Independent Review Panel

Decision No 09/19

In the matter of:

Crains Technologies Limited

(Applicant)

v/s

Office of the Commissioner of Police

(Respondent)

(Cause No. 09/19/IRP)

Decision

A. History of the case

The Central Procurement Board, on behalf of the Public Body, that is, the Commissioner of Police invited sealed bids for the Supply, Installation, Testing, Commissioning and Maintenance of an Advance Passenger Information and Passenger Name Record System on 22nd October 2018.

The deadline for submission of bids was 23rd January 2019. Four bidders, including Joint Ventures, submitted bids. The Applicant, Crains Technologies Limited (also, "Crains") entered into a Joint Venture with Informatics International Limited of Sri Lanka.

B. Evaluation and Notification of Award

Through a letter dated 18th June 2019 the Office of the Commissioner of Police notified the Applicant (Crains Technologies Limited) that an evaluation of the bids received has been carried out and its bid has not been retained for award. The particulars of the successful bidder are given hereunder:

Name of Bidder	***Address***	***Contract Price***
PTL Limited (MALTA) in association with IBM (Mauritius) Limited And STATE Informatics Limited (SIL)	*Nineteen Twenty Three Valleta Road Marsa MRS3000 Malta*	*USD 10,780,105 (VAT Excl) but inclusive of four (4) years of maintenance costs (year 2 to year 5) year 1 being the warranty period.*

C. The Challenge

On 24 June 2019, the Applicant challenged the procurement on the following grounds:

(a) *"The decision to consider **PTL Limited (Malta) in association with IBM (Mauritius) Limited And STATE Informatics Limited (SIL)** as the successful bidder, and to award the tender to the latter is manifestly wrong, unfair, unreasonable, irrational and untenable inasmuch as:*

(i) JV's bid was to all intents and purposes technically responsive;

(ii) *The bid of JV was USD XXX and was substantially lower than the bid submitted by the successful bidder which amounted to USD 10, 780, 105;*

(iii) *The bid of JV was in the circumstances, the lowest bid;*

(iv) *The bid of JV was substantially responsive and JV should have been retained as the successful bidder as a result.*

(b) *The decision-making process of the Board did not comply with the sacrosanct principles and procedures provided under the Public Procurement Act 2006 and the directives issued by the Public Procurement Office."*

D. The Reply to Challenge

On 28 June 2019, the Public Body made the following reply to the challenge and stated that:

"This is to inform you that as per the bidding document (ITB 17.1), Bids need to be secured by a Bid Security and the amount of Bid Security required is Fifty thousand US dollars (USD 50,000)(MUR 1,700,000, EUR 42,500, GBP 38,500) and should be as per format provided at page 260 of the bidding document and to be submitted in its original form, (copies will not be accepted).

You did not submit any bid security. The submission was not an original bid security, neither signed nor in the required format as the per the bid document.

This is considered as a ***major deviation*** *(according to ITB 17.4) and therefore your proposal was* ***not retained*** *for further evaluation and thus the marking of the technical proposal was not carried out."*

E. Grounds for Review

On 04 July 2019, the Applicant seized the Independent Review Panel for review on the following grounds:

"The decision of the Commissioner of Police and/or the Central Tender Board ("the Board") to award the tender for USD 10,780,105 (VAT Excl) to ***PTL Limited (MALTA) in association with IBM (Mauritius) Limited and STATE Informatics Limited (SIL)*** *("the Successful Bidder"), is manifestly wrong, unlawful, unfair, unreasonable and untenable inasmuch as:-*

a. *The Applicant's bid was to all intents and purposes technically responsive.*

b. *The bid submitted by the Applicant was to all intents and purposes substantially lower than that of the successful bidder.*

c. *The Applicant's bid was substantially responsive and the Commissioner of Police and/or the Board was wrong to reject it's bid on the sole ground that no bid security was submitted when, in truth and in fact, the Applicant did submit an original bid security, which bid security is deemed to have been accepted by the conduct of the Board, acting through its préposés.*

d. *In awarding the tender to the Successful Bidder, the Commissioner of Police and/or the Board failed to award the tender to the lowest evaluated substantially responsive bidder.*

e. *The Commissioner of Police and/or the Board failed and/or neglected to comply with Section 11(2), 37(9), 40(1) of the Public Procurement Act and Directive no. 3 of the Public Procurement Office."*

F. The Hearing

The Hearing was held on 18th July 2019. Written submissions were made on 17th July 2019 and 23rd July 2019, by Applicant and Respondent respectively.

The Applicant was represented by Messrs Vencadasamy and Sunnassee of Counsel and Mr Attorney Ramlochund while the Respondent was represented by Miss Sawock, Senior State Counsel.

As a preliminary point, we wish to again emphasise to the parties appearing before us that they are to abide by the strict deadlines set out in section 45 of the Public Procurement Act 2006 (the "Act") and the Public Procurement Regulations 2008. Applicants are to file their applications for review not only with the Panel but a copy has to be submitted to the Public Body at the time of the application. Similarly, the Public Body is to submit its Reply and Comments to the Panel, with copy to the Applicant and the latter must submit its Reply and Comments thereon to the Panel, with copy to the Public Body. One should note that the Panel is invited, by the Act itself in section 44, to seek to avoid formality subject to section 45. It follows that, out of

fairness, the parties should also ensure that sufficient material is provided to the successful bidder who is an intervener in the review proceedings and it goes without saying that, in the relevant cases, the Public Body will ensure that the Central Procurement Board, another intervener, is provided with the appropriate material.

G. Findings

The facts of this case are hardly disputed and we rely on the useful summary of background facts provided by the Applicant and on which it relies to develop its arguments. Following the invitation for sealed bids on 22nd October 2018, the Applicant entered into a Joint Venture with a Sri Lankan entity on 23rd January 2019 which, incidentally, was the deadline for submission of bids. This being a major contract for the Office of the Commissioner of Police, the procurement proceedings fell under the purview of the Central Procurement Board ("CPB").

The Applicant, in association with the foreign company, submitted its bid on that day together with a photocopy of an unsigned bid security document from DFCC Bank. The Applicant has produced, during the hearing, Document A which is only the first page of the bid security document from DFCC Bank.

This document (the "Bid Security") as submitted with the bid on 23rd January 2019, is addressed to the Commissioner of Police, is dated 21st January 2019 and is for the sum of USD 50,000.

On the following day, that is, 24th January 2019, one Mrs Sheksha Juggurnauth, a *préposée* of the Central Procurement Board sent, in an e-mail to the Applicant's director, a PDF file in respect of the Public Opening of Technical Proposals held on the due date of 23rd January 2019.

Again, on 24th January 2019, a properly signed bid security document, issued by the Mauritius Commercial Bank, was furnished by the Applicant. During exchanges with the Panel, Mr Ujoodha, the Chairman of the Bid Evaluation Committee stated that the bid security submitted on 24th January 2019 was not the 'same one' as the Bid Security submitted with the bid. We gather from exchanges with Counsel that this was because the Mauritius Commercial Bank, as correspondent bank of DFCC Bank, issued the bid security document and this was the one sent on 24th January 2019.

The Applicant was later requested to extend its bid; the same request was made to all other bidders.

The Applicant also suggests that a press article by L'Express newspaper (Document D of the Applicant) was based on an unlawful disclosure.

In a gist, the Applicant's case is as follows. It concedes that the bBid security ("Bid Security") submitted with the bid was unsigned and not in the format set out in the bidding documents but then argues that since Mrs Juggurnath of the CPB, in effect, acknowledged that it submitted a bid security with its Technical Proposal, through the PDF file, the Public Body was therefore estopped from going back on this 'acknowledgement' or it had created a legitimate expectation on the part of the Applicant that its bid was valid.

Finally, the Applicant submits that the Public Body (through the CPB) acted in breach of Paragraph 68(b) of the Public Procurement Regulations 2008 which broadly provides that no disclosure should be made in relation to procurement proceedings.

The Public Body's case is that early in the evaluation stage by the CPB duly-appointed Bid Evaluation Committee ("BEC"), it became obvious that the Bid Security furnished by the Applicant was not valid since it was unsigned and not in the required format. Accordingly, by way of a letter dated 28th June 2019, the Public Body, under the hand of the Deputy Commissioner of Police on behalf of the Commissioner, informed the Applicant that it *'did not submit any bid security. This submission was not an original bid security, neither signed nor in the required format as the (sic) per the bid document.*

*This is considered as a **major deviation** (according to ITB 17.4) and therefore your proposal was **not retained** for further evaluation and thus the marking of the technical proposal was not carried out."*

In that letter, the Applicant was referred to page 260 of the bidding documents and that only original bid security documents were to be submitted with bids.

The crux of the case is, therefore, whether the Bid Security being unsigned and not being in the proper format was a deviation of such a nature that it rendered the bid of the Applicant invalid.

<u>The Bid Security as included in the bid of the Applicant</u>

The Applicant argues that section 33 of the Interpretation and General Clauses Act 1974 ("IGCA") applies to the present matter. It provides that: *"Where a form is prescribed, a document which purports to be in the form prescribed shall not be void by reason only of a deviation from the form where the deviation does not affect the substance of the document and is not calculated to mislead."* Accordingly, the Applicant

submits, the Bid Security as filed with the bid should be deemed valid. In response, the Public Body relies on section 37(9) of the Public Procurement Act 2006 which holds that: *"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."*

It can hardly be disputed that the bidding documents clearly set out what was required in terms of bid security and the format it should take. ITB 17.4 has been relied on by the Public Body at challenge stage, and in submissions before us, it has also referred to ITB 17.2(d).

Reference has also been made, in the Written Submissions on behalf of the Public Body, to Directive No.3 issued by the Procurement Policy Office in 2010 where it is stated that a 'failure to submit an original bid security as specified in the bidding documents will lead to rejection of a bid.' We must be forgiven for not having been able to trace this extract from the Directive of 2010 since we were not referred to the chapter and verse. Nevertheless, we find a fairly similarly-worded sentence at page 4 of the Directive, paragraph (iv)(d) which, however, includes between parentheses *"(i.e the bid security is valid for a shorter period or lower amount)"*. We note that paragraph (iv) is meant to provide a non-exhaustive list of examples of *'nonconformance to commercial terms and conditions, which are justifiable grounds for rejection of a bid'*. The said nonconformance is, of course, one of a number of grounds given throughout the Directive for rejection of bids.

Be that as it may, the Panel subscribes to the submission made by Senior State Counsel that the specific provisions of the Act and of the Directive No.3 prevail over the general provisions contained in the IGCA. Indeed, we are of the opinion that the procurement legislation and the directives must ensure a level playing field in the arms race which is the bidding process, where all bidders are aware of what rules and requirements they have to abide by, let alone ensuring that the evaluation process is as fair, effective and efficient as can be. To allow such a deviation, which admittedly was not calculated to mislead and seemingly not affecting the substance of the document, would very much mean that the Applicant is placed in a better position than other bidders and was, effectively, granted an additional day to submit its Bid Security while the other bidders had diligently made sure that their bid security documents were as per the requirements by the deadline for submission of bids.

We, accordingly, agree with the Public Body that this would qualify as a material, if not a major deviation as defined in Directive No.3 issued by the Procurement Policy Office.

The PDF file sent on 24th January 2019

The Applicant contends that the fact that it received a record of the opening of bids, which record did not raise any issue about the Bid Security it had furnished, the CPB (and therefore, the Public Body) is to be deemed to have duly accepted the said bid security. To support this submission, the Applicant argues that the Public Body was estopped from rejecting its bid after having indicated, through this record of opening of bids, that it had duly received the bid security. In addition, the CPB had thus created a legitimate expectation in the mind of the Applicant that the Bid Security of 23rd January 2019 had been, as it were, perfected.

We have read, with great interest, these submissions on behalf of the Applicant which have referred the Panel to a number of English authorities. We note that Senior State Counsel has focused her response, in her Written Submissions on behalf of the Public Body, on whether there was acquiescence or a legitimate expectation in respect of the extension of the bid security period.

The Panel is of the view that, in the specific circumstances of the present case, estoppel (administrative estoppel, if there is such a concept in Mauritius administrative law) and legitimate expectations are to be taken together.

We deem that it is pertinent to refer to the very recent pronouncement of the Judicial Committee of the Privy Council in the decision in *The State of Mauritius v The (Mauritius) CT Power Ltd [2019] UKPC 27*. That case was centred, *inter alia*, on the format of a letter of comfort issued by a bank. Their Lordships provide a helpful analysis of the concept of legitimate expectations, as they are to be applied before our Courts, at paragraphs 58 to 60 of their judgment:

"58. It may be that the assurance given by the Ministry of Finance referred to above created a procedural legitimate expectation that the Ministry would consider whether any bank comfort letter submitted by CT Power was in the form of the draft bank comfort letter agreed at the meetings on 15 and 16 January 2015. The Ministry did consider whether the Avendus letter was in the form of the draft bank comfort letter; accordingly, it complied with such a procedural legitimate expectation, if there was one. However, there could be no question of the Ministry being subject to any substantive legitimate expectation arising out of what was said at the meetings on 15 and 16 January 2015 that it would confirm that Condition 15 was satisfied when it received the Avendus letter, both because the Ministry rationally and

lawfully concluded that that letter was not in the form of the draft which had been agreed and also because the Ministry of Energy was not prepared to sign the Implementation Agreement (whether in the draft then proposed by CT Power or in any other version).

59. CT Power enjoyed no legitimate expectation to the kind relied upon by the Supreme Court in its judgment. In the Attorney General of Hong Kong case, the Board stated the relevant principle in relation to procedural legitimate expectations as follows, at [1983] 2 AC 629, 638:"... when a public authority has promised to follow a certain procedure, it is in the interest of good administration that it should act fairly and should implement its promise, so long as implementation does not interfere with its statutory duty. The principle is also justified by the further consideration that, when the promise was made, the authority must have considered that it would be assisted in discharging its duty fairly by any representations from interested parties and as a general rule that is correct."

60. In the present case, however, neither the Ministry of Finance nor the Ministry of Energy made any promise or gave any assurance that if CT Power submitted a bank comfort letter which was not in the form agreed at the meetings on 15 and 16 January it would be afforded an opportunity to make representations as to why, notwithstanding its non-conformity with the agreed draft, it should nonetheless be accepted by them."

We believe one should look closely at what was sent as a PDF file. It was a record of the opening of bids. Was this a promise made to the Applicant (through its Director)? Was this an acknowledgement to that the Bid Security was valid?

To answer those questions, we rely on the very clear statutory provisions to which, quite surprisingly, we have not been referred in the Public Body's defence statements and submissions.

First, we read from section 36 of the Act which deals directly with opening of bids:

"(4) The name of the bidder, the total amount of each bid, any discount or alternative offered, and the presence or absence of any bid security, if required, shall be read out and recorded, and a copy of the record shall be made available to any bidder on request.

(5) No decision regarding the disqualification or rejection of a bid shall be taken or announced at the bid opening session." (our emphasis)

It is of note that Paragraph 32 of the Public Procurement Regulations 2008 emphasises (and largely reproduces) those provisions from section 36 of the Act.

Secondly, we find, in the extensive provisions found section 37 of the Act, the sequence that the Public Body (or the CPB in the case of major contract) has to follow when examining and evaluating bids. A bid evaluation committee is to be set up to evaluate the bids under subsection (2); under subsection (3), the CPB/Public Body has to examine following the opening of bids whether the bids are complete and in accordance with the bidding documents, whether they are signed and whether the documents required to establish the legal validity of the bid and the required security have been provided.

We will graciously leave it to another day to ponder on the merits of whether it should be the CPB/Public Body or the appointed bid evaluation committee which should carry out the check under section 37(3) and we are of the view that the governmental bodies are much better placed, under the apt guidance of the CPB and Procurement Policy Office, to decide on the logistics.

However, a reading of sections 36 and 37 of the Act as a whole, or even taken individually, point to one clear conclusion. A record of the opening of bids is not a decision. If it were so, it would be unlawful and in clear breach of section 36(5). As such, we find that it could not create any legitimate expectation of the Applicant that its Bid Security was valid since this would be decided 'following the opening of bids' and not at the time of opening of bids. In fact, Directive No.3 to which we have broadly referred to above states that the record of opening of bids is to be supplemented with the actual bid evaluation (again, Page 4 of the Directive).

In the present case, the Bid Evaluation Committee immediately upon being provided the various bids carried out a checking exercise and formed the view that the Bid Security submitted on 23rd January 2019 was not valid for being unsigned and for not being in the specified format. Accordingly, it simply did not proceed to carry out the evaluation of the Applicant's technical proposal.

The request for extension of the bid security

It is the Applicant's contention that since the Public Body has requested it to extend the bid security's validity period, this would be tantamount to an acquiescence that the Bid Security was valid *ab initio*. We do not subscribe to this view and we agree with the submission made on behalf of the Public Body that requests for

extension are made across the piece because: i) the evaluation process is confidential until the CPB/Public Body inform the bidders or awards the contract, as the case may be, under the Act, and ii) the CPB/Public Body allows for the possibility that it favourably entertains a challenge by a bidder under section 43 of the Act or, further down the line, the Panel orders, for example, a re-evaluation of the bids.

We find this approach to be sound and the decision is then left to bidders whether they wish to extend the bid security period (and often, the bid validity period) to remain in 'the game' so to speak.

The press article

Finally, we turn to the article published in L'Express. We believe this Panel should avoid delving into the merits and demerits of what is published or into the considerations journalists give when deciding to publish and report material for the public's consumption.

However, in this matter before us, the article published was incorrect when it stated, *'Une chose est sure : un seul soummissionnaire s'est manifesté pour fournir...'* thereby contradicting its own heading: *"SEULE UNE FIRME EN LICE POUR LE LOGICIEL DE PROFILING"*. It is obvious that there was a number of bidders that *s'étaient manifestés*.

The Maltese and Mauritius successful joint venture was named, its bid price reported and it was portrayed as the *'la seule à avoir été retenue'*. The article then goes on to state: *'Ce sera au Bid Evaluation Committee de retenir l'offre ou de la rejeter.'*

Based on the evidence on record, it became apparent that the article followed the opening of the sealed Financial Proposals after the Technical Proposals had been evaluated by the BEC. At that stage, only the successful bidder had been selected for financial evaluation and, by definition, was the only one attending this 'second opening' which would precede final evaluation by the BEC, the decision of the CPB, the communication of that decision to the Commissioner of Police and finally, the notification of the award. This is an established practice of the CPB, in some cases, to open the 'bids' in stages and press reports are, to us, a consequence beyond the control of the Public Body and of the CPB.

The Applicant relies on the L'Express article to suggest that the procurement proceedings were tainted and that there was an unlawful disclosure.

We do not find that, in this case, there was any breach of paragraph 68 of the Regulations attributable to the Public Body or the CPB. In fact, similar press reports are likely to have been made in relation to the 'first' opening of bids that took place on 23rd January 2019 which, we suspect, mentioned all the bidders that had submitted bids.

We must add that we also have no reason, at all, to doubt the integrity of the CPB and of the Public Bodies (which are the Respondents before us) and of the independently appointed and independently-operating BECs which would not be influenced by any premature press report. Nor would they breach the procurement laws by disclosing preliminary information while completing their examination and evaluation duties when it is the notification of award which stands as their decision.

H. Conclusion

In the circumstances, we do not find any reason to interfere with the decision of the Public Body, through the CPB, and we dismiss the application for review.

Chairperson
(H. Lassemillante)

Member
(A.K Namdarkhan)

Member
(R. Mungra)

Dated: 02 August 2019