

Independent Review Panel

Decision No. 19/19

In the matter of:

**Compagnie Régionale de Services et de l'Environnement Ltée
(CRSE LTEE)**

(Applicant)

v/s

**Ministry of Social Security, National Solidarity, and
Environment and Sustainable Development (Environment
and Sustainable Development Division)
(Solid Waste Management Division)**

(Respondent)

(Cause No. 19/19/IRP)

Decision

A. History of the case

On 17th May 2019, the Ministry of Social Security, National Solidarity and Environment and Sustainable Development (the “**Public Body**”) invited for bids, an open international bid, for the maintenance and operation of the transfer station of waste at La Laura. The selected operator would then transfer the waste to the landfill at Mare Chicose.

This being a major contract for the Public Body, the Central Procurement Board (the “**CPB**”) would be in charge of the procurement selection process. There were six bidders including the Applicant, Compagnie Régionale de Services et de l’Environnement Ltée, **CRSE** for short.

The bids were submitted on 26th July 2019 and opened on that same day.

Within 4 days, on 30th July 2019, the Applicant filed a challenge in respect of one of the bidders, Sotravic suggesting that the latter had failed to disclose its fraudulent practice ‘of increased volume of leachate transported from the Mare Chicose Landfill with the goal of ‘over-claiming’ the Public Body.

This early challenge was responded to unfavourably by the Public Body and the selection process carried on as from 14th August 2019.

On 23rd September 2019, bidders were notified that Sotravic had been selected as the successful bidder by the Public Body.

The Applicant filed a second challenge under section 43 of the Public Procurement Act 2006 (the “Act”) on 27th September 2019 which challenge was not upheld by the Public Body in its reply dated 4th October 2019.

This has now given rise to this application for review before us pursuant to section 45 of the Act.



B. Hearing

The case was called *pro forma* on 14th October 2019. Hearings were held on 24th and 28th October 2019 and 5th November 2019, the last two being the substantive ones.

The Applicant was assisted by Mr R.Purse, Senior Counsel together with Mr R. Ramsaha and they were instructed by Mr Attorney G. Ng Wong Hing. The Respondent was represented by Ms A. Daby, State Counsel represented by State Attorney. The successful bidder was assisted by Mr G.Glover, Senior Counsel together with Ms S. Chuong. The CPB was represented by its Secretary.

C. Notification of Award

On 23 September 2019, the Public Body referred to the bid which the Applicant submitted in response to the Invitation for Bids for the procurement of **“Operation and Maintenance of La Laura Transfer Station and Transportation of Wastes from La Laura Transfer Station to Mare Chicose Landfill. – CPB/26/2019”** and informed that its bid has **not** been retained for award.

The particulars of the successful bidder are given hereunder:-

<i>Bidder</i>	<i>Address</i>	<i>Amount for 36 months exclusive of VAT (Rs)</i>
<i>Sotravic Limitée</i>	<i>Industrial Zone La Tour Koenig</i>	<i>100,220,000.</i>

D. The Challenge

On 27 September 2019, the Applicant challenged the notification for award on the following grounds:




- (1) *“The Public Body erred in selecting the Bid of Sotravic Ltée for award as it does not meet the eligibility requirements inasmuch as it is the current operator of the Landfill.*


The Bidding Document provides that a contractor having at least 3 years of experience in the operation of Landfill, Transfer Station, Composting Plant, Recycling Plant or other services of similar nature over the last 10 years is eligible. This cannot be construed to apply to the current operator of the Mare Chicose Landfill since Sotravic Ltée as the operator of the Mare Chicose Landfill is required to certify the weight of waste received by the trucks of the operators of different waste Transfer stations.

By participating in the Bidding procedure Sotravic Ltée places itself in a serious situation of conflict as it would certify the weight of waste brought in to Mare Chicose by its own trucks from the relevant waste stations. This is likely to give rise to bias and/or abuse. Sotravic Ltée is in a position of abuse given that as operator of Mare Chicose, it will be certifying and can therefore manipulate, for monthly payments, the amount of waste incoming from any Transfer Station including those itself would be managing.

- (2) *The Public Body erred in selecting the bid of Sotravic Ltée for award inasmuch as Sotravic Ltée is disqualified for conflict of interest. Sotravic Ltée as operator of the Mare Chicose Landfill has a relationship with other bidders that puts Sotravic Ltée in a position (a) to access to information about the bid of Compagnie Regionale de Services et de l’Environnement Ltée.*

The Public Body failed to take into account that Sotravic Ltée, as operator of Mare Chicose Landfill, is in possession of the Tonnage of waste and other related information of the different bidders. The Public Body failed to take into account that Sotravic Ltée has supplied such information to the Public Body in the drafting of the Bidding Document and has hence a relationship with the Public body. This is in direct breach of ITB 6.1(d) of the Bidding Documents since Sotravic Ltée has a clear conflict of interest.

Sotravic Ltée is in a position to access information – such as the number, arrival time and tonnage of waste for each trailer coming from La Laura – on the bid of Compagnie Regionale de Services et de l’Environnement Ltée and this puts it in a position of a privilege bidder and capable to influence the decision of the Employer.

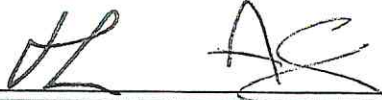

- (3) *Sotravic Ltée failed to disclose that it is the current operator of the Mare Chicose Landfill in breach of ITB 3.1 and 3.2*
- (4) *The Public Body failed to take into account that Sotravic Ltée is not registered as scavenging contractor in line with ITB 5.5 (b)."*

E. The Reply to Challenge

On 04 October 2019, the Public Body made the following reply to the challenge and stated that:

"The Ministry wishes to inform you the following with regards to parts 7 and 8 of the challenge therein:

(i)	<i>No. 7 – Specific Act or Omission in relation to the procurement: The Public Body wrongly selected the bid of Sotravic Ltée for award as it failed to take into account that the contract could not be awarded to the current operator of the Mare Chicose Landfill</i>	
	<i>(a) Sotravic Ltee fails clause 5.5(b), (c) and (d) of the ITB as modified by the BDS;</i>	<p><i>(a) Sotravic Ltee has met requirements under ITB 5.5 as follows:</i></p> <p><i>ITB 5.5(b) – Bidder has complied with the requirements of at least three (3) years’ experience as contractor in the operation of Landfill, Transfer Station.</i></p> <p><i>ITB 5.5(c) – Bidder has submitted the list of essential vehicles and equipment to be deployed.</i></p> <p><i>ITB 5.5(d) – Bidder has complied with the requirement of key personnel.</i></p>
	<i>(b) Sotravic Ltee contravenes part IV of the Public Procurement Act – Procurement Integrity (Section 52), ITB 3.1 and ITB 3.3(ii) and (v)</i>	<p><i>(b) During this procurement process there has been no observed or reported breach of ITB3.1</i></p> <p><i>There is also currently no evidence of conviction by institutions for fraud or corruption in contract</i></p>

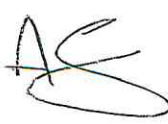




		<i>execution.</i>
	(c) <i>Sotravic Ltd contravenes clause 6.1 of the ITB and is in serious situations of Conflict, conjunction of Interest and Abuse.</i>	(c) <i>With regard to Item 6.1(d) of the Bidding Document i.e 'access information about or influence on the Bid of another Bidder or influence the decisions of the Employer regarding this bidding process', please note that Sotravic Ltee, as the current contractor of the La Brasserie Transfer Station and the Mare Chicose landfill has access to updated information on waste tonnages; same has been disclosed in the bidding documents to all bidders for the sake of transparency and level playing field.</i>
	(d) <i>Sotravic Ltd fails to respect clause (I)(iii) of Bid Submission Form.</i>	(d) <i>With reference to part (1) of the Bid Submission Form, there is no conviction in relation to Fraud or Corruption against Sotravic Ltee.</i> (e) <i>Sotravic Ltee did not submit falsified documents or erroneous data.</i> (f) <i>Sotravic Ltee is not in a position whereby it failed to disclose an information which was deemed to be disclosed.</i>
(ii)	<i>No 8 – Bidder's grounds for challenges</i>	
	(1) <i>The Public Body erred in selecting the Bid of Sotravic Ltee for award as it does not meet the eligibility requirements in as much as it is the current operator of the Landfill.</i>	(1) <i>Sotravic Ltee meets the eligibility criteria. There has been no participation of the bidder in the preparation of the bidding document. Whatever information sotraviv Ltee may have from the Landfill is also the property of the Public Body and has been</i>

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		<p>imparted to all bidders through the Scope of Service and Performance Specifications at Section V. The bidder has never participated in the drafting of the bidding document which is the responsibility of the Consultant/Public Body.</p> <p>(2) Sotravic Ltee does not certify the weight of waste received by the trucks of the operators of different transfer stations. This is a responsibility of the Ministry who is the legal owner of the data recorded at the landfill and the Ministry uses these for comparison with those from transfer station for payment purposes on a monthly basis.</p> <p>Even if Sotravic Ltee is entrusted the task of effecting data entries at the Mare Chicose Landfill, this does not place Sotravic Ltee in a bias or abusive position as the Ministry has put up proper control and supervision measures to ensure that these tasks are performed in a proper and fair manner.</p>
	<p>(2) The Public Body erred in electing the bid of Sotravic Ltee for award in as much as Sotravic Ltee is disqualified for conflict of interest. Sotravic Ltee as operator of the Mare Chicose Landfill has a relationship with other bidders that puts Sotravic in a position</p> <p>(a) to access to information about the bid of</p>	<p>(3) BEC did not determine any conflict of interest against Sotravic Ltee, though being Operator. Sotravic Ltee having access to information about the bid of Compagnie Regionale de Services et de l'Environnement Ltee and influencing the bid of the latter, before bid submission is outside the purview of the Central Procurement Board.</p> <p>Bids were received at the</p> 

	<p><i>Compagnie Regionale de Services et de l'environnement Ltee and</i></p>	<p><i>Central Procurement Board in sealed conditions and were opened in public on 26 July 2019.</i></p> <p><i>Sotravic Ltee being responsible for data entry at the Mare Chicose landfill does only have records on wastes tonnages from transfer stations and no other information such as price which could give it an advantageous position with regard to procurement exercise of transfer stations. For transparency sake, waste tonnages over the past three years have been included in the bidding documents in view to ensure a level playing field among bidders.</i></p> <p><i>The relationship between the Public Body and Sotravic Ltee is that of the Employer and Contractor. Sotravic Ltee does not hold any privileged information and the Employer is not influenced by its Landfill Contractor. Bidder's have to do their own surveys and due diligence when it comes to details such as number of trips, arrival time and tonnage of trailers.</i></p>
	<p><i>(3) Sotravic Ltee failed to disclose that it is the current operator of the Mare Chicose landfill in breach of ITB 3.1 and 3.2.</i></p>	<p><i>(4) There is no requirement for such disclosure in the bidding document.</i></p>
	<p><i>(4) The Public Body failed to take into account that Sotravic Ltee is not registered as scavenging contractor in line with ITB 5.5(b).</i></p>	<p><i>(5) Sotravic Ltee complied with the requirement of ITB 5.5(b).</i></p>

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F. Grounds for Review

On 09 October 2019, the Applicant seized the Independent Review Panel for review on the following grounds:

“The Public Body wrongly selected the Bid of Sotravic Ltée for award as it failed to take into account that the contract could not be awarded to Sotravic Ltée in as much as:-

A. Sotravic Ltée contravenes Part IV of the Public Procurement Act – Procurement Integrity Section 52(as further supported by ITB 3.2), ITB 3.1 and ITB 6.1(d) & (f)

1. *Section 52(5)(a) of the Public Procurement Act more specifically sets out that a bidder or supplier who is responsible for preparing the specifications or bidding documents for, or supervising the execution of a procurement contract, or a related company of such a bidder or supplier, shall not participate in such bidding.*
2. *For the purposes of the abovementioned section, Sotravic Ltée as operator of the Landfill is responsible for the input and recording of the waste tonnage received directly from the trucks incoming from different stations.*
3. *Through the above, Sotravic Ltée as operator of the Landfill has in its possession all the information regarding the input and recording of the waste tonnage, which information it was privilege for and has provided to the Public Body which has used same in its preparation for the specifications of the bidding documents.*
4. *The contractor shall further, under the bidding documents refer to ITB 3.1, which sets out that:-*

“The Government of the Republic of Mauritius requires that bidders/suppliers/contractors, participating in procurement in Mauritius, observe the highest standard of ethics during the procurement process and execution of contracts.”

5. *ITB 3.2 sets out that:-*

“Bidders, suppliers and public officials shall be aware of the provisions stated in Section 51 and 52 of the Public Procurement Act which can be consulted on the website of the Procurement Policy Office (PPO).”

6. *Sotravic Ltée under its contract for the management of the Mare Chicose Landfill has been the subject of preliminary findings to the effect that there may have ‘pre-meditated, well planned,*

*synchronised and repeated unlawful actions, in the conduct of fraud for financial gain'. The report further recommended that the matter be further investigated. The report is attached as **Annex H**.*

7. *Sotravic Ltée is still executing the contract where the live issue remains.*
8. *The Public Body is well aware about all the above malpractices. By allowing Sotravic Ltée to participate in this Bidding Exercise, the Public Body has not undertaken any deterrent action and is condoning the malpractices of Sotravic Ltée.*

B. Sotravic Ltée failed to satisfy clause 5.5(b) of the Instructions to Bidder (“ITB”) as modified by the Bid Data Sheet (“BDS”) in as much as:

1. *Section 40 (1) of the PPA provides that: “a procurement contract shallbe awarded to the bidder ... which meets the qualification criteria specified in the bidding documents ...” (**Annex I**)*
2. *Clause 5.5(b) of the ITB as modified by the BDS stipulates as follows:-*

*“The bidder shall have **EITHER***

*(i) at least three (3) years experience as contractor in the operation of Landfill, Transfer Station, Composting Plant, Recycling Plant or other services of similar nature over the last ten (10) years; **OR***

*(ii) at least three (3) years experience as contractor over the last five (5) years in the collection and transportation of wastes and be registered as scavenging contractor with the Ministry of Local Government of Mauritius for local service providers or from the relevant authority in the country of origin/operation for overseas service providers, where applicable; **OR***

(iii) at least three (3) years experience as contractor over the last five (5) years in providing logistics for transportation of goods or wastes using heavy vehicles.

*The Bidder **shall** submit all necessary documents supporting their qualifications in respect of the above criteria including the registration as scavenging contractor with the Ministry of Local Government or relevant authority in the country of origin/operation, as applicable, in case of a foreign bidder.” (**Annex J**)*

3. *Clause 5.5 (b) sets out clearly two requirements as couched therein in its contents and form/presentation that Sotravic Ltée:-*

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(i) shall firstly fall under Sub Section (i), or (ii) or (iii) and

(ii) secondly, shall submit all necessary documents supporting its qualifications in respect of its experience including the registration as **scavenging contractor** with the Ministry of Local Government.

4. Sotravic Ltée does not satisfy the second mandatory requirement in as much as Sotravic Ltée does not hold the said Scavenging Contractor Registration as it should have. Sotravic Ltée is in fact not on the last updated list issued by the Ministry of Local Government (**Annex K**).

C. Sotravic fails to respect Clause L of Bid Submission Form

1. Clause L (iii) of the Bid Submission Form is set out as per **Annex L**
2. The Applicant relies more specifically on sub section (iii) of Clause L.

Sotravic Ltée deliberately may not have disclosed in its Bid that it is presently operating the Landfill. In so doing Sotravic Ltée has breached Section 5.3 (d) of the ITB (**Annex M**) where it is clearly spelt out that all bidders shall include “...details of Services under way...” in their bids. Such information is of utmost importance in as much as a full disclosure of interest, more so of conflict of interest, would certainly have had a bearing on the decision of the Bid Evaluation Committee. Yet it is strongly believed that the Bid Evaluation Committee is aware that Sotravic Ltée is the present Operator of the Mare Chicose Landfill but has not only kept the latter as a Bidder but has selected Sotravic Ltee as the successful bidder.

3. The Bid Submission Form spelt out clearly that “ transgression of the above (clause) is a serious offense and appropriate action will be taken against such bidders”.
4. The Respondent is failing to act according to the clause of the Bid submission form.

D. The Public Body failed to consider the Conflicts of Interest that will develop if Sotravic Ltée is awarded this contract (CPB/26/2019) and ignored Clause 6.4 of the Special Conditions of Contract (SCC), Clause 3.2.3 of the General conditions of Contract (GCC) and Clause 6.3 of the SCC.

1 If Sotravic Ltee is awarded this contract (CPB/26/2019), whilst it is still operating the Mare Chicose Landfill, it will be in a position of

conflict of Interest whereby a) It will be **auto certifying** its Invoices to the Client and b) it will be able to manipulate the tonnage of waste on either side (that is at La Laura Transfer Station and the Mare Chicose Landfill) to derive illegitimate financial benefits as per clause 6.4 of the SCC (**Annex N**). Sotravic Ltée should not have been allowed to participate in this bidding exercise.

2 **Clause 3.2.3 of the General Conditions of Contract (GCC) (Annex O)** makes provision to prevent the (future) development of Conflict of Interest. The Public Body is ignored this clause. If Sotravic Ltée is awarded this contract (CPB/26/2019) : a) payment for its activities at **Mare Chicose** depends upon the tonnage of Waste, b) Payment for the Transportation of waste from the **Transfer Station** depends upon the tonnage of waste. a) and b) above constitute a conjunction of Interest conflicting with clause **6.3 of the SCC (Annex P)** which provides for the reduction of the amount of waste going to Landfill by retrieving recyclables from the wastes.

3 The Public Body should have declared Sotravic Ltée, the present Contractor of the only Landfill, as ineligible in accordance with the provisions of Clause 3.2.3 of the GCC, Clause 6.4 of the SCC and Clause 6.3 of the SCC.

Conclusion

In light of the above, the Applicant humbly moves for the Independent Review Panel to quash the decision of the Public Body i.e. that of the Ministry of Social Security, National Solidarity and Environment and Sustainable Development (Environment and Sustainable Development Division), dated 23rd September 2019 selecting Sotravic Ltée as being the successful bidder, and to send the matter back to the CPB for re-evaluation.”

G. Findings

Preliminary Objection




We must first deal with a preliminary matter that has been forcefully raised by State Counsel appearing for the Public Body and supported by Senior Counsel appearing for Sotravic – that the grounds for review before us were not the same as those put forward in its challenge of 27th September 2019.




By way of example, we propose to compare the grounds for challenge and grounds of review that target any potential or actual conflict of interest on the part of Sotravic, to which the Applicant takes issue. In its challenge of 27th September 2019, the Applicant focuses on the fact that Sotravic is in a privileged position, as operator of the landfill at Mare Chicose, and would have access to information about the bid of different bidders already transferring waste to the landfill. We understand that this is not access to the bidding documents themselves but to information that would be necessarily contained in the bid of CRSE since Sotravic is aware of the transport capacity and other operational information of CRSE through the continuous dealings they have had as Landfill operator and Transfer Station operator respectively. In short, Sotravic as Landfill operator has access to and supplies such information about transfer station operators to the Public Body and now, Sotravic wishes to be a transfer station operator as well. The Grounds for challenge also included, at Clause 8(1) of the Challenge, that Sotravic would be certifying its own trucks and this could lead to bias and manipulation of records.

The corresponding grounds for review were then split into Grounds A and Ground D. Ground D takes issue with the fact that Sotravic, as Landfill Operator, the undisputed certifying authority (as per Applicant) which is meant to send the tonnage received at Mare Chicose by the various Transfer Station operators for the latter to receive their payments from the Public Body, would essentially be certifying itself. Sotravic as both Transfer Station Operator and Landfill Operator would be auto-certifying its tonnage as has been put by the Applicant in its Statement of Case and it would be in a position to manipulate the tonnage (on the basis of which payment is effected by the Public Body) at La Laura and at Mare Chicose. The Ground is expanded by adding that Mare Chicose is the only landfill and this exacerbates the conflict of interest situation.

We have taken good note of a previous decision of the Panel (**Decision No. 11/18**) on the issue as provided to us by State Counsel but we find that it must be distinguished from this particular case. In the 2018 decision, the applicant, State Informatics Ltd had not taken issue, either at challenge stage or when settling its grounds for review under section 45, with the fact that the notification of award did not contain the name and address of the successful bidder and attempted to make it an issue at the hearing of the case. Here, the Applicant has in effect reworded its grounds for challenge and expanded on them in its statement of case; it has not tried to come with novel grounds.



Upon a reading of grounds for challenge, Clauses 8(1) to 8(4) of the Challenge and of grounds for review A to D, we do not find that the Applicant has departed from its case and it was clear to the Public Body what contentions it had to meet and could not be prejudiced.


We will leave to another the day our determination on how to balance the competing interest of justice and fairness to allow applicants to raise issues before us and the literal and very strict interpretation of sections 43 to 45 of the Act that has been eloquently proposed by Mr Glover SC appearing for Sotravic.

Be that as it may, we will not proceed to determine the Grounds for review. We will address the substantive grounds for review, in turn, that is, Grounds A to D. We will do so strictly in terms of how those grounds have been couched in the application for review and we shall not consider any attempted modification or rewording that might have taken place at the hearings and in submission at the end of the last hearing.

Ground A

First, under Ground A, CRSE argues that since Sotravic is the Landfill operator, it is in a privileged position when it comes to the preparation of the bidding documents by having access to information that other bidders do not have. The Public Body very much disagrees with this submission and has explained, and elicited from the Applicant's director during cross-examination, that the bidding documents are prepared by the CPB and the latter requires no assistance of any kind from the Landfill operator. If we were minded to agree with the Applicant's contention, any purported privileged access to information would solely be a result of Sotravic performing its Landfill Contractor duties over the years and this is not, to us, what is prohibited under ITBs 6.1(d) and (f) being relied on by the Applicant. In fact, other bidders could turn the argument against the Applicant itself, as current operator of the La Laura Transfer Station having intimate knowledge of the operations at that transfer station. We are of the view that, in the circumstances of this case, this ground as couched and on the facts might be taking things 'a little too far'.

Accordingly, we do not find any merit in the suggestion that Sotravic had any bearing and any privilege access or undue influence in the preparation of the bidding documents.



There was, before us, a second chapter under this Ground A. That the Public Body had allegedly made a report on malpractice by Sotravic as Landfill Operator and that this report had been tabled by Mr Ezra Jhuboo, Member of the National Assembly at a sitting of the latter, earlier this year. An undisclosed Member of the Assembly then provided a copy to Applicant's Director and this report ended up before us as an attachment to the Statement of Case of the Applicant filed before this Panel. The Public Body and Sotravic strongly objected to the official production of this document and that it was not a public document. Learned Senior Counsel appearing for Sotravic also raised an objection under the hearsay rule that the maker was not called. Twice the Panel gave a ruling that the document could not be made part of the record. Learned Senior Counsel appearing for the Applicant then attempted to call the maker of the document to give evidence but the Permanent Secretary, although agreeing to allow the maker to appear before us, requested that the Panel summon the latter – a course of action for which we have no power. Ultimately, the Applicant conceded not to produce the document even though Senior Counsel did put some questions to the Public Body's witness later on. The latter's answers were inconclusive, at best and hardly support the Applicant's case.

We had also asked from the representative of the CPB whether this document had been made available to it by the Public Body and we were told it was not. We then queried on whether the Panel was the proper forum to determine the issue of what material was made available to the CPB from a ministry when our jurisdiction is to review the decision-making process of the CPB for major contracts and that of government departments for other contracts. Learned Senior Counsel for the Applicant then submitted to us that the argument of the Applicant was that had the CPB been aware of the report, its final decision might have been different and that the Panel had jurisdiction. In the very particular circumstances of this case, we were minded to agree with this submission and we therefore proceed to determine the potential impact of the report on the CPB's decision.

Taken in its best possible light, the report, that may or may not have been the initiating complaint that has given rise to a police enquiry, is just that – a report by a ministry. There has been no conviction, there has been no determination of the matter. The defaulting entity has not been placed on any cautionary list or black list to be debarred from taking part in bids. There is therefore nothing concrete to suggest that the CPB would have disqualified Sotravic or that it could look at its bid less favourably than it has, on that basis.

We therefore find that Ground A cannot succeed.





Ground B

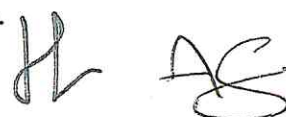
Ground B is to the effect that Sotravic did not meet the requirements of ITB 5.5(b) of the Bidding Documents because it does not have a registration as a scavenging contract. The Public Body argued that such a registration did not apply to Sotravic since it was the Landfill contractor and fell under ITB 5.5(a). Upon a detailed reading of ITB 5.5 as a whole, we can only subscribe to the view of the Public Body and find that a registration as a scavenging contractor was required only for those bidders that did not have three years' experience, within the last 10 years, as landfill operators, transfer station operators, composting plant operators, recycling plant operators and operators providing similar services. Ground B must accordingly fail.

Ground C

The Applicant, under Ground C, essentially took issue with the fact that Sotravic might not have disclosed that it was the landfill operator. Evidence was adduced that it had made that disclosure and, as will be seen below under Ground D, we will add that not only was that fact disclosed but it was thoroughly probed by the Bid Evaluation Committee. These facts dispose of Ground C.

Ground D

We have already touched upon this ground in our determination on the preliminary objection above. The thrust of the argument is the potential conflict of interest in having Sotravic as both Landfill Operator and Transfer Station Operator. The Applicant focuses on two main clauses in the proposed contract. Clause 3.2.3 of the General Conditions of Contract is a general clause that seeks to avoid that a bidder awarded and performing a contract should place himself in a situation of conflict during the term of the contract. The Applicant also relies on Clause 6.3 of the Special Conditions of Contract that provides for bonus payments and incentive to a Transfer Station Operator to channel waste (used tyres, paper and plastics) to recyclers instead of Mare Chicose. We understand, from the latter point, that Sotravic at Mare Chicose will be judge and jury on how much recyclable waste brought by Sotravic from La Laura have been so channelled to recyclers.



We thoroughly queried the witness for the Public Body on the operational side of both the Landfill and of the transfer stations. Admittedly, and in theory, if all works smoothly and given the existence of a Ministry-controlled server compiling the automatic measurements of the weight of lorries at both point of entry and exit as well as the involvement of a third-party consultant in charge of checking the weighbridges and the server, there would be no conflicts. However, manual inputs by Sotravic as Landfill operator (when weighbridges-though numerous- are inoperative) could not be excluded. Moreover, the Consultant was not on-site all the time.

Ultimately, the only people physically present at Mare Chicose, the destination, when the lorries are being weighed – and who can visually inspect what is happening and what type of waste is being dropped off- are the Landfill Operator's staff and the Transfer Station Operator's staff. Now, what would happen if the operators are both one and the same?

Similarly, at La Laura, the source or point of origin, the station would also be operated by Sotravic. We feel that a conflict cannot be excluded.

And we are more than comforted in this view by the fact that the Bid Evaluation Committee independently set up by the CPB to assess the bids spoke at length, in its report of 21st August 2019, of those risks of conflicts under General Conditions of Contract Clause 3.2.3. We will avoid disclosing the contents of the report but we will state that the Committee's conclusion was to seek legal opinion (which we can only presume would come from the office of the Solicitor-General) on whether there would be a conflict of interest situation should Sotravic be awarded the contract – if in the affirmative, the second-best bidder would be recommended. We were also told that the Bid Evaluation Committee comprised members well-versed in the operations of landfills and transfer stations.

No such legal advice was sought and following a meeting between the CPB and the Public Body, the Bid Evaluation Committee was requested not to consider the Prohibition of Conflicting Activities clause (3.2.3(a) of the GCC). A second Bid Evaluation Report was then issued on 11th September 2019. We, exceptionally, queried from the CPB, during the first hearing, as to the reasons behind that and we were told that this was done by the CPB in its *infinite wisdom*. We then invited Counsel for




all parties to address us on this point but none have offered submissions.

We must respectfully disagree with the views of the CPB on this issue of conflicting activities. It is not proper for the CPB to itself include clauses in procurement contracts to then instruct or suggest to its Bid Evaluation Committee not to take those clauses into account. In its second report, the Bid Evaluation Committee did, in fact, subtly reiterate its concerns and made recommendations on how service providers should be monitored to avoid monopolies and manipulation. This culminated in a recommendation that, in future, a Landfill Operator while also acting as Transfer Station Operator could not be allowed to bid to remain as Landfill Operator.

We do commend the Bid Evaluation Committee for their recommendations in both of the reports but, however laudable its suggestions for monitoring and management are, they would require, in our opinion, a modification of the procurement contract itself.

As such, we find that the procurement process in this case was very much imperfect *ab initio*.

Other matters arising from the Bid Evaluation Reports

It should be said that the bid of the Applicant was far from being flawless. It failed to comply with a clarification sought (Clarification No.1 - July 2019), to which the other bidders properly responded. In the first Bid Evaluation Report, the Applicant was not even retained, from an early stage. It was only after the Public Body sent a letter stating that since an additional loader was to be used only in 'bulky waste campaigns', which the Ministry surmised to be 5 days in a year, the Applicant could be forgiven, the technical nonconformance of failing to quote for major item established by the BEC (as per Directive No.3 of 2010 of the Procurement Policy Office) was to become a minor deviation and the Applicant's bid was deemed valid. Admittedly, the Bidding Documents asked for Bills, numbers one and two, for two items. It was only in the Clarification No.1 that Bills Nos. 3 and 4 were sought and the Applicant failed to comply and did not provide quotes for the additional loader. We also note that the reasoning of the Public Body made known to the BEC was focused on the technical side only but we



do not see much consideration given to whether allowing CRSE's bid without the priced bills for an additional loader had 'unfairly affected the competitive position of other bidders presenting substantially responsive bids' – here, virtually all the other bidders.

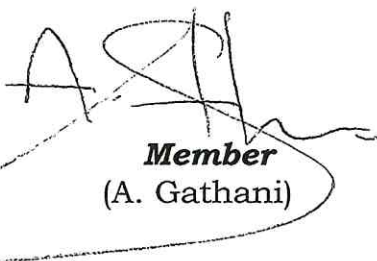
This is another defect that we observed in this particular procurement exercise.

H. Conclusion

Given our observations above, we are of the view that the whole procurement proceedings should be annulled and started afresh and, even though it is not our remit to advise the CPB, we believe that the prohibition of conflict activities, if it is indeed to remain, should be thoroughly explored and clarified before another bidding exercise is carried out.



Chairperson
(H. Lassemillante)

Member
(A. Gathani)



Member
(A. K. Namdarkhan)

Dated: 08 November 2019

