



## Independent Review Panel

**Decision No. 15/18**

**In the matter of:**

**Transinvest Construction Ltd**

**(Applicant)**

**v/s**

**Road Development Authority**

**(Respondent)**

**(Cause No. 13/18/IRP)**

**Decision**

### A. History of the case

The Respondent, the Road Development Authority (“RDA”) invited, on or about 8 March 2018, bidders to submit bids for the construction project named ‘Design-Build/Turnkey and Completion of the Construction of A1-A3 Link Road – Reference CPB/79/2017’ aimed to connect the existing Port-Louis-St Jean Road (codename, A1) to the Black River Road (codename, A3).

The deadline for submission of bids was set for 8 May 2018. A number of construction companies submitted bids, including the Applicant, Transinvest Construction Ltd (“TCL”).

Since this is a major contract, the Central Procurement Board (“CPB”) was involved in evaluation of the bids submitted.

From the records of the public body, it is apparent that meetings were held between itself, the CPB and the prospective bidders. We also note that, prior to the submission deadline and opening of bids, the RDA issued a number of clarifications and of addenda.

As per the Instruction to Bidders, each bid was to include a technical proposal and a financial proposal to be assessed in turn.

The Applicant’s bid was for an amount of MUR 240,096,725.27 (exclusive of VAT) and was duly submitted on 8 May 2018 with a covering letter stating that TCL’s bid included a deviation to the route which, in its opinion, was necessary.


### B. Evaluation

Upon assessment of the technical proposal submitted by TCL, the CPB rejected its bid as being non-responsive. The reasons for the CPB reaching this conclusion are set out at ‘E’ below.

### C. Notification of Award

The Road Development Authority through a letter dated 08 August 2018 informed the Applicant of the particulars of the successful bidder as follows:

<b>Name of Bidder</b>	<b>Address</b>	<b>Price</b>
<i>Gamma Construction Ltd</i>	<i>Royal Road, Chapman Hill – Beau Bassin 71602</i>  <i>Fax No.: +230 4675656</i>	<i>MUR 256,333,308.00</i>  <i>(Exclusive of 15% VAT)</i>

## D. The Challenge

On 14 August 2018, the Applicant challenged the procurement on the following grounds:

*“A Breach of the duty of Public Body specified under section 50(2)(a) of the Public Procurement Act which set for we quote, ‘every public body shall engage in procurement planning with a view of achieving maximum value for public expenditure’.*

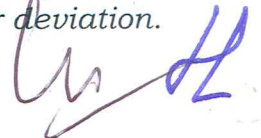
## E. The Reply to Challenge

On 20 August 2018, the Public Body made the following reply to the challenge:

*“I have to inform you that your technical proposal was found to be non-responsive to the requirements of the bidding documents for the following reasons:*

- I. *You stated in your letter dated 8<sup>th</sup> May 2018 submitted along with your bid, that part of the road alignment, in the vicinity of Chapman Hill, is off the limit of land acquisition and that the Employer would have to acquire additional land, estimated at 12,660 square metres, to accommodate the change in the proposed road alignment.*
- II. *The land acquisition exercise will have a negative bearing on the completion time.*
- III. *The relocation of the cremation ground will entail in the process:*
  - a. *Engaging with current owner, the Local Authority, the Municipal Council of Beau Bassin/ Rose Hill, and obtaining its approval. The approval may be hypothetical and delay is inevitable even if same is realized.*
  - b. *There shall be identification of new site by the Road Development Authority if the above happens.*
  - c. *Land acquisition in respect of the new site resulting in additional costs and time.*
  - d. *Engaging with the public and obtaining its agreement in this proposed relocation.*
  - e. *Risk assessment exercise prior to construction works (EIA, etc.....)*

*It was therefore considered that the revised alignment in the vicinity of the foot of Chapman Hill as proposed by yourselves constituted a major deviation.*



*Consequently, your technical proposal was declared non-responsive and your financial proposal was not opened.*

*In the circumstances explained above, your grounds for challenge do not stand, since your bid is not the lowest evaluated and substantially responsive one.*

*We trust the above clarify our stand of notifying the successful bidder as per our letter dated 08 August 2018.”*

## **F. Grounds for Review**

*On 24 August 2018, the Applicant seized the Independent Review Panel for review on the following grounds:*

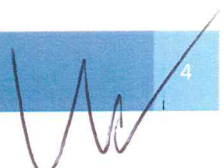
- (i) “We are not agreeable with Public Body opinion that the revised alignment limited in the vicinity of the Chapman Hill constitute a major deviation thus our submission considered as non-responsive. Our standpoint is substantiated in our present Statement of Case. The displacement of the road axis at the Chapman Hill is necessary for stability of the Works, safety of road users and above all is permissible under the Bid Requirement. The same more fully addressed in our Statement of Case enclosed.*
- (ii) Road Development Authority points of contention, that the land acquisition exercise will have a negative bearing on the completion time is disagreed. Our point of contention is supported in our statement of case as enclosed.*
- (iii) The administrative procedures for relocation of the cremation ground is necessary in consideration to the revised alignment and in the upmost interest of safety of road users as elaborated in our Statement of Case as enclosed.”*

## **G. The Hearing**

Hearings were held on 13 September and 02 October 2018.

The Applicant was represented by Mr G. Glover, Senior Counsel together with Ms S. Chuong of Counsel whereas the Respondent was represented by Mrs G. Topsy-Sonoo, Assistant Solicitor General and Miss K. Domah, State Counsel.

The RDA raised preliminary objection in its Reply to the Statement of Case of the Applicant namely, (i) that the present application was outside delay since it targeted an interpretation of the bidding documents and should



therefore have been made within 5 days of the invitation to bid or from the opening of the bids pursuant to paragraph 48(2) of the Public Procurement Regulations 2008, and (ii) that the grounds raised in the application for review under section 45 of the Public Procurement Act 2006 is different from the challenge made under section 43 of that Act.

The RDA is now not insisting on those two preliminary objection and we leave it to another day for a more thorough analysis of such preliminary points.

## H. Findings

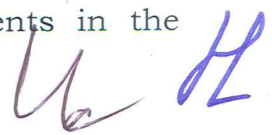
We are thankful to the parties for having filed very complete written submissions dealing with all the issues before us. Both the Applicant and the Respondent have usefully summarised the main issues which we need to address in the following terms:

- (a) Was the Applicant's bid technically responsive (and its corollary, whether the bid documents allowed bidders to provide suggested road alignments and would such revised alignments amount to a material deviation from the bid documents)?
- (b) Would the additional land acquisition made necessary because of the revised road alignment as suggested by the Applicant have a negative impact on the project completion time; and
- (c) Would the relocation of the cremation ground, again made necessary because of Applicant's suggestion, entail a length process?

We believe that points (b) and (c) – as set out in the RDA's reply to the challenge of TCL - are intrinsically linked with point (a) and we propose to focus our determination on the latter.

### The case before us

It appears to us that the Applicant rests its case on Clause 1.5 (Conditions of Particular Application) which sets out the priority of documents in the Bidding Documents as follows:



- “(a) *the Contract Agreement;*
- “(b) *the Letter of Acceptance;*
- “(c) *the Employer’s Requirements;*
- “(d) *the Bid;*
- “(e) *the Conditions of Contract, Part II;*
- “(f) *the Conditions of Contract, Part I;*
- “(g) *the Schedules;*
- “(h) *the Drawings; and*
- “(i) *the Contractor’s Proposal.”*

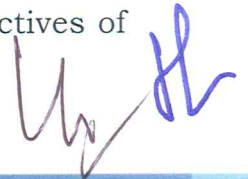
By virtue of this clause 1.5, the Applicant submits that the Employer Requirements would take precedence over the Schedules.

Particular reference has been made to Employer Requirements Section 4 Article 1.1 (safety of road users, including pedestrians; section 4 Article 1.7.2 (contractor to use the services of a suitably qualified and experience and professional geotechnical engineer); General Conditions of Contract – Clause 4.1 (the Works are to include any works necessary to satisfy the Employer’s Requirements or is implied in the Contract, and all works (although not mentioned in the Contract) necessary for stability or for the completion, or safe and proper operation, of the Works); and Section 3 – Conditions of Particular Application – Sub-Clause 4.1 (Contractor is to assume full responsibility for the design criteria and calculations (if any) included in the Employer’s Requirements.

It is the Applicant’s case that to comply with the above requirements, it had to provide, in its bid, a revised road alignment different to the one included in Schedule A – Schedules – Section 7 of the Bidding Documents. It is also the Applicant’s contention that even this Schedule A states that proposals by bidders requiring less compulsory land acquisition are preferable thereby leaving the door open to its suggesting the revised road axis with a further 12,600 square metres of land having to be acquired.

The Applicant also submitted, together with its Statement of Case, two expert reports, one from GIBB Mauritius dated 22 August 2018 and one from Mr P. Andrieux dated 21 August 2018 in order to justify the need for a revised road alignment. It submits that these are independent reports and should provide compelling justification for its suggested road axis alignment the moreso that the RDA has not provided such independent expert evidence.

The Applicant also relies on the general provision to be found at section 50(2)(a) of the Public Procurement Act 2006 (the “Act”) which states that, “every public body shall engage in procurement planning with a view to achieving maximum value for public expenditure and the other objectives of this Act”.

The Respondent submits that the bidding documents did not allow bidders to provide revised road alignment outside the limits defined by the Respondent which it confirmed by issuing the Addendum No.1. Accordingly, the inevitable relocation of the cremation ground and the need for further land acquisition would also amount to a material deviation from the bidding documents rendering the bid of TCL invalid – as per, *inter alia*, Directive No.3 of the Procurement Policy Office.

The Respondent also focuses its submission in response to the Applicant's interpretation of the Employer's Requirements, General Conditions of Contract and the Conditions of Particular Application, as set out above, on the fact that those requirements and obligations are in respect of the limits set out by the RDA, as Employer and should, consequently, abide by those limits. True it is that the road should be built with safety in mind as well as durability and stability- these being the responsibility of the successful contractor while performing the contract- but the Bidding Documents, in summary, according the RDA mean that the road must be so built in accordance with the limits and *tracée* proposed by the Employer.

In respect of the expert reports submitted, the RDA submits that these are expressed as preliminary views and, having been issued in August 2018, they were made only to buttress the application before us.

The RDA further relies on the Addendum No.1 it issued on 19 March 2018 and we believe it is useful to reproduce part of the first paragraph thereof:

*“Further to request from one bidder, a layout plan reference no.: RDA/17/09/02-01 is being provided in soft copy in Autocad showing co-ordinates of the proposed road axis at 50 m interval and acquisition limits indicated as well”*

The RDA submits that this Addendum No.1 modified the Bidding Documents pursuant to ITB Clause 12 which states as follows:

*“12.1 At any time prior to the deadlines for submission of bids, the CPB, may for any reason, whether at its own initiative or in response to a clarification requested by a prospective bidder, modify the bidding documents by issuing an addenda.*

*12.2 Any addendum thus issued shall be part of the bidding documents pursuant to Sub-Clause 10.1, and shall be communicated in writing or by fax to all purchasers of the bidding documents. Prospective bidders shall acknowledge receipt of each addendum by fax to the CPB.”*

The Addendum No.1 was later confirmed, by reference, in Clarification No.1 issued on 3 April 2018. One of the questions set by a prospective bidder was whether land acquisition procedures had been completed to which the

Respondent replied that land acquisition procedures were being finalised as per the limits set out in the Addendum No.1

### **Was there a material deviation?**

We are of the view that the determination of the present matter stands on the interpretation of the relevant parts of the Bidding Documents and of the Addendum No.1 as set out above.

#### The Addendum No.1

We have taken on board the submission of the Applicant as regards the priority of documents and its further submissions (in response to RDA's submissions) to the effect that the Addendum No.1 did not modify the Bidding Documents but had to be read alongside, or in conjunction with the Bidding Documents.

The Applicant also submits, in its further submissions, that the Addendum No.1 could not have the modifying effect as defined in ITB Clause 12 because it was not in response to a request for clarification sought by a bidder but it merely followed a '*request by one bidder*'.

We understand, from this submission by the Applicant, that it intends to convey is the argument that an Addendum can only be issued at the CPB's own initiative or after, perhaps, it issues clarifications. We do not agree with this view given the very broad terms found in Clause 12 of the ITB giving to the CPB the ability to, for 'any reason, whether at its own initiative or in response to a clarification requested' issue Addenda which would effectively modify the Bidding Documents, provided they are issued before the deadline for submissions of bids.

Moreover, were we to be of the view that the Addendum No.1 did not modify the Bidding Documents, we do not see why, *in fine*, its effects would, in this present matter, be different if it were to be read in conjunction with the Bidding Documents since its case appears to be, first and foremost, that the Employer's Requirements and some other clauses, in its interpretation, supersede Schedule A – Section 7.

This brings us to our determination on the interplay between the various documents forming part of the Bidding Documents.

It is our considered opinion, on the whole, that bidders were to submit bids in compliance with the intended road axis alignment provided in the Addendum No.1 and later confirmed in the Clarification No.1, and we agree with the Respondent's submission that the parts of the Bidding Documents



referred to by the Applicant were meant to convey the obligation and responsibility of the successful bidder to construct the road, as proposed, while ensuring safety, stability and durability and to enlist the services of a professional geotechnical engineer to assist it in building the road. Besides, our understanding of the intended effect of the Output Specifications and the Schedule A as a whole, where it is stated that, '*design solutions requiring less land acquisition are preferable*,' is that such solutions would be viewed favourably at evaluation stage and not that it would allow bidders to go beyond the limits for land acquisition clearly expressed by the public body and CPB.

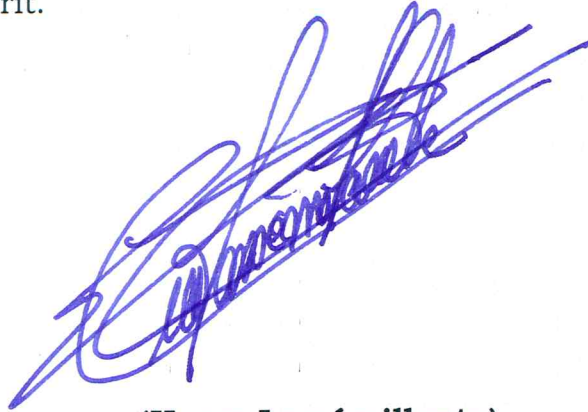
Accordingly, the bid submitted by the Applicant with the suggested revised axis went against what was intended in the Bidding Documents. In addition, the relocation of the cremation ground plus the need to compulsorily acquire some further 12,600 square metres of land in the vicinity brings the Applicant's bid squarely within the definition of a material deviation under Directive No.3 of the Procurement Policy Office leading to a bid being declared invalid.

We take note of the Respondent's submission that the expert reports relied on by the Applicant, which post-date the challenge and application for review, contain only preliminary views.

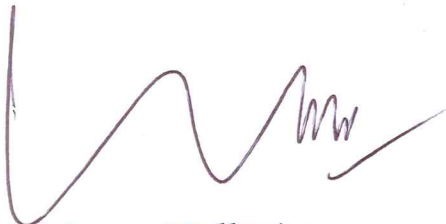
We subscribe to the submission of the Respondent that bids require certainty and are devised following policy decisions made by public bodies and the CPB, as the case may be. These are settled after analysis and feasibility studies by the statutory bodies which are to be held accountable for their performance of their duties and to be mindful of section 50(2) of the Act. The duty of bidders is to provide their services to meet those requirements devised by the statutory bodies. In the present matter, it was expressed on quite a few occasions, though in not as clear terms as the public body and CPB would have hoped, given the interpretation placed on the word by the Applicant, that the road axis alignment was to be as had been 'proposed', or maybe, intended or planned and on the basis of which, it had initiated the next step, that is, the compulsory land acquisition.

On a final note, we wish to address the argument made on behalf of the Applicant that it is possible, based on one of its previous dealing with the RDA, that arrangements could be made and the performance of works carried out in steps while awaiting land acquisition proceedings to be completed. We suggest that public bodies and the CPB, if and when the intent is to allow for such arrangements, ensure that these are open to all bidders and, perhaps, this option clearly made part of the Bidding Documents, for more certainty and consistency.

In the circumstances, we find that the Applicant's bid contained a material deviation from the Bidding Documents and, therefore, its application for review is devoid of merit.



**(Herve Lassémillante)**  
**Chairperson**



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



**(A. Karrim Namdarkhan)**  
**Member**

**Dated 23 October 2018**

