



Independent Review Panel

Decision No. 16/19

In the matter of:

AKUO Energy Solution (MTIUS) Ltd

(Applicant)

v/s

Central Electricity Board

(Respondent)

(Cause No. 20/19/IRP)

RULING

A. History of the case

On 10 January 2019, the Central Procurement Board (CPB) issued Bidding Documents by the way of Open International Bidding for the Design, Manufacture, Supply, Installation, Testing and Commissioning of 14 MW Battery Energy Storage Systems for the Republic of Mauritius bearing reference: CPB/G/CEB/BATRY/12/18. The Public Body concerned is the Central Electricity Board. The extended closing date for submission of bids was 09 April 2019.

At the Public Opening carried out on 09 April 2019 at the CPB, the following eight bids were received.


Table 4: Bidders Name and Number Assigned

| Bidder No. | Bidders Name |
|-------------------|---|
| 1 | EPS Elvi Energy S.r.l (Italy) |
| 2 | Siemens SAS (France) |
| 3 | BYD-DEC JV (Joint Venture of BYD Auto Industry Company Limited and Dongfang Electric International Corporation (P.R. China) |
| 4 | Kokam Co. Ltd (South Korea) |
| 5 | ABB South Africa (Pty) Limited (South Africa) |
| 6 | Akuo Energy Solutions (Mauritius) Ltd |
| 7 | Nidec ASI S. A. (France) |
| 8 | Consortium Sungrow – Samsung SDI Energy/Joonas & Co. Ltd/GreenYellow SAS (Mauritius) |

B. Notification of Award

On 24 September 2019, the Public Body informed the Applicant that an evaluation of the bids received has been carried out for the Procurement Reference: **CPB-58-2018 – Design, Manufacture, Supply, Installation, Testing and Commissioning of 14 MW Battery Energy Storage Systems for the Republic of Mauritius** and its bid has **not** been retained for award.

The particulars of the successful bidder are given hereunder:-

| Description | Name & Address of Selected Bidder | BESS | Total Negotiated Foreign Price (EUR) | Total Negotiated Local Price Excl. VAT (MUR) |
|--------------------|---|-------------|---|---|
| |  | | | |

| | | | | |
|--|---|-------------|---------------------|----------------------|
| Jin Fei | Siemens SAS (France) Batiment 2 Rue de la Neva 38004 Grenoble Cedex 1 France | 4 MW | 2,826,970.00 | 7,807,393.00 |
| La Tour Koenig | | 2 MW | 1,384,806.00 | 6,751,463.00 |
| Anahita | | 4 MW | 2,401,519.00 | 7,807,704.00 |
| Wooton | | 4 MW | 2,389,069.00 | 7,806,462.00 |
| Training | | - | | 3,929,825.00 |
| Mandatory Spare Parts and Tools | | - | 181,263.00 | |
| | Grand Total exclusive of VAT | | 9,183,627.00 | 34,102,847.00 |

C. The Challenge

On 27 September 2019, the Applicant challenged the procurement on the following grounds:

“The CPB has notified Akuo Energy Solutions (Mauritius) Ltd of its unsuccessful bid without explaining the grounds for its rejection. In addition, the financial and technical notes of the selected bidder have been omitted from the notification. At last, we notice that the price of the selected bid has undergone a very significant reduction and question its regularity.

Consequently, we request:

- to be informed of whether our bid has been considered responsive or non-responsive,*
- to receive a detailed description of the grounds on which our bid was considered non-responsive, if applicable,*
- to be informed of our technical and financial notes, if applicable,*
- to be informed of the technical and financial notes of the selected bidder,*
- to receive confirmation that no modification to the CPB/58/2018 Bidding Documents requirements have been granted at the benefit of the selected bidder only to account for the significant price reduction (approximately -24%) of the selected bidder offer,*
- to be informed of the special circumstances that led to a negotiation in accordance with Regulation 8 of the Public Procurement Act, and notably the reasons why a re-bid exercise was considered not practical, if applicable.*




Following these complementary elements, a more precise challenge may be introduced.”

D. The Reply to Challenge

On 03 October 2019, the Public Body made the following reply to the challenge and stated that:

“We have been informed by the Central Procurement Board that your bid has not been retained for award for the following reasons:

- 1. Bid for the above project has been submitted under the name Akuo Energy Solutions (Mauritius) Ltd which was incorporated on 06 February 2017 bearing Company No. 144803.*
- 2. However, the two CIDB Registration Certificates submitted were under the name of Akuo Energy Solutions and in the name of JV Medine Ltd/ Akuo Energy Solutions respectively, which is not in line with ITB 4.7 of Instructions to Bidders and criteria 2.1.5 of Section 1A – Eligibility and Qualification Criteria of the bidding document.*



In light of the above, your bid is found to be not responsive to the requirement of the bidding document.”

E. Grounds for Review

On 10 October 2019, the Applicant seized the Independent Review Panel for review on the following ground:

“The Applicant maintains that its bid is compliant with ITB 4.7 of the Instruction to Bidders and criteria 2.1.5 of Section 1A inasmuch as JV Medine Ltd/Akuo Energy Solutions and the Applicant, Akuo Energy Solutions (Mauritius) Ltd are one and the same entity.”

F. The Pro Forma Meeting

f
 During the Pro Forma meeting held on 14 October 2019, the Respondent’s Attorney at Law raised a preliminary objection that the Application for Review has been filed outside the prescribed delay in breach of Section 48 of the Public Procurement Regulations. 

The Panel fixed the arguments to the 18th October 2019 whilst the application rest fixed to be heard on merits to the 22nd October 2019.

G. The Respondent's Statement of Defence

The Respondent has detailed its 'Preliminary objection in Law' in its written Statement of Defence dated 16 October 2019.

H. Arguments

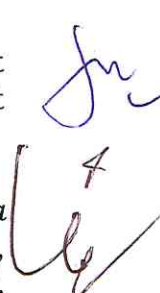
Arguments were heard on 18 October 2019. The Applicant was represented by Ms Natasha Behary Paray, Barrister at Law whereas the Respondent was represented by Mr Ravindra Chetty, Senior Counsel.

The Public Body through a letter dated 3rd October 2019 replied to the Applicant to its challenge. The Applicant under Section 45 of the Public Procurement Act 2006 applied for review against the decision of the Public Body. The application form as provided in the third Schedule under the Regulation 49 is dated 9th October 2019 but the Independent Review Panel received it on the 10th of October 2019. The Respondent in its written statement of defence raised a preliminary exemption in law to the effect that the application should be dismissed as it has been made outside the delay in breach of Section 48 (5) of the Public Procurement Regulations 2008. The Respondent also raised a second point in law to the effect that the Applicant failed to send a copy of its application filed before the Independent Review Panel in breach of Regulation 49 and 50.

It is not disputed that the letter of reply to challenge was dated 3rd of October 2019 and the last date for application for review was 9th of October 2019. It is also not disputed that despite the application for review was dated 9th of October 2019 was filed with the Independent Review Panel on the 10th of October 2019 and therefore the application was filed 1 day after the delay for application for review.

Mr Ravindra Chetty, Senior Counsel, appearing for the Respondent rests his argument on Section 48 (5) of the Public Procurement Regulations 2008 which reads as follows:

"Where the Chief Executive Officer of the public body fails to issue a decision within 7 days or if the bidder is not satisfied with his decision, the bidder may submit an application for review to the Review Panel, provided that the application is filed within 7 days of receipt of the



decision of the public body or the time when that decision should have been received.”

Counsel, Ms N. Behary Paray appearing for the Applicant has referred this Panel to Section 45 (2)(c) which reads as follows:

“an application for review under (1) **shall** –

(a)

(b)

(c) be made within such time as may be prescribed”

(The underlining is ours.)

She further referred to the Regulations mentioned above and submitted that as the delay of 7 days is under the Regulations same is not mandatory. Whereas, Mr Ravindra Chetty Senior Counsel submitted that failure to comply with the delay of 7 days is fatal.

In support of the above both Counsel relied on the Supreme Court judgment of *S. Ramtohul v/s the State 1996 SCJ 356*.

We have gone through the judgement and we do admit that time limit prescribed in procedural matters are not always mandatory to the point of thwarting the course of justice.

We also considered the submission of Counsel regarding the service of documents as provided in Sections 2.3.2, 2.3.4 of the *Companies Act 2001*. Section 323(2) of the Company’s Act as follows:

“The methods of service specified in subsection (1) are, notwithstanding any other enactment, the only methods by which a document in legal proceedings may be served on a company in Mauritius.”

(The underlining is ours.)

Section 324(a) reads “A document, other than a document in any legal proceedings, may be served on a company –

(a) by any of the methods set out in section 323(1)(a),(b),(c) or (e);”

In reply to the above Mr Ravindra Chetty Senior Counsel submitted that all the delays as provided in the Public Procurement Act and Regulations should prevail over the Company’s Act.

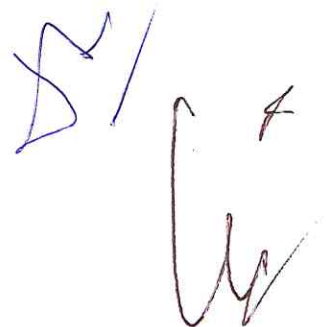
On this issue the Panel do agree with the submission of Mr Ravindra Chetty Senior Counsel, because the Public Procurement Act has provided time limits.

The Panel has taken note that the Public Procurement Act 2006 has been established to provide for the basic principles and procedures to be applied in, and regulate, the public procurement of goods, public works, consultancy services, and other services and for the institutions responsible for those matters. And under Section 44 for the establishment for an Independent Review Panel and under Section 45 allowing an unsatisfied bidder to ask the Review Panel to review the procurement proceedings.

The Independent Review Panel therefore has to discharge its duties under the Public Procurement Act.

The Panel is of the opinion that all the requirements under Section 45 (2) are mandatory and therefore the application for review shall be made within such time as may be prescribed and the time limit of 7 days is mentioned under the Regulations. Had the delay to make the application and the timeframe within which the application should be made been provided in the Regulations, the Panel would have agreed with Counsel for Applicant that the delay prescribed is of procedural matter but unfortunately under this particular law this is not the case. Under this Public Procurement Act the time limit to make the application for review is mandatory.

The Panel therefore upholds the first point raised by Counsel for the Respondent and do not venture on the 2nd point.

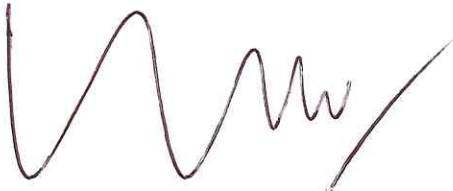
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I. Conclusion

This appeal is dismissed as the applicant failed to comply with Section 45(2)(c) of the Public Procurement Act and Regulations 48(5).



Chairperson
(H. Gunesh)



Member
(V. Mulloo)



Member
(R. Mungra)

Dated: 18 October 2019