



# Independent Review Panel

**Decision No. 16/18**

**In the matter of:**

**TSK Electronica Y Electricidad S.A.**

**(Applicant)**

**v/s**

**Central Electricity Board**

**(Respondent)**

**(Cause No. 15/18/IRP)**

**Decision**

### A. History of the case

In early February 2018, the Respondent, the Central Electricity Board (“CEB”) called for bids, through open international bidding, for a contract for the ‘Design, Supply, Installation, Testing and Commissioning of a Combined-Cycle Gas Turbine Power Plant at Fort George (Mauritius) bearing reference number CPB/76/2017.

Since it is a major contract, the Central Procurement Board (“CPB”) was the public body called upon to determine the suitable candidate to be awarded the procurement contract, as per the relevant laws.

The Applicant, TSK Electronica y Electricidad SA (“TSK”) was one of the bidders which submitted bids by the deadline of 06 June 2018 when the bids were opened publicly.

### B. Notification of Award

The Central Electricity Board through a letter dated 22 November 2018, informed the Applicant of the particulars of the successful bidder as follows:

<i>Name &amp; Address of Selected Bidder</i>	<i>Item No.</i>	<i>Description</i>	<i>Total Amount Excl. VAT (MUR)</i>	<i>Total Amount (EUR)</i>
<i>Mytilineos Holdings S.A Mytilineos-EPC Business Unit 8 Artemidos Street Maroussi 151 25 Athens - Greece</i>	1	<i>Section 1</i>	<i>505,115,730.00</i>	<i>75,943,500.00</i>
	2	<i>Section 2</i>	<i>340,974,270.00</i>	<i>52,556,500.00</i>
		<b><i>Total Lump Sum Bid Price for Section 1 &amp; 2</i></b>	<b><i>846,090,000.00</i></b>	<b><i>128,500,000.00</i></b>
	3	<b><i>Declared Deviations:</i></b> <i>Section 1</i> <i>Section 2</i>		<i>590,500.00</i> <i>205,000.00</i>
<b><i>Grand Total Fixed Lump Sum- Bid Price</i></b>			<b><i>846,090,000.00</i></b>	<b><i>129,295,500.00</i></b>

Plus Long Term Maintenance Service contract based on the bidder's quoted rates.

**C. The Challenge**

On 28 November 2018, the Applicant challenged the procurement on the following grounds:

“(i) By letter dated 6<sup>th</sup> November 2018, the Central Procurement Board requested bidders to extend the bid validity period by 90 days or up to 02 March 2019 and validity period of the bid security by 90 days or up to 01 April 2019, whichever the latest in line with ITBs 18 and 19 of Section I of the Instructions to Bidders and it requested a reply by Wednesday 14 November 2018 at latest. According to a press article dated Saturday 24 November 2018 appearing in *Le Défi*, it appears that Mytilineos Holdings S.A. Mytilineos did not extend the bid validity period as requested by the CPB in its letter dated 6<sup>th</sup> November 2018 within the timeframe imparted to it. However, by letter dated 22<sup>nd</sup> November 2018 (notification to unsuccessful bidder from the Public Body), the Applicant was notified that Mytilineos Holdings S.A. Mytilineos had been selected for award. The Applicant contends that the Public Body has acted in breach of ITB 3.1(a) of Section I – Instructions to Bidders (pages 14 and 15) and Section 51(1)(a) and (c) of the Public Procurement Act when it failed to treat all bidders equality, since all the bidders except Mytilineos Holdings S.A. Mytilineos complied with the CPB’s request to extend the bid validity for the required period. It is the contention of the Applicant that as at the 22<sup>nd</sup> November 2018 which must be the date when the preferred bidder was notified of the Public Body’s intention to award the contract, the preferred bidder had not extended its bid validity beyond 2<sup>nd</sup> December 2018, which would obviously disqualify it from being considered as a valid bidder in the process.

A copy of the press article dated 24<sup>th</sup> November 2018 (*Le Défi* newspaper) is herewith annexed and marked as Document A.

(ii) The Public Body ought to have rejected the bid of Mytilineos Holdings S.A. Mytilineos inasmuch as the latter is currently involved in numerous inquiries and cases of corruption and fraudulent practices. Indeed, the preferred bidder as the Applicant being foreign bidders have a requirement to fulfil before tendering and that is the provision of registration with the Construction Industry Development Board (CIDB). This application at Section G contains a statement of termination of contract/arbitration/legal proceedings which must be filled in by prospective applicant. This application must be successful for a foreign entity to be allowed to bid. Under ITB 3.1(a)(v) of Section I – Instructions to Bidders – obstructive practice is defined and includes making false statements and this must include making false statements in order to be

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registered at the CIDB so that it can participate in the bidding process. Under ITB 3.1(b) of Section I – Instructions to Bidders – the government of Mauritius must reject a proposal for award if it determines that the preferred bidder has directly or through an agent engaged, inter alia in obstructive practices in competing for the contract in question.

- (iii) 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 after Mytilineos holdings S.A Mytilineos.”

#### D. The Reply to Challenge

On 30 November 2018, the Public Body made the following reply to the challenge:

- “(i) At the material time, the bid of Mytilineos Holdings S.A. was still valid and it is to be also highlighted that the bid of the aforesaid bidder is still valid as at this date. There is therefore no breach of ITB 3.1(a) of Section I - Instruction to Bidders and Section 51(1)(a) and (c) of the Public Procurement Act.

- (ii) The Bidding document requires the submission of registration certificates from the Construction Industry Development Board (CIDB) by the Bidder. Those certificates are issued accordingly to the provisions of the CIDB Act 2008 as subsequently amended.

Bidder Mytilineos Holdings S.A. submitted the CIDB Certificates as required.

The evaluation process, as per the bidding documents, does not warrant investigation on registration procedures at CIDB. Therefore, there is no breach of ITB 3.1(a)(v) and 3.1(b).

- (iii) The evaluation and comparison of bids was carried out in line with ITB 30 – ITB 33 in Section I (Instruction to Bidders) of the bidding documents, on the basis of substantial responsiveness comprising the following elements:

- Preliminary examination of Bids and Determination of responsiveness
- Evaluation and Comparison of bids on the basis of:

(a) Eligibility criteria;

(b) Qualification criteria comprising inter-alia – financial soundness, bidder’s experience, bidder’s capability of making good design and having engineering experienced resources, manufacturing capacity corresponding to the bidding documents requirements;

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- (c) *Technical responsiveness criteria, i.e. compliance with Employer's Requirements defining the minimum functional, operational and technical requirements of works related to the plant to be performed by the successful bidder;*
- (d) *Commercial Evaluation identifying and pricing deviations if any; and*
- (e) *Finally computation of Levelized Cost of Electricity (LCOE) based on elements of bid prices as submitted.*

Consequently, the lowest bid price as announced at opening may not necessarily be the determination factor in identifying the **lowest evaluated substantially responsive bid**.

As stipulated in ITB 35.1 in Section 1 (Instruction to Bidders) of the bidding documents, " ... the Employer will award the Contract to the Bidder whose Bid has been determined to be substantially responsive to the Bidding documents and who has the lowest Evaluated Levelized Cost of Electricity (LOCE) ....".

Based on the above and following bid evaluation, Bidder Mytilneos Holdings S.A. was determined as the substantially responsive bid and with the lowest LCOE."

#### **E. Grounds for Review**

On 05 December 2018, the Applicant seized the Independent Review Panel for review on the following grounds:

- "(i) *By letter dated 6<sup>th</sup> November 2018, the Central Procurement Board requested bidders to extend the bid validity period by 90 days or up to 02 March 2019 and validity period of the bid security by 90 days or up to 01 April 2019, whichever the latest in line with **ITBs 18 and 19 of Section I of the Instructions to Bidders** and it requested a reply by Wednesday 14 November 2018 at latest. According to a press article dated Saturday 24 November 2018 appearing in Le Défi, it appears that Mytilneos Holdings S.A. Mytilneos did not extend the bid validity period as requested by the CPB in its letter dated 6<sup>th</sup> November 2018 within the timeframe imparted to it. However, by letter dated 22<sup>nd</sup> November 2018 (notification to unsuccessful bidder from the Public Body), the Applicant was notified that Mytilneos Holdings S.A Mytilneos had been selected for award. The Applicant contends that the Public Body has acted in breach of **ITB 3.1(a) of Section I – Instructions to Bidders (pages 14 and 15) and Section Section 11(2)(c), (d) and (f), 51(1)(a) and (c) of the Public Procurement Act** when it failed to treat all bidders equally, since all the bidders except Mytilneos Holdings S.A Mytilneos complied with the CPB's request to extend the bid validity for the required period.*

*It is the contention of the Applicant that as at the 22<sup>nd</sup> November 2018 which must be the date when the preferred bidder was notified of the Public Body's intention to award the contract, the preferred bidder had not extended its bid validity beyond 2<sup>nd</sup> December 2018, which would obviously disqualify it from being considered as a valid bidder in the process.*

*A copy of the press article dated 24<sup>th</sup> November 2018 (Le Défi newspaper) is herewith annexed and marked as **Document I**.*

- (ii) *In response to the reply of the Public Body dated 30<sup>th</sup> November 2018, the Applicant maintains that although the bid of Mytilineos Holdings S.A. Mytilineos was still valid, in view of its failure to comply with the Public Body/CPB's request dated 6<sup>th</sup> November 2018, to extend the bid validity period being the period referred to in its bid, Mytilineos Holdings S.A. Mytilineos could not have been selected for award inasmuch as its bid ought to have been considered as non-responsive and be rejected purely and simply.*
- (iii) *The Public Body ought to have rejected the bid of Mytilineos Holdings S.A. Mytilineos inasmuch as the latter is currently involved in numerous inquiries and cases of corruption and fraudulent practices. Indeed, the preferred bidder as the Applicant being foreign bidders have a requirement to fulfill before tendering and that is the provision of registration with the Construction Industry Development Board (CIDB). This application at Section G contains a statement of termination of contract/arbitration/legal proceedings which must be filled in by prospective applicant. This application must be successful for a foreign entity to be allowed to bid. Under **ITB 3.1(a)(v) of Section I – Instructions to Bidders** – obstructive practice is defined and includes making false statements and this must include making false statements in order to be registered at the CIDB so that it can participate in the bidding process. Under **ITB 3.1(b) of Section I – Instructions to Bidders** – the Government of Mauritius must reject a proposal for award if it determines that the preferred bidder has directly or through an agent engaged, inter alia in obstructive practices in competing for the contract in question.*
- (iv) *In response to the reply of the Public Body dated 30<sup>th</sup> November 2018, the Applicant maintains that the CIDB certificate is a requirement for a foreign bidder to be able to bid in a procurement exercise and if a bidder has obtained the CIDB certificate on the wrong premise and this has been brought to the attention of the Public Body or CPB, the latter is compelled to carry out an investigation inasmuch as all public official must discharge his duties impartially so as to ensure fair competitive access to procurement by suppliers. Furthermore, the response of the*

*Public Body is evidence that it clearly failed to perform any verification whilst at the parliamentary debates held on 17<sup>th</sup> July 2018 and 27<sup>th</sup> November 2018, the Honourable Deputy Prime Minister stated that the CPB must have done the due diligence exercise which it had to do in the course of the examination of these bids.*

- (v) Mytilneos Holdings S.A. Mytilneos 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.*
- (vi) In response to the Public Body's reply dated 30<sup>th</sup> November 2018, the Applicant maintains that the preferred bidder, Mytilneos Holdings S.A. Mytilneos is not the lowest evaluated substantially responsive bid, with the lowest Levelized Cost of Electricity (LCOE).*
- (vii) 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."*

## **F. The Hearing**

Hearing was held on 12 December 2018. The Applicant was represented by Mr G. Glover, Senior Counsel together with Miss S. Chuong, Counsel whereas the Respondent was represented by Mr R. Chetty, Senior Counsel. The Central Procurement Board was represented by Mrs G. Topsy-Sonoo, Assistant Solicitor General.

## **G. Findings**

We propose to deal with the points raised by TSK in its application for review in the order used in its Statement of Case.

### Bid Validity

TSK takes issue with the fact that Mytilneos did not initially extend the validity of its bid (and the accompanying bid security) when all the other bidders did. Indeed, all bidders were invited by the CPB to extend the validity of their bids by a period of 90 days or up to 02 March 2019. The bid security was also to be extended by 90 days or up to 01 April 2019, all in line with Instructions to Bidders 18 and 19. The CPB had invited the bidders to express their stand to its request by 14 November 2018.

TSK contends that Mytilneos has enjoyed a more favourable treatment than the other bidders since it had refused, by 14 November 2018, to extend the validity of its bid, and yet, was selected as the successful bidder.

TSK seeks support for this contention on section 11(2) of the Public Procurement Act 2006 (the 'Act') which, *inter alia*, provides that the CPB shall strive to achieve equality of opportunity, fairness of treatment of all parties and transparency of process and decision. The CEB's response is simply that at the time of selection of Mytilineos as the successful bidder, its bid was and is still valid.

We note that after being notified of its selection, Mytilineos has extended the validity of its bid on two occasions and no issue is anticipated as to the validity period should Mytilineos be awarded the procurement contract.

At one stage, it was stated on behalf of TSK that this conduct is reprehensible since all other bidders had to extend the validity of their bids, at additional costs, whereas Mytilineos did so only after becoming aware that it had been chosen.

We do not subscribe with this view and we do not find any reason to put into question the conduct of the public body and of the CPB. In our opinion, a public body or the CPB may request an extension of the bid validity periods in anticipation that they may be taking more time to select a bidder amongst the different participants. They indeed owe a duty, in such cases as the present one, to request such an extension from all bidders, an equality of opportunity, so to speak. However, should any particular bidder refuse to extend the validity period of its bid, it is at its own risk and it may find itself with a bid rendered invalid by the passage of time if the public body indeed takes longer to select a bidder and to award the contract.

We are further comforted in our view that a refusal to extend the validity period of one's bid does not mean a disqualification by a reading of Regulation 30(5) of the Public Procurement Regulations 2008 (the "Regulations") that provides that:

*'A refusal by a bidder to extend the bid validity period shall not result in the forfeiture of his bid security.'*

Therefore, we understand that a refusal to extend the validity period is not akin to a bidder, for instance, refusing a correction of its bid by a public body which correction is brought to its attention – section 37(7) of the Act.

Another point was raised by TSK during the cross-examination of the public body's representatives by Mr Glover in respect of meetings held with Mytilineos shortly before the notification of its selection as preferred bidder, that is, the two days leading up to the 22 November 2018. This was not raised in the application for review or the Statement of Case, understandably so, because it only later came to light that such meetings were held and when.

TSK relies on the events of November 2018 to question the process, or approach of the CPB and CEB. In fact, the request for extension of bid



validity was made on 06 November 2018, bidders were invited to respond to it by 14 November 2018, Mytilineos refused to extend by letter dated 08 November 2018, it was selected by the CPB on 14 November 2018. The CPB notified CEB of its decision on 15 November 2018 and the latter contacted Mytilineos to hold special meetings in respect of the bid prior to the official announcement (the Notification of 22 November 2018). Meetings were held, on request of the CPB, as per the testimony of the representatives of the CEB, on 20 and 21 November 2018 and were in respect of minor discrepancies in the bid by Mytilineos and of the extension of the bid validity period.

We are of the view that, even though this timeline or chronology, as it were, may 'look bad', it is not conduct that should warrant our intervention. The Act itself provides for such circumstances where the CPB may initiate negotiations. Sections 40(2) and 40(2A) read as follows:

*“(2) There shall be no negotiation between a public body and a selected bidder or other bidders except in such special circumstances as may be prescribed.*

*“(2A) In the case of a major contract, the Board shall, where special circumstances provided in subsection (2) apply, initiate and oversee the negotiation between a public body and a selected bidder or other bidders in accordance with such instructions as may be issued by the Policy Office.”*

Furthermore, section 37(1), generally, allows the CEB/CPB to seek clarifications from any bidder.

We therefore do not find anything reprehensible in the conduct of the public body and of the CPB during the events leading up to the Notification of 22 November 2018 and we do not find that there was any ill-intent or 'favouritism' by the public officers in favour of Mytilineos.

One final point has been made on behalf of TSK in respect of the conduct of the procurement process by the public body and the CPB. It states that, pursuant to sections 51(1)(a) and (c) of the Act, all public officials involved in planning or conduction public procurement proceedings or contract administration shall be fair, impartial and avoid conflicts of interests. Again, we do not see any such breaches based on the evidence before us, neither from the CEB staff nor that of the CPB.

### Litigation history

Another limb of the said challenge relates to the fact that the Public Body ought to have rejected the bid of Mytilineos in as much as the latter's CEO was currently involved in numerous inquiries and cases of corruption and fraudulent practices.

Indeed the preferred bidder, as well as the Applicant, being foreign bidders, have a further requirement to fulfil before tendering, that is the submission

of a certificate of provisional registration from the Construction Industry Development Board (CIDB). The form in respect of such applications at its Section G contains a statement of termination of contract/arbitration/legal proceedings which must be filed by any prospective applicant. This application must be successful for a foreign entity to be allowed to bid. Under ITB 3.1(a)(v) of Section 1 – Instruction to Bidders – obstructive practice is defined and includes making false statement. This may well, in our view, include making false statements to the CIDB in order to secure a provisional registration so that it can participate in the bidding process. ITB 3.1(b) of Section 1 – Instruction to Bidders, the Government of Mauritius must reject a proposal for award if it determines that the preferred bidder has directly or through an agent engaged, *inter alia*, into obstructive practices in competing for the contract.

In response to the reply of the Public body dated 30 November 2018, the Applicant maintains that the CIDB certificate is a requirement for a foreign bidder to be able to bid in a procurement exercise. If a bidder has obtained the CIDB certificate on the wrong premises such as filing false statements or refraining deliberately from giving full and truthful required information in the application forms and if this fact has been brought to the attention of the Public Body or Central Procurement Board, they are compelled to carry out an investigation inasmuch as a public official shall discharge his duties impartially so as to ensure fair competitive access of procurement by suppliers.

The Applicant avers that the response of the Public Body is evidence that it failed in this duty.

At the Parliamentary Debates held on 17 July 2018 and 27 November 2018, a member of National Assembly said that the Greek company, Mytilineos Holdings SA, should have been disqualified from the beginning for non-declaration of any litigation and, as per general conditions of the tender documents in relation to termination by the employer, would amount to obstructive practice. The reply, at that debate, was that the Central Procurement Board must have done the due diligence exercise which it has to do in the course of the examination of these bids.

The Respondent replied that the CPB has carried out due diligence with respect to the function conferred upon it by the Act. The CIDB certificates had been issued by the CIDB as established by law. Bidder Mytilineos had submitted the relevant CIDB certificates along with the bid and was therefore compliant with the requirements of the bidding documents.

When the case was heard before the Panel on Wednesday 12 December 2018 in presence of the parties and their Counsel, evidence was heard from Mr Kurslay Bagwan, a member of the Central Procurement Board. He informed the Panel that due diligence had been carried out after different press articles and allegations of fraud and corruption were made against the preferred bidder. The information was duly verified. He added that, in

practice, the Central Procurement Board tries to do during the evaluation exercise a due diligence through external bodies, reputable organisations or through the CPB's own efforts and findings. In this case, Mr K. Bagwan added that: *"we had paid a foreign agency, a reputed company to carry out the due diligence and this kind of information is not even exchanged between the Public Body because this is the job and duties and function of the Central Procurement Board to complete evaluation and whatever is done during evaluation remains the property, the ownership of the Central Procurement Board. We do not need to disclose it."*

On 12 December 2018, the Panel, after the hearing, requested the CIDB for specific information with regard to the date of application on the provisional registration by Mytilineos-EPC, particularly of the answers provided to sheet RG7C headed "Statement of Termination of Contract, Arbitration/Legal proceeding (Section G) from the Executive Director of the CIDB. On 13 December 2018, the CIDB through the Manager, Technical Services signing for the Executive Director replied that the application from MEKTA-EPC was received on 03 May 2018 and the Certificate of Provisional Registration was issued on 08 May 2018. The Panel was also informed, by this letter, that Mytilineos had specified '0' in Section G of the application form; that is, it presumably had no litigation history for the last 5 years preceding the application form to the CIDB.

The application for provisional registration as a Foreign Contractor asks various questions from applicants.

Question 1.6 – Has the applicant ever been subject to Insolvency, Bankruptcy or placed under liquidation or judicial management - Yes or No. If yes, please give a brief statement thereof.

Question 1.7 – Has applicant ever been debarred or suspended as a Contractor? Yes or No. If yes, please give details in the annexed Debarment/ Suspension Data Sheet RG7G.

In section G, applicants are to 'State number of Projects, during the last 5 years, which were subject to Termination of Contract/Arbitration/Legal Proceedings' – Mytilineos specified '0'.

In sheet headed RG7C, which relates to section G, a Statement of Termination of Contract/Arbitration/Legal Proceedings was requested from the applicant by the CIDB. No description was inserted by the Applicant, Mytilineos.

On 17 December 2018, the Panel requested that the Chief Executive Officer of the Central Procurement Board would supply the Panel with a copy of the report of the reputed independent firm which had been mandated by the Central Procurement Board to carry out a due diligence exercise on the preferred bidder Mytilineos.

The Panel was informed that the said due diligence report was meant for the Central Procurement Board only and that any distribution of the report and its contents in whole or in part to any third party outside the agreement was prohibited except as approved by the agreement. The Independent Review Panel undertook to use the report with the approval of the Central Procurement Board and the agency in full confidentiality. In accordance with the undertaking given the Independent Review Panel, will use the due diligence report without making any unwarranted disclosure about its findings.

Another requirement which we found from the Eligibility and Qualification Criteria and Compliance Request Sheet is that the bidders were requested to provide accurate information on the prescribed form (Form CON-2) about any litigation or Arbitration resulting from contracts completed or on-going under its execution over the last ten years. This can be found under the heading 'Litigation history' in the Bidding Documents – Volume II, A/3 Page 118 of 343. A footnote to this ITB is to the effect that a bidder with a consistent history of court/arbitral award decisions against it may be disqualified.

The Panel examined the Bidding Documents submitted by Mytilineos and the above-said form and notes with concern that Mytilineos had specified that there was no pending litigation and ticked the box, in Form CON-2 to the effect that it had no litigation history. This is at odds with the findings of the agency which were made known to the CPB in August 2018, and even with publicly available information in Greece, emanating from the authorities and from Mytilineos itself.

In light of the evidence before us and the helpful assistance given to us by the CPB and the CIDB, we wish to make the following two observations.

This Panel does not take lightly to bidders misleading or failing to provide accurate and truthful information in the bids they submit and we are of the view that such conduct should not be condoned.

We are also of the view that the conclusions reached by the CPB might be impacted had it been in the same position of this Panel, that is, in the knowledge of all three sides of the story namely, CIDB, CPB and the international agency. We would invite the CPB, as far as reasonably practical, to liaise with the CIDB since we find that there may be questions as to the correctness or validity of the certificate issued by it in May 2018, and on which the CPB relied to proceed further in the selection between bidders.

We therefore recommend that is appropriate, in the circumstances, that a re-evaluation of the bids takes place in light of the above findings.



**Chairperson**  
**(H. Lassemillante)**



**Member**  
**(V. Mulloo)**



**Member**  
**(A. K. Namdarkhan)**

**Dated: 27 December 2018**



