

Independent Review Panel

Decision No. ⁰²01/18

In the matter of:

CRBC-GAMMA Joint Venture

(Applicant)

v/s

Road Development Authority

(Respondent)

(Cause No. 31/17/IRP)

Decision

A. History of the case

This is a case where the CRBC-Gamma Joint Venture hereinafter “the Applicant” is challenging the decision of the Road Development Authority hereinafter “the Respondent” to award a contract for the Construction of Grade Separated Junction at Pont Fer/Jumbo/Dowlut Roundabouts and A1-M1 Link Roads to the Transinvest – GCC Bouygues TP-VSL1 Junction Pont Fer & A1-M1 Link Road JV, hereinafter “the Selected Bidder”. This was done pursuant to an open advertising bidding exercise bearing reference number (CPB/26/2017).

The Applicant was notified of the award by the Respondent on 20 December 2017 and subsequently challenged the latter’s decision on 22 December 2017.

Feeling aggrieved by the Respondent’s reply to its challenge, the Applicant applied for review of the Respondent’s decision before the Independent Review Panel pursuant to section 45 of the Public Procurement Act 2006, hereinafter “the Act”, on 29 December 2017.

B. Notification of Award

The Road Development Authority through a letter dated 20 December 2017, informed the Applicant of the particulars of the successful bidder as follows:

Name of Bidder	Address	Price
<i>Transinvest-GCC Bouygues TP-VSLI Junction Pont Fer & A1- M1 Link Road JV</i>	<i>c/o Transinvest Construction Ltd 39-41 Richelieu Branch Road 71625 Coromandel Republic of Mauritius</i>	<i>MUR 3,551,619,140.16 (Exclusive of 15% VAT</i>

C. The Challenge

On 22 December 2017, the Applicant challenged the procurement on the following ground:

- a. *the Respondent's Reply to Query 12 of Clarification No. 7 dated 29 September 2017 led the Applicant and any other reasonable bidder to believe that a joint venture should be incorporated in Mauritius at the time of submitting its bid or at the time that the bid evaluation exercise is carried out in order to benefit from the Margin of Preference;*
- b. *had the Respondent clearly stated in its Reply to Query 12 of Clarification No. 7 dated 29 September 2017 that a joint venture was not required to be incorporated before submitting its bid in order to benefit from the Margin of Preference, the Applicant could have opted for the application of the Margin of Preference;*
- c. *the Respondent's Reply to Query 12 of Clarification No. 7 related to a significant factor, namely, the applicability of the Margin of Preference.*

F. The Hearing

The Hearing was held on 24 January 2018. The Applicant was represented by Mr. R. Pursem Senior Counsel assisted by Counsel Nursimulu and Ramnah, whereas the Respondent was represented by Mrs. Topsy-Sonoo Assistant Solicitor General together with Ms. Domah of Counsel. Mr G. Glover Senior Counsel together with Miss. S Cheong of Counsel appeared for the Selected Bidder.

At the outset, both the Applicant and the Respondent agreed that no evidence would be called during the hearing and reliance would be placed on documents on record.

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

Both Counsel for the Applicant and Respondent offered extensive submissions on, *inter alia*, ITB 40, 40.1 and 40.2, section 1.8.1 of Section III- Evaluation and Qualification Criteria, hereinafter "section 1.8.1", all of

“that the bid of CRBC-GAMMA Joint Venture was the lowest evaluated substantially responsive bid in terms of section 40 of the Public Procurement Act.”

D. The Reply to Challenge

On 26 December 2017, the Public Body made the following reply to the challenge:

“The Road Development Authority has been informed by the Central Procurement Board that China Road and Bridge Corporation (CRBC)-Gamma Joint Venture submitted the lower bid. However, CRBC-Gamma Joint Venture have opted for not applying for Margin of Preference. Hence, after application of the Margin of Preference, China Road and Bridge Corporation- Gamma Joint Venture was no longer the lower bid.

Accordingly, the decision for award as per our letter dated 20 December 2017, is being maintained.”

E. Grounds for Review

On 29 December 2017, the Applicant seized the Independent Review Panel for review on the following grounds:

- “1. The Applicant contends that the Respondent erred in applying the “Margin of Preference” inasmuch as:
 - a. Pursuant to the Reply to Query 12 of Clarification No. 7 dated 29 September 2017, “Incorporation in the Republic of Mauritius is a pre-requisite for applicability of Margin of Preference”;*
 - b. The Transinvest JV was not yet incorporated at the time that it submitted its bid;*
 - c. Further, the Transinvest JV was not yet incorporated at the time that the bid evaluation exercise was carried out;*
 - d. As such, the Transinvest JV was not eligible for the application of the Margin of Preference in light of the Respondent’s Reply to Query 12 of Clarification No. 7 dated 29 September 2017.**
- 2. On that basis, the Applicant submits that the Respondent’s decision to award the contract for the above project to the Transinvest JV should be annulled.*
- 3. Alternatively, the Applicant contends that the procurement proceedings should be annulled and commenced anew inasmuch as:*

which forming part of the Bidding Documents Bundle, section 37 of the Public Procurement Act 2006, Regulation 35 of the Public Procurement Regulations 2008 and Clarifications of the Respondent during the different stages of the procurement proceedings dated 17 August, 05 and 29 September 2017 respectively.

The Panel has carefully considered the submissions of both Counsel for the Applicant and Respondent and can safely say that the central issue of this application for review boils down to this:

1. At what stage the applicability of the margin of preference became relevant and;
2. Whether the selected bidder was eligible to qualify for the margin of preference.

The Law, Bidding Documents Bundle and Instruction to Bidders (ITBs)

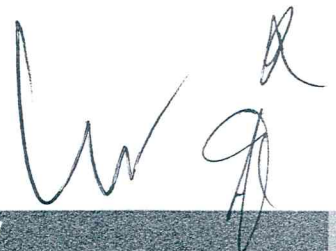
Section 37 of the Public Procurement Act 2006:

“37. Examination and evaluation of bids

(1) A public body may seek clarification during the examination of bids from any bidder to facilitate evaluation, but it shall neither ask nor permit any bidder to change the price or substance of his bid.

(2) A public body shall, in order to evaluate bids, set up a bid evaluation committee, selected from a list of qualified and independent evaluators maintained by it.

(3) Following the opening of bids, a public body shall -



- (a) *examine the bids in order to determine whether they are complete and in accordance with the bidding documents; and*
 - (b) *ascertain whether -*
 - (i) *they are properly signed; and*
 - (ii) *the documents required to establish their legal validity and the required security have been furnished.*
- (4) *Where a prequalification procedure is applicable, a bid received from an entity other than a prequalified bidder shall be rejected.*
- (5) *Where a bid discloses an arithmetical error, the error shall be corrected and the bidder notified.*
- (6) *Where there is a discrepancy between figures and words, the amount in words shall prevail, and the mistake shall be corrected and the bidder notified.*
- (7) *Where a bidder refuses to accept a correction made pursuant to subsection (5) or (6) his bid shall be rejected and the bid security forfeited in accordance with section 30(2)(b).*
- (8) *Where there is a minor deviation in any bid that did not warrant rejection of the bid at an earlier stage, such minor variation shall be quantified in monetary terms, as far as possible.*
- (9) *Every bid shall be evaluated according to the criteria and methodology set out in the bidding documents and the evaluated cost of each bid shall be compared with the evaluated cost of other bids to determine the lowest evaluated bid.*



(10) *Where a prequalification procedure is applicable, the qualifications of the lowest evaluated bidder shall be verified anew to take account of any change since the original prequalification.*

(11) *The bid evaluation committee shall prepare an evaluation report detailing the examination and evaluation of bids and identifying the lowest evaluated bid that meets the qualification criteria.*

(12) *In the exercise of its function, the bid evaluation Committee shall act without fear or favour and shall not be subject to the direction or control of any other person or authority.”*

Regulation 35 of the Public Procurement Regulations 2008 made under section 61 of the Public Procurement Act 2006:

“35. Margin of preference (amended as per G.N No. 86 of 2009).

(1) *Where applicable, the financial evaluation stage shall involve the application of price preference in favour of domestically manufactured goods and domestic and foreign contractors and a regional price preference where the regional price preference is applicable.*

(2) *Any applicable preference shall be stated in the bidding document and shall be in accordance with directives issued by the Policy Office (amended as per G.N No. 71 of 2008).”*

Paragraphs 40 and 40.1 of the Instruction to Bidders (page 26 of the Bidding Documents Bundle):

“Margin of Preference”

“Unless otherwise specified in the BDS, Margin of Preference shall not apply.”

Section II para E, ITB 40.1 (page 34 of the Bidding Documents Bundle):

“A margin of preference, for evaluation of bids, shall apply as defined hereunder and in section III. Evaluation and Qualification criteria.”

ITB 40.2 (page 34 of the Bidding Documents Bundle):

“Bidders applying for the Margin of Preference shall submit, as part of their bidding documents evidence of:

(a) (Not Applicable)

(b) for joint venture, their joint venture Agreement or intention to legally enter into a joint venture agreement to be incorporated in the Republic of Mauritius, where applicable.

(c) (Not Applicable)

(d) (Not Applicable)

Non-submission of the evidence may entail non-eligibility of the bidder for margin of preference”

Section III- Evaluation and Qualification Criteria (page 40 Bidding Documents Bundle) at Section 1.8.1 under the heading “Margin of Preference” and sub-heading “For International Bidding”:

“A Margin of Preference for employment of local manpower shall be applicable as follows:

1.8.1 For International Bidding:

“A bidder, incorporated in the Republic of Mauritius who undertakes to employ local manpower for 80% or more of the total man-days deployed for the execution of a Works contract referred hereto, shall be eligible for a preference of 15%.”

The Panel now turns to the various clarifications sought by different bidders.

On 05 September 2017, referring to a previous clarification, i.e. Clarification No. 4 dated 17 August 2017, the Respondent by way of reply wrote to the Applicant with respect to Applicant’s query on the application of Margin of Preference.

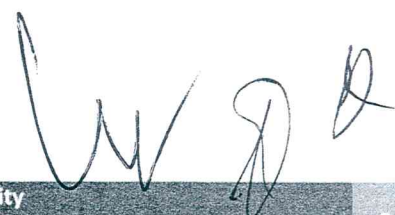
The Query and Reply in Clarification No. 4 stipulates as follows:

Query: “In respect to ITB 40.1, our JV is composed partially (but not entirely) of corporate entities incorporated in Mauritius and will be lawfully registered with the tax administration in Mauritius with a Business Register Number, but no incorporated.

Please confirm the applicability of Margin of preference for our registered (but not incorporated) JV”

Reply: “Please refer to ITB Clause 40.1 which provides inter-alia “for joint venture, their joint venture Agreement or intention to legally enter into a Joint Venture Agreement to be incorporated in the Republic of Mauritius, where applicable”. The Joint Venture shall be incorporated in the Republic of Mauritius.

Furthermore, in the said letter of 05 September 2017, the Respondent amended the last sentence to the above reply to read:



“The Joint Venture shall be incorporated in the Republic of Mauritius prior to the award.”

It can be noted that the aforesaid JV was not incorporated in the Republic of Mauritius at the time it made the query. The Respondent’s reply to the query was that they simply referred to the provisions of ITB 40.1 supported by a one-liner by way of clarification.

The Panel notes that the Respondent clarified their own clarification, i.e. Clarification No. 4 – Query 2 of 17 August 2017, in their reply letter dated 5th of September 2017 addressed to the Applicant.

The Panel now turns to Respondent’s Clarification 7 dated 29 September 2017 and more specifically to the Query and Reply No. 12 thereof the relevant part of which is reproduced hereunder:

“Query: ...“The Parameters for such applicability are not stated in the Bid documents. Whilst the terms “incorporated” is indeed ambiguous and not aligning the usual operating standard of joint ventures in Mauritius, please clarify precisely the definition and applicability for ‘incorporated JV’s’ and if the Employer maintains anew such concept in consideration to our present submission.”...”

In reply to the said query, the Respondent referred to the amended reply to Query No. 2 of Clarification 4, i.e., letter of 05 September 2017 and further amended same to add the following:

“Incorporation in the Republic of Mauritius is a pre-requisite for applicability of Margin of Preference.”

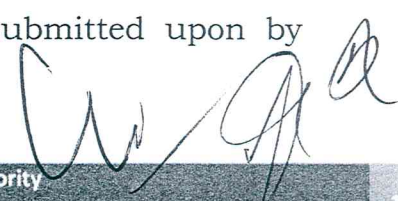


G. Findings

After a careful analysis of all the above and documents on record, the Panel finds as follows:

ITB 40.2 and Section 1.8.1 of Section III- Evaluation and Qualification Criteria, Applicability of Margin of Preference and Eligibility of Selected Bidder

1. The Panel notes that the wording of both ITB 40.2 and Section 1.8.1 of Section III could be ambiguous and inconsistent with each other. We hold the view that ITB 40.2 specifically concerns the requirements a bidder shall comply with, to make an **application** for Margin of Preference at the time bidding documents are submitted i.e. the bidder shall opt for Margin of Preference in its bid and submit evidence as required under ITB40.2 for the bidder's **application** for Margin of Preference to be a valid one.
2. On the other hand, the panel finds that Section 1.8.1 caters for the **applicability** of the Margin of Preference at the Evaluation and Qualification stage i.e. how is the Margin of Preference applied to the different bids and at what stage is it triggered or it became relevant. The panel is comforted in its view by the use of the word "...applicable..." in the heading under which Section 1.8.1 is found which reads "A Margin of Preference for employment of local manpower shall be applicable as follows:..." (underlining ours)
3. True it is that some ambiguities might arise when one would read into both ITB 40.2 and Section 1.8.1 as to the requirements and also as to the use of the words "... to be incorporated ..." and "... incorporated..." in ITB 40.2 and Section 1.8.1 respectively, as submitted upon by Counsel for both Applicant and Respondent.

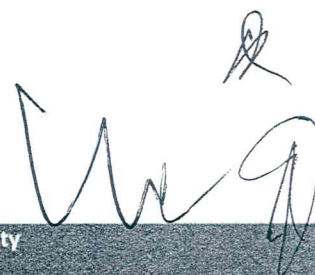


4. The Panel takes note of the contents of the letter of reply of the Respondent to the Applicant dated 05 September 2017 where the Respondent amended its Clarification of 17 August 2017 to read, inter alia, “*The Joint Venture shall be incorporated in the Republic of Mauritius prior to the award.*” (underlining ours).
5. In that regard, the Panel finds it of vital importance to refer to the Respondent’s Clarification 7 – Query 12 dated 29 September 2017, which is by the way the last Clarification of the Respondent regarding queries on Margin of Preference. We take the view that the last Clarification 7 – Query 12 dated 29 September 2017 is of fundamental importance and is in line with the wording of Section 1.8.1. The Panel further finds that Clarification 7 – Query 12 dated 29 September 2017 supersedes the Respondent’s Clarification in the letter of 05 September 2017 addressed to the Applicant.
6. By way of this reply, the Respondent indeed confirms that “Incorporation in the Republic of Mauritius is a pre-requisite for applicability of Margin of Preference.” (emphasis ours) that is to say that Incorporation in the Republic of Mauritius is a mandatory condition for the applicability of Margin of Preference to the bidder’s bid. This in our view puts to rest any concern, a bidder might have had in regards the applicability of Margin of Preference so much so that potential bidders were made aware of this Clarification on 29 September 2017, no less than 41 days before the closing date for bid offers which was due on 09 November 2017. The Panel further notes that no more query with regards Margin of Preference were made after the Respondent’s reply of 29 September 2017.
7. The panel further finds that the wording of Section 1.8.1 makes it clear that at the time of the applicability of the Margin of Preference,



i.e. at the financial evaluation stage, the bidder should be incorporated in the Republic of Mauritius.

8. At this juncture it is interesting to quote the last Note of ITB 40.2 which reads “*Non-submission of the evidence may entail non-eligibility of the bidder for margin of preference*”. (*emphasis added*). We pause here to highlight the use of the word “*may*” in the preceding sentence which clearly demonstrates that the relevant body has a discretion as to the eligibility for margin of preference of a particular bidder based on the documents submitted in its bidding documents under ITB40.2 at the time of application for Margin of Preference in its bidding documents.
9. In other words, what this Note provides is that non-submission of the evidence might not be fatal to the eligibility of the bidder for the Margin of Preference. However, the Panel takes the view that this note cannot be viewed in isolation but should be viewed in conjunction with Section 1.8.1, the Clarification 7 – Query 12 and Regulation 35 of the Public Procurement Regulations 2008.
10. In support of this reasoning, the Panel will refer to regulation 35 of the Public Procurement Act 2006. Again, this Regulation is in line with section 1.8.1 and the reply of 29 September 2017 inasmuch as when speaking of the Margin of Preference, it is stated that “... *the financial evaluation stage shall involve the application of price preference...*” (*emphasis added*).
11. While referring to the above regulation, the Panel finds that it is clear that the margin of preference is applied at the financial evaluation stage.

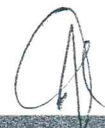


12. Therefore, there is no doubt whatsoever that for a JV to be eligible for margin of preference, it has to be incorporated in the Republic of Mauritius prior to the financial evaluation stage.
13. The Panel notes that the financial appraisal was opened on Tuesday 5th December 2017. This is emanated from the letter dated 4th December 2017, wherein the Central Procurement Board informed the Applicant that its bid was technically responsive and therefore qualifies for financial appraisal and the more so they were invited to attend to the opening of the financial bid. It's a fact that the Selected Bidder was incorporated in the Republic of Mauritius on 14 December 2017, thus it was well after the Financial Evaluation Stage which started on the 05 December 2017.

Observation

14. The Panel also took note that on 13 December 2017, the Central Procurement Board wrote to the Selected Bidder, requesting them to submit their certificate of incorporation in the Republic of Mauritius as per the requirement of the bidding documents. It is a fact that such powers are conferred to the Central Procurement Board under Section 12 (1) of the Act. However, it is still unclear as to why the Central Procurement Board requested such information at a late stage of the financial evaluation, i.e. a week before the award was given. This is testimony to the fact that as at that date, the Selected Bidder was not yet incorporated in the Republic of Mauritius, even though the process had reached the Financial Evaluation Stage.

For the above reasons, the panel concludes that the Selected Bidder was not eligible for the Margin of Preference to the extent that they were not incorporated in the Republic of Mauritius at the financial evaluation stage as this essential requirement is a pre-requisite for the applicability of Margin of Preference.



In the light of the above, the Panel finds that the Respondent was wrong to award the contract to the Selected Bidder. The Panel further finds that to be eligible for the Margin of Preference, the bidder should be incorporated in the Republic of Mauritius before the opening of the Financial Evaluation Stage.

Decision

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



(Arassen Kallee)
Vice-Chairperson



(Virjanan Mulloo)
Member



(Rajsingh Ragnuth)
Member

Dated 29 January 2018

