



Independent Review Panel

Decision No. 20/19

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. 16/19/IRP)

Decision

A. History of the case

This case is, on the facts, virtually identical to another matter which we have recently determined (Decision **19** of **2019**) except that we are concerned with the La Brasserie Transfer Station of waste while the other case pertained to the La Laura Transfer Station.

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 Brasserie. The selected bidder 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**”) handled the procurement selection process bearing reference **CPB/15/2019**. There were five bidders including the Applicant, Compagnie Regionale de Services et de l’Environnement Ltée, **CRSE** for short.

The bids were submitted on 31st July 2019 and the public opening took place on that day.

This time again, there was an early challenge by CRSE under section 43 of the Public Procurement Act 2006 (the “Act”), dated 2nd August 2019, which proved unsuccessful.

On 5th 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 Act on 11th September 2019. Through a reply dated 18th September 2019, the Public Body purportedly set aside that second challenge by CRSE.

These events have now given rise to this application for review before us pursuant to section 45 of the Act.

B. Notification of Award

On 05 September 2019, the Public Body informed the Applicant that an evaluation of the bids received has been carried out for the Procurement of **Operation and Maintenance of La Brasserie Transfer Station and Transportation of Wastes from La Brasserie Transfer Station to Mare Chicose Landfill – CPB Reference Number: CPB/15/2019** and its bid has not been retained for award.

The particulars of the successful bidder are given hereunder:-

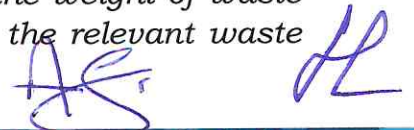
<i>Bidder</i>	<i>Address</i>	<i>Amount for 36 months exclusive of VAT (Rs)</i>
<i>Sotravic Limitée</i>	<i>Industrial Zone La Tour Koenig</i>	<i>97,496,984</i>

C. The Challenge

On 11 September 2019, the Applicant challenged the procurement on the following grounds:

- (1) *“The Public Body erred in selecting the Bid of Sotravic Ltd 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 Ltd 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. If Sotravic Ltd is permitted to bid, it would place 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 a perception of bias and/or abuse. Sotravic Ltd 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 Ltd for award inasmuch as Sotravic Ltd is disqualified for conflict of interest. Sotravic Ltd as operator of the Mare Chicose Landfill has a relationship with other bidders that puts Sotravic in a position (a) to access to information about the bid of Compagnie Regionale de Services et de l'environnement Ltee and (b) influence the bid of Compagnie Regionale de Services et de l'Environnement Ltee.

The Public Body failed to take into account that Sotravic Ltd, 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 Ltd 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 Ltd has a clear conflict of interest.

Sotravic Ltd 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 Ltd 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 Ltd is not registered as scavenging contractor in line with ITB 5.5 (b)."


D. The Reply to Challenge

On 18 September 2019, the Public Body made the following reply to the challenge and stated that:

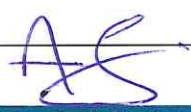
“This Ministry wishes to inform you the following with regards to parts 7 and 8 of the challenge therein:

(i)	<i>No. 7 – Specific Act or Omission in relation to the procurement: The Public Body wrongly selected the bid of Sotravic Ltd 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 Ltd fails clause 5.5 of the ITB as modified by the BDS;</i>	<p><i>(a) Sotravic Ltee has met all requirements under ITB 5.5 as follows:</i></p> <p><i>ITB 5.5(a) – Bidder has complied with the minimum average annual value of services of 45 million rupees over any three (3) of the last five (5) years.</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 requirements of key personnel.</i></p> <p><i>ITB 5.5(e) – Bidder has complied with the minimum amount of liquid assets and/or credit facilities, net of other contractual commitments of the amounts of Rs 7 M.</i></p>
	<i>(b) Sotravic Ltd contravenes part IV of the Public Procurement Act – Procurement Integrity (Section 52), ITB 3.1</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</i></p>

		<i>institutions for fraud or corruption in contract execution.</i>
	<i>(c) Sotravic Ltd contravenes clause 6.1 of the ITB and is in serious situations of Conflict, conjunction of Interest and Abuse.</i>	<i>(c) 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 SotravicLtee, as the current contractor of the La Brasserie Transfer Station and the Mare Chicose landfill has access to 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>
	<i>(d) Sotravic Ltd fails to respect clause (L) of Bid Submission Form.</i>	<i>(d) With reference to part (1) of the Bid Submission Form, there is no conviction in relation to Fraud or Corruption against Sotravic Ltee.</i>
	<i>(e) The bid of Sotravic Ltd is abnormally low.</i>	<i>(e) The bid of Sotravic Ltee is not abnormally low as compared to the Public Body's Cost Estimate.</i>
<i>(ii)</i>	<i>No 8 – Bidder's grounds for challenge</i>	
	<i>(2) The Public Body erred in selecting the Bid of Sotravic Ltd for award as it does not meet the eligibility requirements inasmuch as it is the current operator of the Landfill.</i>	<i>(1)Sotravic Ltee meets the eligibility criteria. There has been no participation of the bidder in the preparation of the bidding document. Whatever information Sotravic Ltee may have from the Landfill is also the property of the Public Body and has been 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. <i>(2) Sotravic Ltee does not certify the weight of waste received by</i></i>


		<p><i>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.</i></p> <p><i>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 set in place proper control mechanism and supervision measures to ensure that these tasks are performed in a proper and fair manner.</i></p>
	<p><i>(4) The Public Body erred in electing the bid of Sotravic Ltd for award inasmuch as Sotravic Ltd is disqualified for conflict of interest. Sotravic Ltd as operator of the Mare Chicose Landfill has a relationship with other bidders that puts Sotravic in a position</i></p> <p><i>(a) to access to information about the bid of Compagnie Regionale de Services et de l'environnement Ltee and</i></p> <p><i>(b) influence the bid of Compagnie Regionale de Services et de l'environnement Ltee</i></p>	<p><i>(2) 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.</i></p> <p><i>Bids were received at the Central Procurement Board in sealed conditions and were opened in public on 31 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,</i></p>


		<p>waste tonnages over the past three years have been included in the bidding documents in view to ensure a level playing field among bidders.</p> <p>The relationship between the Public Body and Sotravic Ltee is that of the Employer and Contractor. Sotravic Ltee does not hold any privileged information 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.</p>
	(6) Sotravic Ltd failed to disclose that it is the current operator of the Mare Chicose Landfill in breach of ITB 3.1 and 3.2.	(3) There is no requirement for such disclosure in the bidding document.
	(8) The Public Body failed to take into account that Sotravic Ltd is not registered as scavenging contractor in line with ITB 5.5(b).	(5) Sotravic Ltee complied with the requirement of ITB 5.5(b).

”

E. Grounds for Review

On 24 September 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) ITB 3.1

1. Section 52(5)(a) of the Public Procurement Act 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 coming from different stations.*
3. *Through the above, Sotravic Ltée is responsible for part of the supervision of the execution of the procurement contract as at today.*
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 presently executing the contract where the live issue remains. Sotravic Ltée has further failed to disclose that it is still executing the said other contract.*
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 contravenes clause 6.1 Section 1 (Instructions to Bidders) and stands in a position of Conflict of Interest.”

1. *ITB 6.1(d) qualifies a conflict of interest of a bidder in the bidding process if they have a relationship with each other directly or otherwise which puts them in a position to have access to information about or influence on the Bid of another Bidder, or influence the decision of the Employer regarding the bidding process.*
2. *The Scope of services as per the bid is set out at Section V, and more specifically at Clause 3(ii), Clause 6 (iii) and Clause 7.20.1, 7.20.2 of the Bidding document is herewith attached as **Annex I**.*
3. *It is important to understand clearly the said part of the scope of services: Sotravic Ltée will in fact firstly operate La Brasserie Transfer Station amongst others, and secondly will transport waste from La Brasserie Transfer Station to the Landfill. At La Brasserie Transfer Station, Sotravic Ltée is responsible to weigh, the outgoing waste taken from the said station.*
4. *The Landfill is also operated by Sotravic Ltée itself.*
5. *Sotravic Ltée as the operator of the Landfill will amongst its operation weigh the waste incoming from La Brasserie Transfer Station.*
6. *The payment for transportation is computed based on the monthly lowest tonnage recorded (i) at la Brasserie Transfer Station when the waste is outgoing or (ii) at Landfill when the waste is incoming. Clause 7.20.2 of the Tender Document (**Annex I**)*
7. *Therefore it is Sotravic Ltée itself (if in charge of the operation of La Brasserie Transfer Station and the transport of the outgoing waste from there) which has the responsibility of weighing the outgoing waste and is itself again weighing the same incoming waste at the Landfill, thus having a clear conflict of interest in doing so in as much as:-*
 - (i) *it can manipulate the tonnage of waste on either side (that is at La Brasserie Transfer Station and Landfill) to derive illegitimate financial benefits;*





- (ii) *This state of conflict of interest can only lead Sotravic Ltée to make an abuse of the situation as it can freely organize and manage its operation to save a maximum of its costs given that it is the same entity which is operating and transporting from La Brasserie Transfer Station and operating the Landfill. Sotravic Ltée can therefore provide an abnormally low bid to become the successful bidder.*
8. *Sotravic Ltée is the only one who records and holds data such as the Weight of Waste which it has provided to the Public Body and which is the information presented as the “tonnage of wastes that have transited at La Brasserie Transfer Station”. As such it has information of every other bidder and can influence the decision of the Public Body and tender for a lower price.*
9. *Sotravic Ltée, in its position as operator of the Landfill, benefitted from ‘inside’ information of all transits, waste tonnages and schedules of the other bidders and could hence pitch a bid at a lower price. This ‘inside information’ falls purely within the qualification of conflict of interest under ITB 6.1 (d) of the Bidding Document (**Annex J**).*
10. *Further to the above, Sotravic Ltée as operator and contractor of the station would certify its own waste tonnages and hence influence payment to itself and is strictly in a position of conflict of interest.*

C. 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 K**)*
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 application; **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 L)

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


(i) shall first 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 is in fact not on the last updated list issued by the Ministry of Local Government **(Annex M)**.

D. 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 N**
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 O)** 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, moreso of conflict interest, would certainly have a bearing on the decision of the Bid Evaluation Committee.

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 Bid Evaluation Committee is aware of the fact that Sotravic Ltée is the present Operator of the Mare Chicose Landfill and should have rejected the Bid of Sotravic Ltée for non disclosure of essential conflict of Interest.*

E. The bid of Sotravic Ltée is abnormally low.

1. *The bid of Sotravic Ltée represents 72% of the average of all the Bid prices received for this tender (CPB/ 15/2019) exercise and 75% of the Bid price of the Applicant. Such a low Bid should have triggered the Public Body’s concern on the ability of Sotravic Ltée to execute this contract to the level of performance as specified at Clause 1.1 (i) and (ii) as modified by the BDS (**Annex P**) and clause 7.18 of section V (**Annex Q**).*
2. *Section 37(9) of the Public Procurement Act (**Annex R**) provides that “every bid shall be evaluated according to the criteria and methodology set out in the bidding documents”*
 - (i) *Sotravic Ltée will not be able to a) maintain the La Brasserie Transfer Station “in a smooth running condition for the whole duration of the contract” nor*
 - (ii) *“Transport all daily incoming wastes, whatever be the peak...” and provide as per clause 4.1 of Section V, “... on a permanent basis: Four (4) Truck Trailers...” (Annex S) and as per clause 7.20 of section V “... for the exclusive use at La Brasserie Transfer Station and for the duration of the contract at least four truck trailers.” (**Annex T**)*
3. *In fact the Low Bid Price of Sotravic Ltée is a strategy to eliminate competitors and eventually put Sotravic Ltée in a Monopolistic Situation in control of the Waste Disposal Network.*





4. *Based on the above, the bid of Sotravic Ltée should have been rejected outright.*

Conclusion

In light of the above, the Applicant humbly moves that 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 5th September 2019 selecting Sotravic Ltée as being the successful bidder be set aside and that the matter be sent back to the Public Body/CPB for re-evaluation.”

F. The Hearing

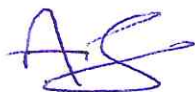
A Hearing was held on 24th October 2019. This had followed two postponements granted at the request of the Public Body and one that was jointly requested by the Public Body and the Applicant, the latter request taking us beyond the statutory deadline to give our decision.

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 Z. Essop, Senior State Counsel instructed by State Attorney. The successful bidder was assisted by Mr G.Glover, Senior Counsel together with Ms S. Chuong. The CPB was also in attendance.

G. Findings

At this stage, a preliminary objection has been raised by the Public Body, supported by the Successful Bidder, Sotravic, which takes issue with the date of the application for review before the Panel.

We are thankful to Counsel on all sides for their submissions, oral and written, on this important issue that will have an incidence on this case and, perhaps, on a number of cases in future. Their submission have set out the two resulting interpretations of the procurement laws when it comes to time-limits to lodge an application for review before us.



In essence, the issue that we have had to grapple with, for lack of a better term, is, ultimately, the interpretation of Paragraphs 48(4) and 48(5) of the Public Procurement Regulations 2008 as amended in 2013 (the “PPR”). They read as follows:

“(4) Unless the challenge is resolved by mutual agreement, the Chief Executive Officer of the public body shall issue a written decision stating his reasons within 7 days of the filing of the application.

“(5) 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.” (emphasis is ours)

It is obvious and for all to see that these paragraphs of the PPR, imply two different acts, by the Public Body and by any applicant, respectively. The former must issue a written decision within 7 days from the date of a challenge under section 43 of the Act, the latter must apply to the Panel within 7 days from receipt of the decision of the Public Body, or, in case there was no such decision, 7 days from the date it ‘should have been received’.

In this most unusual case before us, the Public Body issued a notification of award, the actual triggering event of all documents to come, on 5th September 2019. From the papers provided to us by the Public Body, the despatch of the notification was done the next day, that is, 6th September 2019 (even though CRSE avers it received in on the 11th September 2019 – at the very last minute for a challenge. CRSE challenged, within the time-limit, through an application under section 43 of the Act dated 11th September 2019.

By operation of Paragraph 48(4), the Public Body was to issue a decision by 17th September 2019 (in law, 7 days from 11th September 2019). Moreover, we gather that it wrote to the CPB – the authority handling the selection process and whose decision is binding on the Public Body – on 16th September 2019. The CPB promptly replied on 17th September 2019 but the Public Body only issued its decision on the 18th September 2019, that is, outside the time-limit under Paragraph 48(4).

One should bear in mind the peculiar nature of procurement proceedings where, even though the Public Body is the titular respondent, it is in fact the CPB that carries out the selection and is the only authority having sufficient knowledge of the facts to be in a position to respond to such challenges and that is precisely why the





Public Body is directed to ‘*obtain all relevant information from the Board*’ in Paragraph 48(3) of the PPR.

In this case, the CPB and the Public Body acted as expediently as they could and the CPB had provided the answers on 17th September 2019. The Chief Executive of the Public Body, for some reason, issued and dispatched the CPB comments, which he had rightly made his own, only on the 18th September 2019.

The Applicant thus received that decision of the Public Body on 18th September 2019 and filed its application within 7 days of that date, on 24th September 2019.

We must confess that we have found it difficult to apply this sequence of events to the strict mechanism provided for in Paragraph 48 of the PPR and we feel there is bound to be statutory construction issues that arise. It is a matter of regret that the drafting of that Paragraph of the PPR and its sub-paragraphs has created an ambiguity of such a nature and that, perhaps, this peculiar sequence of events that we see in this case had not been contemplated by the then Minister of Finance, back in 2008. As the Panel set up under the Act, we will now embark into an exercise to try and reconcile the wording of the PPR so as to give proper effect to the spirit of the procurement laws. We do so in the knowledge that our position will have a bearing on future cases before this Panel and we hope that it will clarify the issue pending any eventual intervention by the Minister of Finance or by Parliament.

True it is, also, that section 48(4) of the Act invites us to seek to avoid formality in our procedure as a tribunal but it makes this subject to what may be prescribed and we hold that Paragraph 48 is such a prescription which we are generally bound to apply.

We therefore propose to look at the general wording of Paragraph 48 of the PPR. It has as heading ‘*Challenge and appeal procedures.*’ At sub-paragraph (1), it requires that a challenge under section 43 of the Act should be in the form set out in the Second Schedule to the PPR.

At sub-paragraph (2), it prescribes, or defines, the deadline under section 43(3)(b) of the Act – which then has to be read with section 40(4) of the Act which, in turn, needs to be read with Paragraph 38(3) of the PPR to finally conclude that this Paragraph 48(2) of the PPR applies to contracts of less than Rs 15 million but above Rs 1 million, of



course, after it is further read with Paragraph 48(6) of the PPR. No wonder litigants and their advisors may find it daunting to navigate their way through the maze that are the 2006 Act and 2008 PPR as presently drafted; this is just one example of the intricacies, out of many, of those two pieces of legislation.

Sub-paragraph (3) of Paragraph 48 directs the Public Body to obtain information from the CPB to respond to challenges under section 43 of the Act.

Sub-paragraph (4) directs the Public Body (its Chief Executive Officer) to issue a written decision, if he cannot resolve the matter or challenge by mutual agreement with the challenger. In case he sets aside the challenge, this written decision of his must contain his reasons and must be issued within 7 days of the application for challenge under section 43. We find that that, even though not clearly stated, Sub-paragraph (4) is to be read in connection with section 48(4) of the Act of which it is essentially a reproduction.

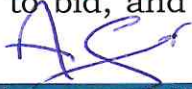
We will discuss sub-paragraph (5) in more detail below.

Sub-paragraph (6) provides the threshold of Rs 1 million relevant to the ‘combination’ of Paragraph 48(2) of the PPR - Paragraph 38(3) of the PPR - Section 40(4) of the Act - Section 43(3)(b) of the Act.

Sub-paragraph (7) sets out how an applicant can ask the Panel to review procurement proceedings after a contract has been awarded. The contract must be worth above Rs 1 million (but below Rs 15 million because of Section 40(3) of Act combined with Paragraph 38(3) of the PPR) and the Application for Review must be made within 5 days of the date the applicant *‘becomes aware of alleged breach (sic)’*

Finally, one notes that section 40(4) of the Act, which actually applies in this case, gives a 7-day time-limit to the challenger to make his challenge under section 43 of the Act from the date of the notice informing a bidder that it has not been retained.

We can safely state that the time-limits under our procurement laws are, broadly speaking, based on events having sufficient certainty or on the date of documents. A CEO of a public body must give his written decision within 7 days from the date of the application for challenge, a challenger must apply for a challenge within 7 days from the date of notice, a challenge for a contract of less than Rs 15 million but above Rs 1 million must be made within 5 days of the bid opening or the invitation to bid, and a review post-award of contract must be applied


for within 5 days from the date on which an applicant becomes aware of an alleged breach.

Moreover, a challenge to a public body or application for review before the Panel, under Paragraph 50 of the PPR, may be filed by the Challenger/Applicant by hand delivery, mail or commercial courier. This paragraph even goes further and provides that a challenge filed to the public body is deemed to be filed on the day (by close of business) it is received by the public body.

Sadly, Paragraph 48(5) does not have the same clarity and does not provide for a method of service by the Public Body. After providing for two different situations: the Public Body fails to issue a written decision to respond to a challenge or the Public Body does issue one and the applicant is unsatisfied with the decision, that paragraph then directs that the time computation should start from the date a decision is received or when it should have been received. However, it does not refer to any mechanism of issuing documents or any reference to laws that do, such as the Interpretation and General Clauses Act which would have gone a long way to assist the Panel and parties before us but the latter applies only in cases where communication is to be done through postal services (such as the reference to commercial courier in Paragraph 50 of the PPR).

So, we are left in the dark as to when a ‘decision should have been received’ while we do know when a decision should be issued – that is, within 7 days from the date of application for challenge.

Even in this case, we have seen that the despatch of the notification itself took place the following day after it was issued, that is, it was issued on 5th September 2019 but dispatched on the 6th and the Applicant avers it received it by fax on 11th. Yet, this did not affect the time limits for challenge because it is 7 days from the date of notification – which would remain the 11th September.

We have tried to obtain further guidance from the other provisions of the PPR and of the Act but they are not helpful to the matter at hand. Section 50(4) only provides that all documents and communications and decisions are to be made in writing. Sections 50(5) and (6) deal with documents in relation to bids and acceptance of bids and not challenges or responses thereto.

A handwritten signature in blue ink, appearing to be 'AM' inside a circle.A handwritten signature in blue ink, appearing to be 'AS'.Handwritten initials in blue ink, appearing to be 'HL'.

Coming back to Paragraph 48(5) of the PPR, our reading is that it is not elective. Indeed, the Applicant, in its submissions, argues that when a CEO issues a decision late, it extends the time-limit for an application for review as from the date of that late decision. Senior Counsel further argues that finding otherwise would be punishing the applicant for the failure of the Public Body to act in time. We do not subscribe to this view in this particular context. We find that the situation where a Public Body does not issue a decision is specifically provided for in the law and has been contemplated by the Minister when passing the PPR. The PPR provide two avenues that are mutually exclusive: either a decision is issued in time or no decision is issued in time. In our opinion, a late decision is tantamount to a case where *'the Chief Executive Officer of the public body fails to issue a decision within 7 days'* (Paragraph 48(5) of the PPR).

We believe it is also apposite to set out the two scenarios and provide examples.

First, using this case where a challenge has been made on 11th September 2019 as a case study, we deal with examples where the CEO issues his written decision in time. For example, a hypothetical and particularly diligent CEO issues his decision on 12th September 2019. He sends out the document by despatch on that day itself. By operation of Paragraph 48(5), the application before us should therefore be filed within 7 days from the 12th which is 18th September 2019, in law by applying the Interpretation and General Clauses Act. At the other extreme, we have the complacent CEO who issues his written decision at 15 59 on 17th September 2019 – that is, within the deadline but at the last minute. The despatch takes place on, say, 21st September 2019. In that case, it would be open to an applicant to argue that since there was a decision validly issued under Paragraph 48(4) of the PPR, which decision he received on the 21st, the 7 days must run from the date of receipt and would end on 27th September.

Secondly, we set out what happens when a CEO does not issue a decision under Paragraph 48(4). In those cases, there is no document to dispatch, no document to scan and send by e-mail or fax. Yet, Paragraph 48(5) still, ambiguously, states that the deadline of 7 days starts to run from the date a decision should have been received. And this, without providing for a mechanism to calculate that all-important date of hypothetical receipt. Should we then arbitrarily impose a time-lapse for reception of a hypothetical decision which in reality has not been issued? Could we allow, say, one day for receipt or one week or 10 days?





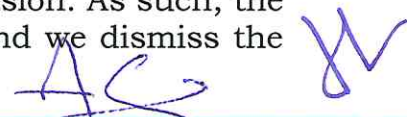
We find that the current case falls into that second category or avenue. We say so because of the strict wording of the first grammatical clause of Paragraph 48(5) especially when it is read together with Paragraph 48(4); a CEO must issue his decision within 7 days and has not done so. We, therefore, consider that there has been no decision of the CEO in this case. The document he issued on 18th September 2019 is in breach of the procurement laws (Section 43(4) of the Act and Paragraph 48(4) of the PPR).

We now turn to the final grammatical clause of Paragraph 48(5) which will determine the matter before us and give our interpretation of the words ‘should have been received’ in the context of procurement laws. In doing so, we have used another principle of statutory interpretation which is that the patent ambiguity created by those words should not be applied in such a way as to reach an absurd result. Here, the wording points towards the hypothetical date of receipt of a decision that was not issued. We do not feel it is within our powers to define such a hypothetical date.

In the context of the very strict deadlines and mechanisms for exchange of documents which are widespread in the Act and the PPR and the ever-tightening time-limits (Paragraph 48 used to have a 15-day time-limit until 2013 when it was reduced to 7), we hold that it could not have been the intention of the Minister, when passing the PPR, to allow for this Panel to randomly create a hypothetical date of receipt for a document that never existed. It did not escape us nor both Senior Counsel that we could then find ourselves with ‘extreme’ delays that could go on for weeks or months before an application under section 45 is lodged before us and we give our decision within 30 days from that date of application.

Rather, the intention of the Minister, in our view, was that an applicant may apply for review within 7 days from the date a CEO of a public body should have issued a decision. This interpretation would give proper clarity to the law and ensure that the procurement process remains as rapid as possible and without crippling delays – which is and has always been an essential aspect of the procurement laws and of public policy.

We therefore conclude that the Applicant, CRSE, should have computed the time-limit as from the 17th September 2019 – the date a decision should have been issued – and not 18th September 2019 when it received a belated document purporting to be a decision. As such, the application for review has been made one day late and we dismiss the



application pursuant to our powers under Paragraphs 56(a) and (c) of the PPR.

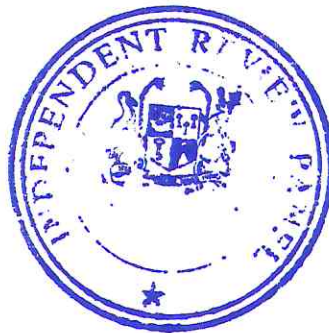
Observations

We are conscious of the incidence of this decision of ours on the allocation of Transfer Station operators contracts and Mare-Chicose operator contract when we have recently annulled the procurement proceedings in the related contract of La Laura Transfer Station but we feel that the law requires certainty in its application to meet the ends it wishes to achieve.

We also wish to point out that this decision should not be an encouragement to public bodies to keep quiet and regularly fail to issue their decisions in time and respond only at review stage before us. We feel that it is crucial for the two-stage review mechanism that public bodies provide their views at challenge stage, and this Panel will not take such failures lightly.



Chairperson
(H. Lassemillante)




Member
(A. Gathani)



Member
(A. K. Namdarkhan)

Dated: 22 November 2019

