



Independent Review Panel

Decision No. 04/20

In the matter of:

State Informatics Ltd

(Applicant)

v/s

Mauritius Qualifications Authority

(Respondent)

(Cause No. 07/20/IRP)

Decision



A. History of the case

On 14 October 2019, the Central Procurement Board (CPB) issued Bidding Documents for the supply, installation, and commissioning of an integrated information system for the purpose of computerizing all the processes and supporting the core activities and functions of the Mauritius Qualifications Authority (MQA), the Public Body and Respondent.

On 04 December 2019, Applicant, along with three other Bidders submitted their respective proposal for the Supply, Installation and Commissioning of an integrated information system.

B. Evaluation

An evaluation of the Bids received has been carried out by a Bid Evaluation Committee (BEC), set up by the CPB and a notification of award was subsequently sent to the bidders.

C. Notification of Award

Through a letter dated 18 March 2020 the Mauritius Qualifications Authority notified the Applicant that an evaluation of the bids received has been carried out and that its bid has not been retained for award. The particulars of the successful bidder are given hereunder:

“Item: Supply, Installation and Commissioning of an Integrated Information System

Name of Successful Bidder: Leal Communications & Informatics Ltd

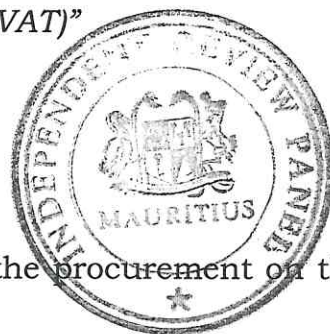
Address: Pailles

Contract Price: Rs 27, 429, 618.00 (excluding VAT)”

D. The Challenge

On 24 March 2020, the Applicant challenged the procurement on the following grounds:

“(a) The Public body failed to take into consideration the fact that the State Informatics Ltd was the lowest evaluated



bidder as compared to Leal Communications & Informatics Ltd;

(b) The Public body failed to appreciate that the State Informatics Ltd was more substantially responsive to the bidding documents as compared to Leal Communications & Informatics Ltd.”

E. The Reply to Challenge

On 28 May 2020, the Public Body made the following reply to the challenge and stated that:

“The price quoted by State Informatics Ltd (SIL) for Professional Education Management System (PEMS) was nil and according to the Bid Evaluation Committee, this component was precisely the one where development and customization were mostly required. (In fact, the requirements of the Mauritius Qualifications Authority are in terms of an integrated system consisting of five (5) different software components, which need to interact seamlessly, and its core component is the PEMS).

Although State Informatics Ltd was given the opportunity to explain through clarifications as to why the cost quoted for the PEMS component was nil, SIL merely stated that the development of the PEMS component was included in the total price quoted, without submitting any further technical details thereon even though in the tender document, the requirements of the PEMS component was detailed. In fact, State Informatics Ltd had not attempted to submit even a brief description of how the it envisaged to tackle the PEMS component in its technical proposal.

Moreover, quoted price, that is, Rs 16,172,114.46 (excluding VAT) is 48.58% lower than the estimated cost of Rs 31,450,000/- (excluding VAT).

Furthermore, as per Directive No.46 issued by the Procurement Policy Office on 08 April 2020, “public bodies shall consider a bid as abnormally low, where it is lower than the updated estimated cost by 15% or more”.

In addition, based on the evaluation, the bid submitted by your company was not the lowest evaluated substantially responsive bid.”



F. Grounds for Review

On 02 June 2020, the Applicant seized the Independent Review Panel for review on the following grounds:

- “1. The Central Procurement Board (‘CPB’) erred in its appreciation of the Applicant’s ‘Zero quote’ for the Professional Education Management System (‘PEMS’) component.
2. The CPB erred in finding that the Applicant did not ‘even’ attempt to submit ‘even a brief description of how it envisaged to tackle the PEMS component in its technical proposal’, where there was overwhelming evidence to the contrary in its Technical Proposal.
3. The CPB erred in finding the Applicant’s bid as ‘abnormally low’ without beforehand complying with exigencies of Section 97(10A) of the Public Procurement Act (‘PPA’).
4. The CPB erred in enforcing Directive No.46 against the Applicant retrospectively.
5. The CPB violated its statutory obligations under Section 11(2) and 11(2)(f) of the PPA in its evaluation of the Applicant’s Proposal.
6. The CPB failed to take into consideration the fact that the Applicant was the lowest evaluated bidder as compared to Leal Communications & Informatics Ltd.
7. The CPB failed to appreciate that the Applicant’s bid was substantially responsive as per the provisions of the bidding documents.”

G. Statement of Reply

- “1. Save and except that Respondent will reply to the grounds set out at paragraph 1 of the Statement of Case below, Respondent admits that the appeal is based on seven grounds of appeal. Respondent further avers that the CPB is not a party to the present application, but carried out the evaluation of the bids as mandated by the Public Procurement Act.
3. As regards paragraphs 3 to 6 of the Statement of Case, Respondent-
 - (a) admits that the price quoted for PEMS by Applicant in its bid was NIL;
 - (b) denies that Applicant’s proposal was rejected because it had quoted for PEMS component at Zero price; and



(c) takes note of the other averments made therein, without making any other admission thereto.

4. Respondent further avers that –

(a) given that the core of Respondent's activities consists of the registration and regulation of training institutions and accreditation of programmes amongst others, PEMS was the core component of the Integrated Information System, where most development and customization are required;

(b) the remaining components (that is, the Document Management System, HRMS/PAYROLL, Accounting Software and Procurement Fixed Assets Management, Web Portal) are standard components;

(c) hence, whilst generic methodology and generic work plans could be submitted for standard components, more detailed methodology and work plans needed to be submitted for the core component, PEMS, to enable the Bid Evaluation Committee to understand and assess how the bidder was proposing to tackle and customize the PEMS component in accordance with the Respondent's requirements;

(d) pursuant to ITB 29.1, the Contract had to be awarded to the lowest evaluated Bidder for the entire Information System;

(e) ITB 29.4 in the Bid Data Sheet further stipulated that 70% weightage would be allocated to technical evaluation and 30% weightage would be allocated to financial evaluation. The lowest evaluated substantially responsive bidder would be determined on the basis of the computation of both the technical and financial scores;

(f) Applicant's bid was found to be substantially responsive under ITB 27;

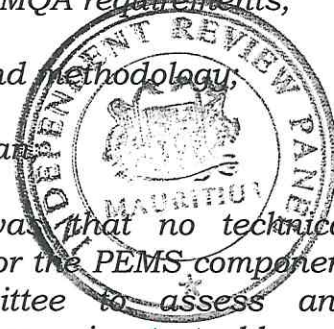
(g) when Applicant's proposal was evaluated, it was allocated an overall rating of 4 marks over 30 marks computed as follows:-

(i) 0 out of 10 for the understanding of MQA requirements;

(ii) 2 out of 10 for technical approach and methodology;

(iii) 2 out of 10 for the proposed work plan

(h) the main reason for this allocation was that no technical information was submitted by Applicant for the PEMS component to enable the Bid Evaluation Committee to assess and understand exactly how Applicant was proposing to tackle and



AW

[Handwritten signature]

f

customize the PEMS component in accordance with Respondent's requirements;

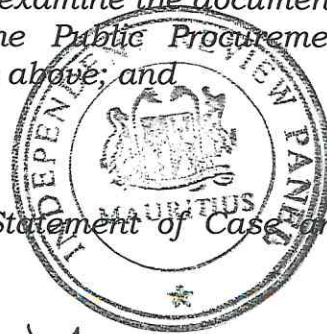
- (i) *Applicant had only stated that the PEMS component would be customized as per Respondent's requirement without explaining how, even though the requirement of the PEMS component was detailed in the bidding documents. In fact, the Applicant was given the opportunity to explain why the cost quoted for the PEMS component was NIL, the latter merely stated that the development of the PEMS component was included in the total price quoted by Applicant without submitting any further technical details thereon even though in the tender document the requirements of the PEMS component were detailed;*
- (j) *hence, Applicant's bid was not found to be the lowest evaluated bid;*
- (k) *therefore, by letter dated 18 March 2020, the Applicant was, inter alia, informed that its bid has not been retained for award and that the successful bidder is Leal Communications and Informatics Ltd.*
5. *Respondent is advised that the Independent Review Panel has no jurisdiction to examine the correctness of the allocation of marks to the Bidder without substituting itself for the Bid Evaluation Committee, which it is precluded from doing under the Public Procurement Act.*
6. *Respondent denies paragraph 7 of the Statement of Case and reiterates paragraph 4 above.*
7. *As regards paragraph 8(a) of the Statement of Case, Respondent avers that Applicant's bid only spelt out the generic requirements for PEMS and stated that custom developed application would be provided without giving any indication of how it intended to tackle those specific requirements. Respondent further reiterates paragraph 4 above.*
8. *As regards paragraphs 8(b) and (c) of the Statement of Case, Respondent –*
- (a) *avers that these set out only generic technical details for which it was allocated 2 marks out of 10; and*
- (b) *reiterates paragraphs 4 and 7 above.*
9. *As regards paragraph 8 (d) of the Statement of Case, Respondent reiterates the averments made at paragraphs 4, 7 and 8 above.*



AN

[Handwritten signature]

10. As regards paragraph 9 of the Statement of Case, Respondent reiterates the averments made at paragraphs 4, 7 and 8 above.
11. In reply to paragraph 10 of the Statement of Case, Respondent avers that even if Applicant's bid was technically and financially compliant, Applicant's bid was not found to be the lowest evaluated bid.
12. Respondent denies paragraph 11 of the Statement of Case and reiterates paragraphs 4, 7 and 8 above.
13. In reply to paragraph 12 of the Statement of Case, Respondent denies that the abnormally low principle was enforced during the evaluation exercise or thereafter. Respondent reiterates paragraphs 4, 7 and 8 above and further avers that –
- (a) Applicant's bid was evaluated both technically and financially and was ranked in the 2nd position;
 - (b) there was therefore no need to apprise Applicant as to any concern on the abnormally low characteristic of the Applicant's bid price;
 - (c) there was therefore no need to apprise Applicant as to any concern as to its ability to perform the procurement contract;
 - (d) there was no need to request any information from Applicant on any alleged adverse factor to be applied against it.
14. Respondent denies paragraph 13 of the Statement of Case and reiterates paragraph 13 above.
15. In reply to paragraphs 14 to 16 of the Statement of Case, Respondent –
- (a) avers that the Bid Evaluation Committee did not apply Directive No. 46 to Applicant's bid during the evaluation exercise or thereafter;
 - (b) invites the Independent Review Panel to examine the documents submitted under regulation 53 of the Public Procurement Regulations 2008 for confirmation of the above; and
 - (c) reiterates paragraphs 4, 7 and 8 above.
16. Respondent denies paragraph 17 of the Statement of Case and reiterates paragraphs 4, 7, 8 and 15 above.



[Handwritten signature]

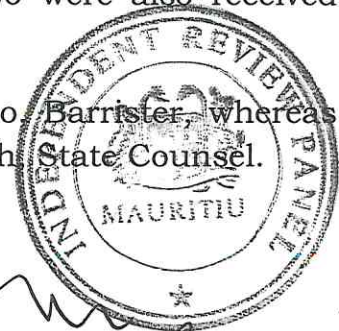
[Handwritten initials]

17. Respondent denies paragraphs 18 and 19 of the Statement of Case and reiterates paragraphs 4, 7, 8 and 15 above.
18. As regards paragraph 20 of the Statement of Case, Respondent avers that the bid quoted by Applicant amounts to Rs 16, 172, 114.46 (excluding VAT) and the estimated cost amounts to Rs 31, 450, 000/- (excluding VAT).
19. Save and except that Respondent avers that the bid of Leal Communications and Informatics Ltd was Rs 27, 429, 618, Respondent makes no admission to the other averments contained in paragraph 21 of the Statement of Case.
20. Respondent denies paragraph 22 of the Statement of Case and avers that the Applicant's bid was technically and financially evaluated and after the evaluation exercise, it was not found to be the lowest evaluated Bidder. Respondent further reiterates paragraphs 4, 7 and 8 above.
21. As regards paragraphs 23, 24, 25 and 27 of the Statement of Case, Respondent avers that Applicant was not the lowest evaluated bidder and reiterates paragraphs 4, 7 and 8 above.
22. As regards paragraph 26 of the Statement of Case, Respondent avers that the matters stated therein were considered at evaluation stage.
23. Respondent denies paragraph 28 of the Statement of Case and reiterates paragraphs 4, 7 and 8 above.
24. Respondent avers that the present application is devoid of merit and moves that it be set aside."

H. The Hearing

Hearing was held on 26 June 2020. There was on record a Statement of Case and a Statement of Reply, by Applicant and Respondent respectively. Speaking notes dated 26 June 2020 were also received from Counsel for the Applicant.

The Applicant was represented by Mr A. Sookhoo, Barrister, whereas the Respondent was represented by Miss K. Domah, State Counsel.



I. Findings**(i) Preliminary point**

Before going into the merits of the present matter, we will address the plea *in limine litis* raised by the Public Body to the effect that the prayer found at paragraph 29 (c) of the Statement of Case of the Applicant is not a remedy that can be sought before the Panel. The paragraph reads thus: *“the selection instead of the Applicant’s bid for award as the lowest evaluated substantially responsive bid”*.

This prayer was dropped, and rightly so, by Counsel for the Applicant but we feel the need to mention in passing that the Panel, under the Public Procurement Act 2006 (the “Act”) and the Public Procurement Regulations 2008 (the “Regulations”), is indeed not empowered to order a remedy that an applicant for review, or challenger, should be the one selected instead of another bidder. The selection is and has always been the remit of the public bodies, with involvement of the CPB, as the case may be.

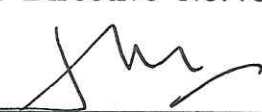
(ii) Merits**(a) Grounds 3 to 7**

Counsel for the Applicant proposed to first submit on Grounds 3,4,5, 6 and 7, which grounds were to be taken together. He argued that, should the Panel find merit in those grounds, it would dispose of the matter.

We do not subscribe to this view for reasons that will become apparent below and in light of our ruling in favour of the Applicant on what it could submit on under Grounds 1 and 2.

We propose to deal with Grounds 3,4 and 5 first. They relate, in essence, to the Respondent’s statement, in its letter dated 28 May 2020 in response to the Challenge lodged by the Applicant under section 43 of the Act, that: *‘Furthermore, as per Directive No.46 issued by the Procurement Policy Office on 08 April 2020, “public bodies shall consider a bid as abnormally low, where it is lower than the updated estimated cost by 15%.”* More specifically, ground 3 takes issue with the application of section 37(10A) of the Act which deals with the process when a public body or the CPB is concerned about an abnormally low bid price, ground 5 is premised on the lack of transparency by the public body in breach of sections 11(2) and 11(2)(f) of the Act while ground 4 aims directly at the application of Directive No.46 by the public body.

AK



A

It can hardly be disputed that the Applicant settled its grounds for review on, at least three of them, based on that statement by the Director of the MQA in its letter dated 28 May 2020 (Reply to Challenge). However, at the Review stage, when it came to file its Statement of Reply, the Respondent clearly stated that Directive No.46 was not applied since it came into effect on 8 April 2020 while the evaluation report was issued on 5 March 2020.

After perusing the procurement proceedings documents, including the Bid Evaluation Report, and correspondence from the CPB, it has become obvious that Directive No.46 was not applied at all during the evaluation of the bids and reference to it came only later and was incorrectly mentioned by the Director of the MQA.

Reliance is placed by the Applicant on the doctrine of estoppel as defined in the Supreme Court case of **THE COLONIAL SECRETARY vs DESVEAUX DE MARIGNY & ORS 1884 MR 52:**

“Probably the best judicial definition of estoppel is given by Lord Denman in

the case of Pickard versus Sears & Adolphus and Ellis Page 475.

The rule of law, he says, is clear that “where one by his words or conduct

wilfully causes another to believe in the existence of a certain state of things

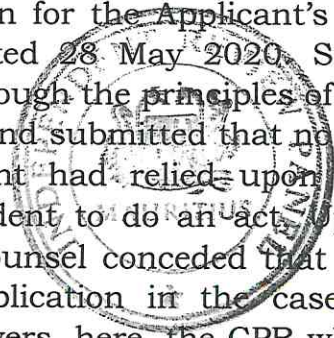
and induces him to act in that belief so as to alter his own previous position,

the former is concluded from averring a different state of things against the

latter as existing at the same time.”

In Applicant’s Counsel’s submission, the Respondent is debarred from making in the argument, as it has done in its Statement of Reply, that Directive No.46 was never applied after the Director of the MQA had set out the said Directive as an additional reason for the Applicant’s bid not to have been retained, in his letter dated 28 May 2020. State Counsel for the Respondent took the Panel through the principles of the doctrine and applied it to the present matter and submitted that no the doctrine would operate only if the Applicant had relied upon the promise or words or conduct of the Respondent to do an act. Upon comments from the Panel, the Applicant’s Counsel conceded that the doctrine of estoppel would not find its application in the case of statutory bodies exercising their statutory powers, here, the CPB when

APC



[Handwritten signature]

[Handwritten mark]

evaluating the bids and the MQA when handling the challenge process pursuant to section 43 of the Act.

On the facts of this case, we feel that the only result of this ill-made reference to Directive No.46 had was that the Applicant acted upon it to frame three of its grounds for review. Based on the evidence before the Panel, the truth, simply put, is that the director of the MQA simply overreached himself. Had the CPB and the Bid Evaluation Committee indeed applied the new Directive, the Applicant would have indeed won the day.

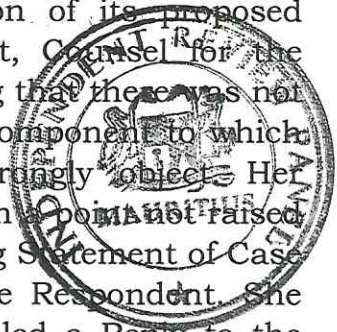
We leave it to another day to adjudicate on the application of the doctrine of estoppel to cases before this Panel even though we feel that the concept of legitimate expectations that obtains in administrative law would cater for such situations where a person is induced to act upon the words or conduct of the Executive and its agents.

Since we have found that the Directive No.46 was never applied during the selection process, grounds 3, 4 and 5 must, insofar as they relate to the purported use of the Directive, fail.

We propose to address grounds 6 and 7, which are general in nature and apply to all the other grounds, at the end of our decision, after setting out our determination on grounds 1 and 2.

(b) Grounds 1 and 2

Before addressing these grounds in detail, we must indicate here the objection by State Counsel appearing for the Respondent when the Applicant sought to submit on whether the Applicant provided enough details of its solution to meet the Respondents. As couched, ground 1 aims at the appreciation of the Bid Evaluation Committee, set up by the CPB, of the Applicant's bid which included a zero quote for Professional Education Management System ("PEMS") and ground 2 is to the effect that Applicant had provided 'overwhelming evidence' that it had complied with need to provide a brief description of its proposed solution for PEMS. During the hearing, in a gist, Counsel for the Applicant expanded on those grounds by contending that there was not even a need to provide a description of the PEMS component to which State Counsel appearing for the Respondent strongly objected. Her contention was that the Applicant was submitting on a point not raised in the Application for Review or in the accompanying Statement of Case and that it was an ambush and prejudicial to the Respondent. She added that the Applicant should have, perhaps, filed a Reply to the Statement of Reply by the Respondent to spell out such an additional argument. Having not done so, the Applicant was debarred, or 'estopped', so to speak, to raise this point at this stage.



AM

The Panel gave a ruling on the point and, in all fairness and given that a reply to a public body's statement of reply is not mandatory but discretionary under the Regulations, it allowed the Applicant to proceed with its submissions with the additional point that there was no need to provide any specific description of the workings of the PEMS component.

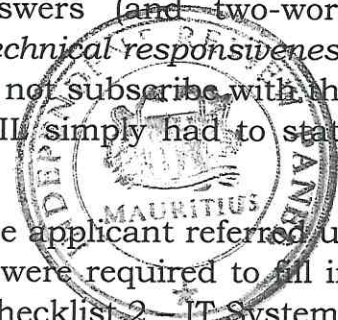
(c) The Bidding Documents and its requirements

Counsel for the Applicant then took the Panel through the various ITBs and BDS items relating to the PEMS component and argued that bidders were only required, when filing their technical bids online, was to expressly state that their bids complied with the requirements founds scattered in the Bidding Documents, including the Response Templates under the heading Section VI. It is not disputed that the bidders were required to fill in the technical bids online

We find the specific technical requirements for the PEMS component at Pages 161 to 168 of the Bidding Documents. At item 14.1 of Section V of the Bidding Documents (entitled Technical Requirements) we also read that. *'The bidder is expected to specify whether its proposed solution satisfies each requirement by listing responses and comments for each requirement as specified in this document. The reference of each requirement as contained here should be documented next to the comments to ease interpretation.'* The bidders are then invited to keep their responses brief (preferably, 'Yes', 'No' or 'Partly') but must be documented in the format set out in section H of the same document; bidders are also told that the requirements are also classified based on criticality.

Section H, the Technical Responsiveness Checklists includes a note to bidders which, *inter alia*, enjoins bidders to respond to each requirement in their technical bids. Cross references must be provided with relevant supporting information – documents, page number, paragraph. The Checklist is clearly stated not to supersede the technical requirements and single word answers (and two-word answers) are *'not normally sufficient to confirm technical responsiveness with Technical Requirements.'* Accordingly, we do not subscribe with the submission of Counsel for the Applicant that SII simply had to state 'Comply' and that would be the end of it.

There are then two checklists and Counsel for the applicant referred us to the second one which reiterates that bidders were required to fill in the online template "Technical Responsiveness Checklist 2 – IT Systems (Ver 1.0)" provided for this item as detailed in Section V and then refers to pages 150 to 312 of the Bidding Documents.



[Handwritten signature]

[Handwritten initials]

We now turn to Section V itself. Bidders were to fill out the column for prices for each item – PEMS being module 2.4 and sub-modules 2.4.1 to 2.4.13 and it was clearly stated that the MQA ‘reserves the right to do not take (*sic*) all the sub-modules’ but bidders were invited to quote for each sub-module. We understand from this caveat that the MQA required module prices in case it had to adjust the bids of all bidders by subtracting the modules it would not require from all the bids. This caveat is also spelt out at Page 317, in Section VI, the Response Templates. It is not beyond imagination how the zero quote of SIL would have created additional problems by this fact alone.

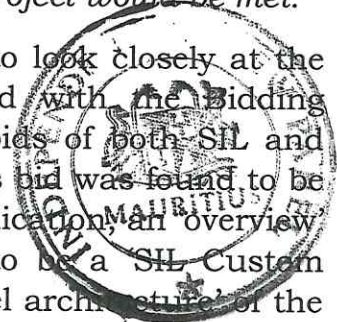
Having set out an overview of the specific clauses of the Bidding Documents relating to the PEMS, we now turn to the general and overriding requirements that had to be met by the bidders.

The Panel notes ITB 17.2(a), on which State Counsel appearing for the Respondent, relies in her written submissions. It states:

“Scanned copies of the Bidder’s technical bid, i.e., a **detailed description** of the Bidder’s proposed technical solution **conforming in all material aspects** with the **Technical Requirements (Section VI) and other parts** of these Bidding Documents, **overall as well as** in regard to the essential technical and performance **characteristics** of each component making up the proposed Information System.” (**our emphasis**)

It was hardly disputed that the PEMS is a component of the Information System though, as per BDS 1.1 read with ITB 1.1, we agree with Counsel for the Applicant, it is not made clear that it was a core component, unlike what the Bid Evaluation Report and later exchanges between the MQA and SIL state. Be that as it may, the PEMS was a component and had to be set out in detail in the Applicant’s bid pursuant to ITB 17.2(a) as well as the BDS 17.2(a). The latter states that the Technical Bid should include (but not be restricted to) an, *‘Understanding of the module wise, stakeholder wise and phase wise functional requirements of the Project. Bidder should clearly explain in detail as to how the functionality envisaged in the Project would be met.’*

Counsel for the Applicant stressed that we were to look closely at the bid of SIL and we would find that it complied with the Bidding Documents. The Panel has indeed perused the bids of both SIL and Leal Communications and we must state that SIL’s bid was found to be wanting in respect of the PEMS. Only a passing indication, an overview of SIL’s proposed solution, that the PEMS was to be a ‘SIL Custom Develop Application’. Then we can find a ‘high level architecture’ of the Information System which shows that the PEMS would be part of the SIL TAMIS Production Suite of software. In contrast, Leal Communication set out a detailed description of how it would approach



AN

the PEMS component, with clear cross-references to supporting documents. In fact, as per the Bid Evaluation Report, we gather that the other two bidders also provided detailed descriptions and we understand that they scored 21 marks out of 30 (similarly to Leal Communications) while SIL scored only 4 marks, with zero mark out of 10 under the criterion 'Understanding of MQA's requirements', 2 marks out of 10 for the methodology and 2 out of 10 for the workplan.

It goes without saying that the Applicant won the financial evaluation with flying colours given that it quoted 3 to 4 times less than its competitors in terms of cost of software development.

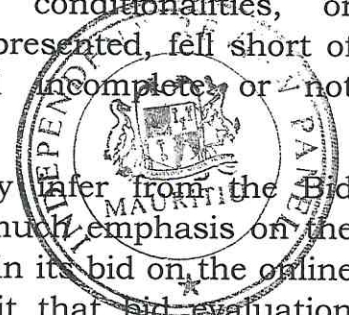
Counsel for the Applicant strongly took issue with the zero mark given to the Understanding of MQA's requirements item and submitted that this criterion applied to all components and failure under one should not lead to a zero mark which, as per the evaluation criteria defined in the Bidding Document at page 53, is given to irrelevant responses.

(d) The evaluation by the Bid Evaluation Committee

Pursuant to ITB 27, the BEC carried out a preliminary evaluation of the bids in the form of a table listing out each item and stating whether each bidder complied with the item. For some reason, SIL was deemed to have complied with the items 'Conformity of the Information System to the Bidding Documents' and 'Technical Responsiveness Checklist' and was further evaluated.

We find it odd that the BEC did not pick up on the missing information about the PEMS component, in breach of ITB 17.2(a), at that preliminary stage and, as it were, made life difficult for itself by proceeding with a detailed evaluation of the bid of SIL. In fact, ITB 27.4 clearly states that a bid that is not of acceptable quality or is incomplete or is not substantially responsive should be discarded. Furthermore, a bid that is substantially responsive is one that conforms to all the terms, conditions, and specifications without material deviations, exceptions, objections, conditionalities, or reservations. The proposed solution of SIL, as presented, fell short of ITB 17.2(a) and could have been deemed incomplete or not substantially responsive.

The only reason for this that the Panel may infer from the Bid Evaluation Report is that the BEC placed too much emphasis on the statement by SIL, the word 'comply' it indicated in its bid on the online portal. To prevent such occurrences, we feel it that bid evaluation committees should probe a little bit more even though it is understandable that such confusion, specially at preliminary evaluation, may arise when checklists are used. In these



circumstances, it is only when the subsequent detailed evaluation is carried that the members of the BEC will find the shortcomings of any particular bid.

Be that as it may, the Respondent made its own this determination, that the bid of SIL was substantially responsive, and consistently averring that it was, even in its Statement of Reply. It is only at submission stage, in its written submissions, that ITB 17.2(a) was put forward. The Applicant, on the other hand, maintained that its bid was compliant with ITB 17.2(a).

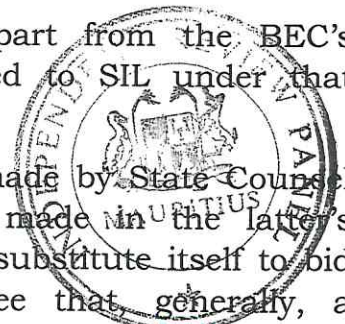
Even though we believe the rejection of the bid of SIL at preliminary stage would be the preferred route, since the BEC proceeded with a detailed evaluation, we will provide our determination on that basis.

During detailed evaluation, it became apparent that SIL had not provided a detailed description of the PEMS component. Accordingly, it was given the 0+2+2 marking as described above. Scoring zero under the 'understanding of MQA requirements' was, in effect, equivalent of marking it as being irrelevant for being incomplete. Indeed, how are we to expect the BEC to carry out a balanced and proper comparison when a bidder omits requested information for a core component?

On a side note, Counsel for the Applicant made an interest point in that the zero marking was flawed given that PEMS is only one component out of six and failing in one should not lead to no marks at all. To this, the Respondent reiterated that the PEMS component was a core component that had to be integrated in the Information System. Any flaw in the specific bid for one component would impact the whole assessment, hence, the zero mark. The Bid Evaluation Report goes further and describes the PEMS system as the one component that needed to be heavily customised and properly presented and could not be generic like the other five. This emphasis on the PEMS is not apparent in the Bidding Documents and only came about at the evaluation stage and during correspondence between the Respondent and Applicant in the wake of the challenge.

The Panel, however, finds no reason to depart from the BEC's evaluation that zero mark should be allocated to SIL under that criterion.

We pause here to comment on a submission made by State Counsel appearing for the Respondent, a point also made in the latter's Statement of Reply, that the Panel should not substitute itself to bid evaluation committees. Even though we agree that, generally, a reviewing authority should not look into the findings of fact, we hold that we can do so when the finding is *Wednesbury* unreasonable – a



decision that is so unreasonable that no reasonable authority in the same position would have reached – a principle developed first in the seminal English case of ***Associated Provincial Picture Houses Ltd v Wednesbury Corporation (1948) 1 KB 223***. This was conceded by State Counsel following comments by the Panel at the end of her submissions.

In applying this principle, the Panel even wonders how SIL was allocated 2 marks for methodology and 2 for its work plan when it failed to provide the requested information (a detailed description) of one of the components of an “*Integrated Information System that will aim at supporting core activities and support functions within the MQA.*” (BDS 1.1)

In any event, 4 marks out of 30 were allocated to SIL and the other three bidders were allocated 7 out of 10 in each criterion making a total of 21 out of 30 and the BEC proceeded to the financial evaluation.

Immediately, it raised concerns that the bid of SIL might be abnormally low because it quote a zero price for the PEMS component making its total development costs a third or quarter of the development costs of the other three bidders. Accordingly, clarifications were sought in line with section 37(10A) of the Act.

In the combined evaluation, on the strength of its very competitive pricing, the Applicant came a close second out of the 4 bidders.

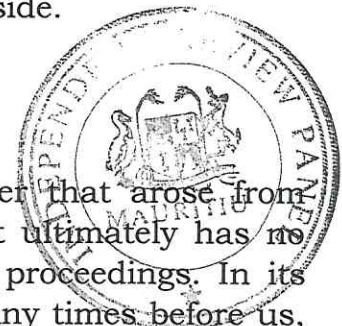
Grounds 1 and 2, and grounds 6 and 7 insofar as they apply to the evaluation of the bids, must also fail.

J. Conclusion

In view of the above, we do not find that intervention by the Panel is necessary in the present case. Accordingly, we find that the Application for Review is devoid of merit and therefore it is set aside.

K. Observations

We feel it is necessary to comment on one matter that arose from reviewing these procurement proceedings, one that ultimately has no incidence on our decision but may impact future proceedings. In its response to the Challenge under section 43 and many times before us, it was stated by the Respondent, or on its behalf, that SIL was given a chance to provide a description of the PEMS component, through the request for clarification, but failed to do so.



AK

[Handwritten signature]

The relevant request was as follows:

“ c) The core component of the MQA IIS is the PEMS and its subcomponents. In your financial proposal, zero costs have been indicated for these specific subcomponents. Please clarify.” (our emphasis)

This Panel cannot read how this sentence, when subjected to the staple legal test of the reasonable person, would understand that this was a chance to provide detailed, or ‘even a brief’, description of the technical bid. It may be that some bidders, who have had dealings with public bodies and have gathered considerable experience in bidding processes, may be more astute and would read between the lines and provide technical information when a clarification is sought on pricing and financial proposal but we feel that, for consistency and in fairness, the requests for clarification should be more express than that.

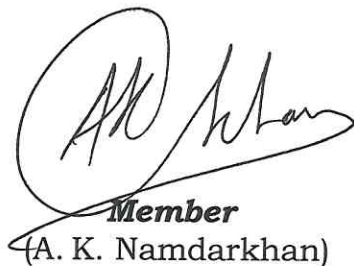
To us, it is no surprise that SIL restricted its response to saying that its proposal included the implementation of the PEMS component and its subcomponents.

The Respondent should, in the circumstances, have refrained from taxing the Applicant for having failed to make up its shortcomings in its response to such a cryptic request for clarification.




Vice-Chairperson
 (H. Gunesh)




Member
 (A. K. Namdarkhan)


Member
 (R. Mungra)

Dated: 01 July 2020