



Independent Review Panel

Decision No. 12/18

In the matter of:

Sotravic Limitée

(Applicant)

v/s

Wastewater Management Authority

(Respondent)

(Cause No. 12/18/IRP)

Decision

Given the particular circumstances of this case and the observations we are to make below, we feel that, for convenience, we should set out the history of the case and of the proceedings before us as well as matters set out in the challenge and the application for review.

A. History of the case

The Pailles Guibies Sewerage Project Phase 2, a major contract for the Wastewater Management Authority (**WMA**), included works of construction of trunk sewers, Sewer Reticulation Network and House Connections, the decommissioning of the Pailles Wastewater Treatment Plant, the replacement of existing CWA piping and reinstatement and other ancillary works. Following the approval of the Central Procurement Board (**CPB**), an open international invitation for the prequalification was launched on 19 April 2016.

At the closing date of 09 June 2016, eleven bidders had submitted their bids. An evaluation exercise was carried out by the CPB. Nine bidders were shortlisted. Notification was accordingly issued on 06 October 2016 to the selected and unsuccessful bidders following the WMA's Board approval.

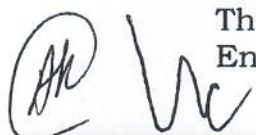
Thereafter, the WMA invited the selected prequalified bidders to submit their bids. At the public opening of the bids by the CPB on 06 February 2018, three bidders submitted their bids. BCEG/GAMMA Pailles Guibies JV bid for Rs. 1, 502, 801, 996, Sotravic Limitee bid for Rs. 1, 075 135, 563 and Sinohydro Corporation Ltd (China) bid for Rs. 849, 001, 947.34. The Bid Validity would extend to 05 June 2018, and the Bid Security to 05 July 2018.

The evaluation exercise was then carried out by the CPB.

On 19 April 2018, the WMA was informed that the CPB had approved the award of the contract for the Pailles Guibies sewerage Project Phase 2 to the lowest evaluated substantially responsive bidder, Sinohydro Corporation Ltd for the sum of Rs. 851,511,598.24 (Excl. VAT) and to proceed with the notification in accordance with the provisions of the Public Procurement Act 2006.

On 31 May 2018, one of the bidders Sotravic Limitee submitted a letter stating that Sinohydro Corporation Ltd and Beijing Construction Engineering Group Co. Ltd were state owned companies and the two companies might be in a situation of conflict of interest having regard to clauses 5.4(a) and (d) of the Instruction to Bidders. The letter from Sotravic Limitee was submitted to WMA and copied to the CPB. On 15 June 2018, the CPB had a meeting with the representative of the WMA following which the CPB issued a letter to WMA.

The WMA decided that the matter would be referred to the Ministry of Energy and Public Utilities. On 22 June 2018, the CPB informed WMA



of the advice obtained from the Competition Commission of Mauritius on the representations made by Sotravic Limitee. The CPB mentioned that it maintained its decision to proceed with the notification of the award.

On 30 July 2018, the Public Body notified Sotravic Limitee that an evaluation of the bids had been carried out and that its bid had not been retained for award.

Sotravic Limitee challenged the decision of the WMA on 03 August 2018.

By letter on 09 August 2018, the WMA informed Sotravic Limitee that the CPB had taken note of the challenge made by it under Section 43 of the Public Procurement Act 2006.

The Applicant averred that

- a) There is a breach of ITB 5.5 of Section I – Instruction to applicants of the Prequalified Document and ITB 5.4(a), (b), (d) and (e) of Section I of the Bidding Documents with regard to Conflict of Interest.
- b) The bid of the successful bidder is abnormally low and there is a breach of the Section 37(10A) of the Public Procurement Act 2006.
- c) The successful bidder was not responsive in the context of Section III of the Bidding Document namely, the litigation history.
- d) Sotravic Limitee (the Applicant) had submitted the lowest substantially responsive bid.

Feeling dissatisfied with the decision of the Public Body to award the contract to Sinohydro Corporation Ltd and with the reply of the Public Body dated 09 August 2018, the Applicant applied for review of the procurement proceedings pursuant to Section 45 of the Public Procurement Act 2006.

On 14 August 2018, the Panel informed the Public Body that the Applicant had filed an application for review and that the procurement proceedings had been suspended.

The Panel requested the WMA to make available the relevant information and documentation and to submit comments on the application for review.



B. Evaluation

This tender has been evaluated by the Bid Evaluation Committee which comprised the following members:-

1. Mr S. Gungah - Chairperson (Civil Engineer)
2. Mr M. Lutchoomun – Member (Principal Engineer (Civil))
3. Mr R. Jhurry – Member (Works Manager (Civil))
4. Mr L. Y. Bhoosungur – Secretary (Administrative Officer)

C. Notification of Award

The Wastewater Management Authority through a letter dated 30 July 2018, informed the Applicant of the particulars of the successful bidder as follows:

Details	Name of Bidder	Address	Contract Amount
Contract WW 260W – Pailles Guibies Sewerage Project – Phase 2 Construction of Trunk Sewer, Reticulation Network, House Connections and CWA Pipe Replacement – CPB 06/2016	Sinohydro Corporation Ltd – (China)	25, Avenue Dodo, Sodnac, Quatre Bornes	MUR 851, 511, 698.24 (exclusive of VAT)

D. The Challenge with the Public Body

On 03 August 2018, the Applicant challenged the procurement on the following grounds:

I. CONFLICT OF INTEREST

- (i) **ITB 5.5 of Section I of the Instructions to Applicants of the Prequalification Document** provides that: “A firm and any of its affiliates (that directly or indirectly control, are controlled by or are under common control with that firm) may submit its application for prequalification either individually, as joint venture or as a sub-contractor among them for the same contract. However, if prequalified only one prequalified applicant will be allowed to bid for the same contract. All bids submitted in violation of this procedure will be rejected.”

- (ii) At the public opening of bids, three bids were received by the Public Body and two of the bidders were **BCEG/GAMMA Pailles Guibies JV and Sinohydro Corporation Limited**. The partner BCEG in the Joint Venture with GAMMA is in fact Beijing Construction Engineering Co Limited. Sinohydro Corporation Limited and BCEG are both incorporated in the People's Republic of China and ultimately state-owned companies with officials appointed by the State in their management. **Beijing Construction Engineering Group Co Limited (BCEG) and Sinohydro Corporation Limited** are known to be State-Owned Enterprises whereby the State ultimately has control on both companies by virtue of shareholding and administrative arrangements.
- (iii) The ultimate ownership of Sinohydro Corporation Limited lies with Power Construction Corporation of China Limited which is owned by the State Council and which is under the control of the State Owned Asset Supervision and Administration Committee (SASAC) of the State Council. Beijing Construction Engineering Group is owned by People's Government of Beijing City, which is under the authority of the State Council and is controlled by the State owned Asset Supervision and Administration Committee (SASAC) of the People's Government of the City of Beijing, which is directed and supervised by the State Owned Asset Supervision and Administration Committee (SASAC) of the State Council.
- (iv) A chart showing the ownership in both companies including the administrative and controlling links between them is herewith attached and marked as **Document A**. The Company report in respect of Beijing Construction Engineering Group Co Limited (BCEG) is herewith attached and marked as **(Document B consisting of 37 pages)**. The Company report in respect of **Sinohydro Corporation Limited** is also herewith attached and marked as **(Document C consisting of 29 pages)**.
- (v) In the light of the above facts, supported by documentary evidence, there is a clear conflict of interest between the two bidders BCEG/GAMMA Pailles Guibies JV and Sinohydro Corporation Limited in breach of **ITB 5.5 of Section I of the Instructions to Applicants of the Prequalification Document and ITB 5.4(a), (b), (d) and (e) of Section I of the Instructions to Bidders**. Therefore, the bids of both bidders BCEG/GAMMA Pailles Guibies JV and Sinohydro Corporation Limited ought to have been rejected and the two bidders should have been disqualified.

ITB 5.4 (a), (b), (d), and (e) of Section I of the Instructions to Bidders provide:

[Handwritten signatures]

[Handwritten signature]

"A Bidder shall not have a conflict of interest. All Bidders found to have a conflict of interest shall be disqualified. A Bidder may be considered to have a conflict of interest with one or more parties in this bidding process, if:

- (a) they have at least one controlling partner in common; or*
- (b) they receive or have received any direct or indirect subsidy from any of them; or*
- (c) they have a relationship with each other, directly or through common third parties, that puts them in a position to have access to information about or influence on the bid of another Bidder, or influence the decisions of the Employer regarding this bidding process; or*
- (d) a Bidder participates in more than one bid in this bidding process. Participation by a Bidder in more than one Bid will result in disqualification of all Bids in which such Bidder is involved. However, this does not limit the inclusion of the same subcontractor in more than one bid; or"*

II. ABNORMALLY LOW BID PRICE

- (vi) On the 6th February 2018, three bidders submitted their respective bids, namely BCEG/GAMMA Pailles Guibies JV with a bid amount of MUR 1,502,801,996.00 (Exclu. VAT), Sotravic Limitée with a bid amount of MUR 1,075,135,563.00 (Exclu. VAT) and Sinohydro Corporation Limited with a bid amount of MUR 849,001,947.34 (Exclu. VAT). The bid amount of Sinohydro Corporation Ltd – (China) is abnormally low and ought to have been rejected by the Public Body pursuant to **Section 37(10A) of the PPA.***
- (vii) The budget for the Public Body for the contract was assessed at MUR 1.2 Billion whilst the bid of the selected bidder is MUR 851,511,698.24 (Exclu. VAT) that is about 30% less than the estimated budget cost. The bid of the selected bidder is 21% lower than the bid of Sotravic Limitée and 43% lower than the bid of BCEG/GAMMA Pailles Guibies JV.*
- (viii) The bid of the selected bidder ought to have been rejected outright. In view of the abnormally low price of the selected bidder, there is a great risk that the selected bidder will either fail to execute its obligations under the contract which consist of major works, resulting in the public body incurring substantial financial losses or there is a high probability that the technical proposal has missed out important elements.*

AR

W H

- (ix) *The abnormally low price of the selected bidder creates doubt as to its compliance with the technical specifications of the bidding documents. Given the complexity and size of the project, and the unrealistically low price, the selected bidder may have omitted to submit the price on certain specifications of the bidding documents or deliberately given low figures to bolster its chances to obtain the contract knowing full well of the physical impossibility to perform the contract according to the required standard at that price.*
- (x) *Moreover, in light of the abnormally low price of the selected bidder, the ability and capacity of the selected bidder to perform its obligations under the contract are very doubtful if not downright impossible.*
- (xi) *The bid price is abnormally low compared to the minimum construction cost required to successfully implement this project within the time and budget which is estimated at the bid price of Sotravic Limitée. Attached is a comprehensive and detailed construction cost summary report showing the real and true cost estimates which are required for the successful implementation of the procurement contract (**Document D consisting of 37 pages**). The Public Body should have serious qualms as to the ability of the selected bidder to perform the contract which may lead to a poor and low quality of the works, the risk of cost overrun and the risk of time overrun. The Public Body should pay heed to the Procurement Guidance of the World Bank on Abnormally Low Bids and Proposals of July 2016 which is attached for ease of reference as **Document D1 consisting of 13 pages**. The bid price of the Applicant has also been assessed by chartered quantity surveyor as evidenced by **Document D2** who is also of opinion that bid price of preferred bidder is abnormally low.*

III. ELIGIBILITY AND QUALIFICATION CRITERIA

- (xii) *At pre-qualification stage, we strongly believe that Sinohydro Corporation Ltd failed to provide accurate information on the related Application Form (Form CON-2) about any litigation or arbitration resulting from contracts completed or ongoing under its execution over the last five years when it did not disclose its litigation history. The selected bidder therefore fails to meet the eligibility and qualification criteria **“2.4 Litigation History of Section III, Qualification Criteria and Requirements of the Prequalification Document**. A copy of a Judgement from the Court of Appeal for the Republic of Botswana dated 29th October 2015 in the matter of Attorney General v/s Sinohydro Corporation Limited is herewith annexed as **Document E consisting of 11 pages**.*
- (xiii) *Sinohydro Corporation Ltd – (China) should not have been selected for award as it is not the lowest evaluated substantially responsive bidder in view of all the arguments propounded above.*

AP

H W

- (xiv) Moreover, both Sinohydro Corporation Ltd and BCEG/GAMMA Pailles Guibies JV should have been disqualified in view of the conflict of interest between them.
- (xv) For all the reasons given above, the Public Body should have awarded the bid to the Applicant, whose bid is the lowest substantially responsive bid.

E. The Reply to Challenge

On 09 August 2018, the Respondent made the following reply to challenge:

“The Central Procurement Board has taken note of the challenge made by yourself under Section 43 of the Public Procurement Act 2006 as amended, and denies that:

- (a) There is a breach of ITB 5.5 of Section I – Instruction to Applicants of the Prequalification Document and ITB 5.4 (a), (b), (d) and (e) of Section I of the Bidding Document with regard to Conflict of Interest;*
- (b) The bid of the successful bidder is abnormally low and there is a breach of Section 37 (10A) of the Public Procurement Act 2006;*
- (c) The successful bidder was not responsive in the context of Section III of the Bidding Document namely the Litigation History; and*
- (d) Sotravic Ltée submitted the lowest substantially responsive bid.*

The CPB’s response is addressed in more detail below.

Conflict of Interest

The Central Procurement Board was in presence of an unsolicited letter from Sotravic Ltée during evaluation of bids where the issue of “conflict of interest” was raised regarding Chinese State-Owned companies. This issue of state-owned bidders had previously been addressed by the Central Procurement Board as was taken up to the relevant authorities. This specific case was referred to the relevant authority. After recommendation of the latter, the Central Procurement Board finds that unless and until the Bidding Document expressly forbids State-Owned companies to bid in procurement exercise, neither the Bid Evaluation Committee nor the Central Procurement Board has the power to disqualify such bidders. The Central Procurement Board wishes to put on record that throughout the history of Public Procurement in Mauritius, no such action has ever been taken to forbid State-Owned companies to compete in a procurement process. Furthermore, it is pertinent to note that the

AW

HL

actual aggrieved bidder was awarded a contract in a procurement exercise where three State-Owned companies were also bidders.

Re: Plaine Wilhems Sewerage Project – Stage 1 – Contract WW 80F – Construction of Reticulation Network and House Connections – Lot 1A – WMA.

Abnormally Low Price

The term “abnormally” is subject to interpretation and what seems abnormal to an aggrieved bidder has not been considered as “abnormal” neither by the Bid Evaluation Committee appointed by the Central Procurement Board nor by the CPB Board. An abnormally low bid is determined in comparison to the public body’s cost estimate for the project. With a limited interpretation as taken in this context, both bidders could have been considered to be abnormally low.

With regards to the ability and capacity of the selected bidder to perform its obligation under the contract, this has been addressed by the Bid Evaluation Committee according to the eligibility and qualification criteria as required in the bidding documents, namely General experience, specific construction experience, financial soundness, financial resources, cash flow requirement, experience key personnel and key equipment among others.

Litigation History

The Bid Evaluation Committee has examined compliance of the bidder with respect to:

- (a) Non-performance of a contract as a result of bidder’s default since 1 January 2013.
- (b) Consistent of court/arbitral award decisions against the Applicant since 1 January 2013.

In both cases the successful bidder has been found to be compliant.

The Central Procurement Board did not find any element in document E produced by Sotravic Ltée which relates to a Judgement from the Court of Appeal of the Botswana dated 29 October 2015 which could demonstrate noncompliance with requirements at (a) and (b) above.

Lowest substantially responsive bid

Sotravic Ltée was not determined to be the lowest substantially responsive bid by the Central Procurement Board as per the requirements of the bidding documents and the Public Procurement Act.”

AL
WW

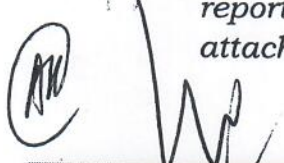
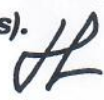
AW

F. Grounds for Review

On 14 August 2018, the Applicant seized the Independent Review Panel for review on the following grounds:

I. CONFLICT OF INTEREST

- (i) **ITB 5.5 of Section I of the Instructions to Applicants of the Prequalification Document** provides that: “A firm and any of its affiliates (that directly or indirectly control, are controlled by or are under common control with that firm) may submit its application for prequalification either individually, as joint venture or as a sub-contractor among them for the same contract. However, if prequalified only one prequalified applicant will be allowed to bid for the same contract. All bids submitted in violation of this procedure will be rejected.
- (ii) At the public opening of bids, three bids were received by the Public Body and two of the bidders were **BCEG/GAMMA Pailles Guibies JV and Sinohydro Corporation Limited**. The partner BCEG in the Joint Venture with GAMMA is in fact Beijing Construction Engineering Co Limited. Sinohydro Corporation Limited and BCEG are both incorporated in the People’s Republic of China and ultimately state-owned companies with officials appointed by the State in their management. Beijing Construction Engineering Group Co Limited (BCEG) and Sinohydro Corporation Limited are known to be State-Owned Enterprises whereby the State ultimately has control on both companies by virtue of shareholding and administrative arrangements.
- (iii) The ultimate ownership of Sinohydro Corporation Limited lies with Power Construction Corporation of China Limited which is owned by the State Council and which is under the control of the State Owned Asset Supervision and Administration Committee (SASAC) of the State Council. Beijing Construction Engineering Group is owned by People’s Government of Beijing City, which is under the authority of the State Council and is controlled by the State owned Asset Supervision and Administration Committee (SASAC) of the People’s Government of the City of Beijing, which is directed and supervised by the State Owned Asset Supervision and Administration Committee (SASAC) of the State Council.
- (iv) A chart showing the ownership in both companies including the administrative and controlling links between them is herewith attached and marked as **Document A**. The Company report in respect of Beijing Construction Engineering Group Co Limited (BCEG) is herewith attached and marked as **(Document B consisting of 37 pages)**. The Company report in respect of **Sinohydro Corporation Limited** is also herewith attached and marked as **(Document C consisting of 29 pages)**.

- (v) In the light of the above facts, supported by documentary evidence, there is a clear conflict of interest between the two bidders BCEG/GAMMA Pailles Guibies JV and Sinohydro Corporation Limited in breach of ITB 5.5 of Section I of the Instructions to **Applicants of the Prequalification Document and ITB 5.4(a), (b), (d) and (e) Section I of the Instructions to Bidders**. Therefore, the bids of both bidders BCEG/GAMMA Pailles Guibies JV and Sinohydro Corporation Limited ought to have been rejected and the two bidders should have been disqualified.

ITB 5.4 (a), (b), (d), and (e) of Section I of the Instructions to Bidders provide:


“A Bidder shall not have a conflict of interest. All Bidders found to have a conflict of interest shall be disqualified. A Bidder may be considered to have a conflict of interest with one or more parties in this bidding process, if:

- (a) they have at least one controlling partner in common; or
 - (b) they receive or have received any direct or indirect subsidy from any of them; or
 - (d) they have a relationship with each other, directly or through common third parties, that puts them in a position to have access to information about or influence on the bid of another Bidder, or influence the decisions of the Employer regarding this bidding process; or
 - (e) a Bidder participates in more than one bid in this bidding process. Participation by a Bidder in more than one Bid will result in disqualification of all Bids in which such Bidder is involved. However, this does not limit the inclusion of the same subcontractor in more than one bid; or”
- (vi) In its response dated 9th August 2018 to the Applicant’s challenge, the Public Body failed to address its mind to the Applicant’s contention which was not that two state-owned companies (Beijing Construction Engineering Group Co Limited (BCEG) and Sinohydro Corporation Limited) had bid but that both companies are controlled by the same body, namely the State, by virtue of their shareholdings and arrangements, thereby giving rise to a conflict of interest as defined under clause 5.4 of the ITB.

II. ABNORMALLY LOW BID PRICE

- (vii) On the 6th February 2018, three bidders submitted their respective bids, namely BECG/GAMMA Pailles Guibies JV with a bid amount of MUR 1,502,801,996.00 (Exclu. VAT), Sotravic Limitée with a bid

amount of MUR 1,075,135,563.00 (Exclu. VAT) and Sinohydro Corporation Limited with a bid amount of MUR 849,001,947.34 (Exclu VAT). The bid amount of Sinohydro Corporation Ltd – (China) is abnormally low and ought to have been rejected by the Public Body pursuant to **Section 37(10A) of the PPA.**

- (viii) The budget for the Public Body for the contract was assessed at MUR 1.2 Billion whilst the bid of the selected bidder is MUR 851,511,698.24 (Exclu. VAT) that is about **30% less than the estimated budget cost.** The bid of the selected bidder is 21% lower than the bid of Sotravic Limitée and 43% lower than the bid of BECG/GAMMA Pailles Guibies JV.
- (ix) The bid of the selected bidder ought to have been rejected outright. In view of the abnormally low price of the selected bidder, there is a great risk that the selected bidder will either fail to execute its obligations under the contract which consist of major works, resulting in the public body incurring substantial financial losses or there is a high probability that the technical proposal has missed out important elements.
- (x) The abnormally low price of the selected bidder creates doubt as to its compliance with the technical specifications of the bidding documents. Given the complexity and size of the project, and the unrealistically low price, the selected bidder may have omitted to submit the price on certain specifications of the bidding documents or deliberately given low figures to bolster its chances to obtain the contract knowing full well of the physical impossibility to perform the contract according to the required standard at that price.
- (xi) Moreover, in light of the abnormally low price of the selected bidder, the ability and capacity of the selected bidder to perform its obligations under the contract are very doubtful if not downright impossible.
- (xii) The bid price is abnormally low compared to the minimum construction cost required to successfully implement this project within the time and budget which is estimated at the bid price of Sotravic Limitée. Attached is a comprehensive and detailed construction cost summary report showing the real and true cost estimates which are required for the successful implementation of the procurement contract (**Document D consisting of 37 pages**). The Public Body should have serious qualms as to the ability of the selected bidder to perform the contract which may lead to a poor and low quality of the works, the risk of cost overrun and the risk of time overrun. The Public Body should pay heed to the Procurement Guidance of the World Bank on Abnormally Low Bids and Proposals of July 2016 which is attached for ease of reference as **Document D1 consisting of 13 pages**. The bid price of the Applicant has also been assessed by chartered quantity surveyor as evidenced 

by **Document D consisting of 13 pages**. The bid price of the applicant has also been assessed by chartered quantity surveyor as evidenced by **Document D2** who is also of opinion that bid price of preferred bidder is abnormally low.

- (xiii) In response to the reply to the challenge by the Public Body dated 09th August 2018, the Applicant maintains that in view of the above reasons, it cannot be said that the Bid Evaluation Committee carried out a proper evaluation and examination of the bids in as much as the workings of the applicant show without a doubt that the successful bidder will never be able to carry out the works within the proposed tender price for which this contract has been awarded.

III. ELIGIBILITY AND QUALIFICATION CRITERIA

- (xiv) At pre-qualification stage, we strongly believe that Sinohydro Corporation Ltd failed to provide accurate information on the related Application Form (Form CON-2) about any litigation or arbitration resulting from contracts completed or ongoing under its execution over the last five years when it did not disclose its litigation history. The selected bidder therefore fails to meet the eligibility and qualification criteria **"2.4 Litigation History of Section III, Qualification Criteria and Requirements of the Prequalification Document**. A copy of a Judgement from the Court of Appeal for the Republic of Botswana dated 29th October 2015 in the matter of Attorney General v/s Sinohydro Corporation Limited is herewith annexed as **Document E consisting of 11 pages**.
- (xv) In response to the reply to the challenge of the Public Body dated 9th August 2018, the Applicant maintains that the selected bidder not only failed to meet the eligibility and qualification criteria but did not provide accurate information about its litigation history as it would appear from that response that the successful bidder failed to disclose this case in Botswana.
- (xvi) Sinohydro Corporation Ltd – (China) should not have been selected for award as it is not the lowest evaluated substantially responsive bidder in view of all the arguments propounded above.
- (xvii) Moreover, both Sinohydro Corporation Ltd and BCEG/GAMMA Pailles Guibies JV should have been disqualified in view of the conflict of interest between them.
- (xviii) For all the reasons given above, the Public Body should have awarded the bid to the Applicant, whose bid is the lowest substantially responsive bid. Furthermore, the reply to the challenge of the Public Body dated 9th August 2018 cannot stand and is wrong."

AN

H W

G. The Hearings

The case was called *pro forma* on 21 August 2018. Mr Gavin Glover SC and Ms Sandy Chuong appeared for the Applicant and Mr Kanen Colunday appeared for the Respondent; both parties had their representatives present. State Counsel appeared for the CPB which was not represented by any officer. At this formal hearing, Mr Colunday confessed to having some difficulty conducting the defence of the Respondent for the simple reason that it had been the CPB that had evaluated the bid and WMA was bound by the instructions of the CPB not only on who to award the contract to but also on what defence to put up. The case was fixed for a hearing and the Panel invited the CPB to intervene.

When the case came for hearing on 29 August 2018, the CPB was present and was represented by State Counsel. The representative of the CPB apologised for not being present at the previous sitting. Since no Reply to the Statement of Case of the Applicant had been received, Counsel appearing for WMA reiterated his stand that the CPB is the most apt to conduct the defence of the Respondent. State Counsel appearing for the CPB stated that since she had only received instructions from the CPB on the previous day, that is, on 28 August 2018, she would not be in a position to conduct the hearing on the day and moved for a short postponement. Mr Glover objected to same since, even if it is to be agreed that the CPB truly is better equipped to effectively conduct the defence case, it is not a party to the proceedings but simply an invitee of the Panel allowed to intervene and to give its views.

Upon an undertaking being given by the Respondent that the contract would be awarded pending the determination of the Panel, Mr Glover dropped his objection to the postponement. Mr Colunday, after consulting with the CPB, undertook to have a Reply ready before the hearing. The case was accordingly adjourned to the 18 September 2018.

The case was then fixed for hearing on 18 September 2018 and a case-management meeting with Counsel was held on 13 September 2018. At that meeting, Principal State Counsel and State Counsel appearing for the CPB moved to withdraw since the latter would now be called as a witness by the Respondent. Mr Colunday for the Respondent informed us that he had finally received, around 12 September 2018, the instructions and relevant information from the CPB to put in a statement of reply to the Applicant's case.

The Reply of the Respondent to the application for review was finally received on 17 September 2018 with the hearing to take place the next day.

At this juncture, we would like to make an observation in respect of the conduct of cases by respondents when the CPB and their respective Counsel or legal officers are involved. We are given to understand that Counsel appearing for applicants, and even for respondents, have raised concerns before with particular focus on a lack of coordination. We think it appropriate to impress upon the Central Procurement Board, the statutory body empowered by Parliament to expertly, and bindingly, evaluate major bids on behalf of public bodies, the seriousness of the need to provide reasonable and timely assistance to those public bodies having to defend the bids evaluated by it before us and at challenge stage. We believe that it is most unfortunate that, because of logistical problems or delays, Public Bodies, carrying out important projects for the betterment of this country, should find their cases weakened or otherwise hindered by the delayed action or the inaction of the CPB.

Nevertheless, we now turn to what occurred at the hearing of 18 September 2018. The case was called and was in shape with the Reply of the WMA having finally been filed. At the start of the hearing and before any submissions were made or evidence adduced, Mr Colunday informed us of an error in the Bid Evaluation Report he had been apprised of a few moments before by members of the Bid Evaluation Committee. The error, Mr Colunday informed us, relates to the percentage of the Preliminaries and General Items minus Provision Sums over the total bid amount. Mr Jhurry, a member of the Bid Evaluation Committee, explained to us that this error is, to him, of no consequence since both bidders, Sotravic and Sinohydro, would be compliant.

Mr Glover objected to this course on the basis that such a crucial point cannot be simply mentioned '*en passant*' when it had not been part of any statement or reply from the WMA or the CPB the more so that the Bid Evaluation Report is confidential and not available to the Applicant, and that it cast serious doubts as to the bid evaluation exercise. He stated that he was minded to move that the Panel order a re-evaluation of the bids. Mr Glover then asked for 5 minutes to confer with his client.

After seeking instructions from his client, Mr Glover formally moved that the Panel order a re-evaluation of the bids and he put in copies of the judgments from the Republic of Botswana referred to in the Applicant's Statement of Case.

Mr Colunday, who had also conferred with his client, the CPB and members of the Bid Evaluation Committee, stated that the Respondent left the matter in the hands of this Panel since we are better placed to determine the course of action to be undertaken.



Mr Glover then invited us to make observations, if we so wished, in respect of the grounds of review forming the basis of the application before us. Upon a query from the Panel, Mr Colunday repeated his stand that we are better placed to decide on this.

H. Findings

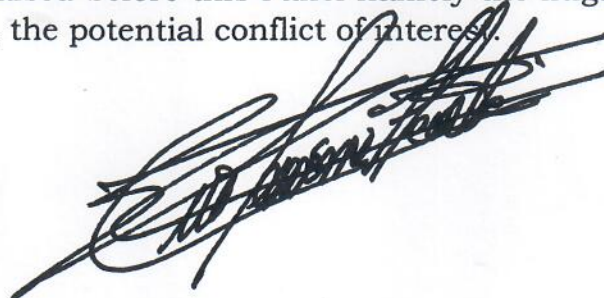
We must confess to some degree of surprise at the way the proceedings before us unfolded.

We have perused the statements of case, the record and the documents in issue at the hearings before us, including the Bid Evaluation Report. It is clear from the latter that the Bid Evaluation Committee made a glaring mistake by substituting figures pertaining to Sinohydro into their calculations in respect of Sotravic and as a result, the final percentage obtained was 15% below the correct one, that is, 6% instead of 21%.

We can read also in the Bid Evaluation Report that there is a ceiling of 25% on this particular calculation and that non-compliance is fatal to a bid.

Be that as it may, considering the stand of the Respondent, we feel it most appropriate, in the circumstances and given that all parties are now alive to one another's case and position, to recommend a re-evaluation of the bids to be undertaken by a differently constituted bid evaluation committee.

We invite the Bid Evaluation Committee as newly constituted to consider carefully the issues raised before this Panel namely the litigation history, the abnormally low price, the potential conflict of interest.



(Hervé Lassémillante)
Chairperson



(Abdool Karrim Namdarkhan)
Member




(Mr Virjanan Mulloo)
Member

Dated 28 September 2018