalised by the absence of refund of the processing fee of Rs. 50, 000. In the present case, the applicant rightly summarizes the relevant parts of the transaction thus:

"True it is that the Respondent may cancel the procurement exercise at any time prior to the award to the Successful Bidder, however, we are here in a situation where:

- a) The bidding documents were issued in July 2017;*
- b) One year after, in July 2018, the notification of award was issued;*
- c) The Applicant challenged the decision to award the bid to 2 bidders, allegedly lowest substantial evaluated bidders and even communicated documents in support of its contention to the Public Body. Nevertheless, the latter maintained its decision. At this stage, the Public Body could have cancelled the procurement exercise, yet it did not deem it fit to do so;*



- d) *It is only after the applicant had applied for review and filed its statement of case with all its annexures, that the Public Body decided to cancel the procurement exercise on the ground that the bidding documents require substantial modification;*
- e) *Had a proper assessment and evaluation of the bids of all bidders been carried out, the Public Body ought to have found that there was an issue with the bidding documents, it ought to have cancelled the procurement exercise and not wait until an application for review is lodged to cancel the procurement proceedings;*
- f) *No challenge and no application for review under Section 45 of the PPA shall be entertained in respect of the cancellation;*
- g) *The Applicant is put before a “fait accompli” whereby the Public Body is solely responsible for the prejudice caused to the Applicant. It was open to discontinue the process at challenge stage – this they did not do and forced the Applicant to initiate the costly procedure before the IRP – the Panel cannot and should not condone this type of attitude which makes a mockery of its process.”*

“ The present application for review was lodged by the Applicant as of right and to be able to exercise such right, it had to comply with the payment as a security deposit and a non-refundable processing fee, otherwise it cannot proceed with the application for review. Given that the Respondent has now cancelled the proceeding exercise, the Applicant is being deprived of its right of review and the Applicant cannot be penalized further by losing the security deposit and the non-refundable processing fee, this would be most unfair to the Applicant.”

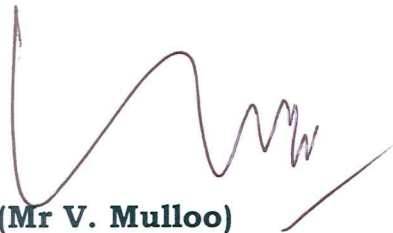
Even if their summary was to be correct and to the point, the law prevents the Independent Review Panel from refunding the Rs. 50, 000. This Panel must apply the law as it stands. However, it is our view that our laws must be fair and be seen to be fair. The present situation falls foul, in our view, on fairness.

AK

[Signature]



(Mr H. Lassemillante)
Chairperson



(Mr V. Mulloo)
Member



(Mr A.K. Namdarkhan)
Member

Dated 13 September 2018

