



## Independent Review Panel

**Decision No. 06/20**

**In the matter of:**

**Erick Contracting & Waterproofing Ltd**

**(Applicant)**

**v/s**

**Commission for Education and Others,  
Rodrigues Regional Assembly, Rodrigues**

**(Respondent)**

**(Cause No. 09/20/IRP)**

**Decision**



### A. History of the case

The Respondent called for an Open Advertised Bidding exercise for the construction of six additional classrooms at La Ferme College, Rodrigues having Procurement Ref: **RRA/EDU/OAB/15/2019/2020** in October 2019. The deadline for submission of the bid was 21 November 2019 at 13:00 hrs. Four Bids were received.

### B. Evaluation

A Bid Evaluation Committee (BEC) was set up by the Respondent for the evaluation of bids received.

### C. Notification of Award

Through a letter dated 07 May 2020 the Public Body notified the Applicant that an evaluation of the bids received has been carried out and its bid has **not** been retained for award. The particulars of the successful bidder are as given hereunder:

Name of Bidder	Address	Contract Price
Bolah JEETUN Co. Ltd	Angulus Lane 11 Grannum Road Vacoas MAURITIUS	MUR 15,132,080.00 Exc. VAT

### D. The Challenge

On 08 May 2020, the Applicant challenged the procurement on the following grounds:

- “Notification for award sent to a bidder whose bid Price is well above our quote price of Rs 13,693,425 excluding VAT*
- *We have not been given an opportunity to clarify our bids as per Section 37 of the 2006 Act.*

*We also request that the Public Body viz Commission for Education and Others to submit the specific and details reasons for which our bid has not been retained for award. The reasons given shall be explicitly justified, substantiated and referred to relevant Sections of the updated PPO Act, Regulations and Directives.*

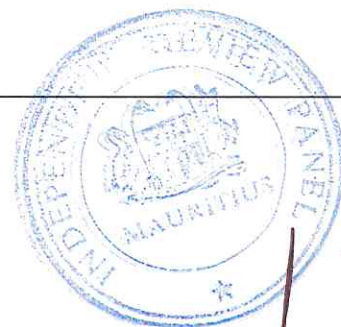
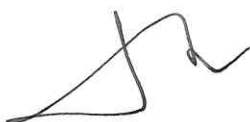
### E. The Reply to Challenge

On 12 May 2020, the Public Body made the following reply to the challenge and stated that:

*“2. We wish to inform you that the Bid Evaluation Committee has found that your bid has not complied with the following:-*

<b>Reference Section I-ITB</b>	<b>Description</b>	<b>Remarks</b>
Clause 6.3(a)	To qualify for award of the Contract, bidders shall meet the following minimum qualifying criteria: (a) duly registered with the CIDB under the grade that would allow him to perform the value of works for which he is submitting his bid.	<b>Non-qualification- It has been observed that Bidder has quoted beyond the value of contract that it is allowed to undertake.</b>  <b>For CIDB Grade G – Up to 10 Million</b>
Clause 6.3(d)(i)	One Project Manager, Civil Engineer as defined in CIDB Act, Section 2(c) and having at least five (5) years post registration experience in works of similar nature.	<b>Non-qualification – It has been observed that Bidder did not submit the CV of the Project Manager proposed and the roll of Engineers for the year 2018 has been checked on the website of the CRPE and the name of the proposed Project Manager was not found. It was concluded that the latter is not a registered Engineer with 5 years of post-registration experience as required at ITB 6.3(d).</b>
Clause 6.3(e)	The minimum amount of liquid assets and/or credit facilities net of other contractual commitments of the successful Bidder shall be <b>MUR 2,500,000/-</b> . The bidder should submit documentary evidence mentioning the name of the project and its procurement reference. Non submission of the supporting documents may lead to rejection of the bids. Documentary evidence may comprise but not limited to: (1) Bank certificate (2) Certificate from Auditors (3) Certificate from a Professional Registered Accountant	<b>Non-submission of original document- the document submitted is a copy of a certificate made by an accountant.</b>

*3. Consequently, your bid has not been retained.”*




## F. Grounds for Review

On 18 May 2020, the Applicant seized the Independent Review Panel for review on the following grounds:

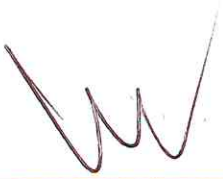
*“Dissatisfied with Decision: Reasons put forward by Public Body in letter dated 12<sup>th</sup> May are irrational and unfair.”*

## G.

### STATEMENT OF CASE

#### HISTORY

1. The Applicant is a registered company since 20 March 2003 and is involved in general building construction work. The business activities of the applicant are mainly in Rodrigues. The Applicant has worked on several projects allocated by Rodrigues Regional Assembly.
2. The Respondent called for an open national bidding exercise for the Construction of Six Additional Classrooms at La Ferme College, Rodrigues having Procurement Ref: **RRA/EDU/OAB/15/2019/2020 in October 2019**. The deadline for submission of the bid was 21 November 2019 at 13.00hrs.
3. On 21<sup>st</sup> November 2019, the Applicant submitted its bid before the deadline. The contract price for the bid is **Rs 13,693,425 excluding VAT**.
4. The Republic of Mauritius was placed under National Lockdown as from the 20<sup>th</sup> March 2020 and subsequently placed under National Sanitary Curfew on the 23<sup>rd</sup> March 2020 due to the Covid-19 Pandemic.

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## NOTIFICATION OF THE AWARD

5. The Respondent notified the Applicant by letter dated 7<sup>th</sup> May 2020, that its bid was not retained for award and that the bid will be awarded to **Bolah Jeetun Co.Ltd** at the contract price of **Rs 15,132,080 excluding VAT**. The notification of the award was made during the said period of national lockdown and sanitary curfew.

## THE CHALLENGE

6. The Applicant challenged the decision of the Respondent and the procurement proceedings by letter dated 8 May 2020.
7. The Respondent replied to the Challenge by letter Ref: **RRA/EDU/OAB/15/2019/2020** dated 12 May 2020 stating the reasons for its Decision for not retaining the Applicant's bid for award. The stated reasons are as follows:

Reason No. 1: Section 1 ITB, Clause 6.3(a)- Non -qualification

*"It has been observed that the Bidder has quoted beyond the value of the contract that it is allowed to undertake. For CIDB Grade G- up to 10 million."*

Reason No. 2: Section 1 ITB, Clause 6.3(d) (i) - Non -qualification

*"It has been observed that Bidder did not submit the CV of the Project Manager proposed and the roll of engineers for the year 2018 has been checked on the website of CRPE and the name of the proposed Project Manager was not found. It was concluded that the latter is not a registered Engineer with 5 years of post-registration experience as required at ITB 6.3(d)"*

Reason No. 3: Section 1 ITB, Clause 6.3(e) Non-submission of original document



***“the document submitted is a copy of the certificate made by an accountant.”***

REPLY TO CHALLENGE

8. The Applicant clearly explained by letter of 14<sup>th</sup> May 2020 addressed to the Respondent that the **3 (three)** reasons put forward by the Respondent to justify his decision for not retaining the Applicant's bid is manifestly erroneous and irrational.
9. The Applicant also pointed out to the Respondent in its letter of 14<sup>th</sup> May 2020 about the issue of validity of the bid.
10. The Respondent accordingly requested all bidders including the Applicant to extend the Bid Validity for a further period of one month from 18<sup>th</sup> May 2020.
11. The Applicant made an application to the Independent Review Panel on 18 May 2020 to review the decision of the Respondent.

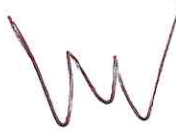
GROUND FOR REVIEW OF THE DECISION OF RESPONDENT

12. The Applicant reiterates the grounds in the letter dated 14<sup>th</sup> May 2020 that the **3 (three)** reasons put forward by the Respondent for not retaining the Applicant's bid for award is manifestly erroneous, unlawful and irrational.

SUBMISSIONS IN SUPPORT OF THE GROUNDS

IN LAW

13. The deadline for submission of bid for this project was **November 2019** and the Respondent has taken several months to complete the bid evaluation exercise. The bidders including the Applicant have had no alternative than to bear with





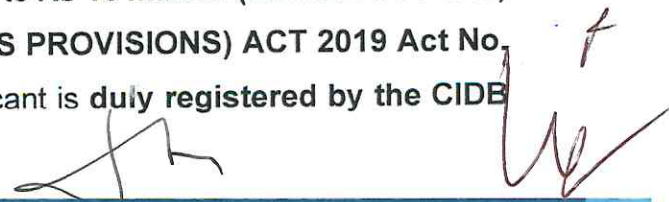
this unreasonable delay in completing the evaluation exercise and have had to maintain their prices by extending the Bid Validity time and again.

14. The Bid validity has been extended several times since the deadline to submit bid on 21 November 2019. The last extension for validity of Bid is from 18<sup>th</sup> May 2020 to a further 1 month. The Applicant has always been agreeable for extension of bid validity. Extension for bid validity has even been requested after reply to the challenge. The Respondent has never given any reason for extension of validity of the bid.
15. On 15 May 2020, the Applicant wrote to the Independent Review Panel to seek guidance and advice regarding application for review to the Independent Review Panel ("IRP") during the lockdown decreed by the government due to the unprecedented situation of Covid 19 pandemic.
16. The Applicant made an application to the Independent Review Panel on 18 May 2020 to review the decision of the Respondent. By a covering letter of 18 May 2020, the Applicant also explained that due to nationwide confinement and non-availability of flight from Rodrigues, it is impossible for the Applicant to call at the IRP's Office in Mauritius to complete the formalities of the application viz. submission of the original bank cheque and the original of the statement of case.
17. The applicant also requested the IRP's advice on the deadline to complete the formality requirements for the application for review in light of Covid-19 which is an unexpected situation and due to the impossibility to fly in Mauritius.



### ON THE MERITS

18. The first reason given by the Respondent is irrational. The allowed Value of Contract that a contractor of **Grade G** is up to **Rs 15 million (exclusive of VAT) as per THE FINANCE (MISCELLANEOUS PROVISIONS) ACT 2019 Act No. 13 of 2019 on 25<sup>th</sup> July 2019**. The applicant is **duly registered by the CIDE**



as **Grade G Contractor for Building Construction Works**. Its Registration referenced is **CT/BW/L/G-01014** and is valid up till **30 June 2020**. The Applicant has submitted a copy of his CIDB Registration Certificate with the Bid in conformity with the requirement of Section 6 of the Instructions to Bidders.

19. The second reason stated by the respondent is not valid. The CV of Mr Packiry Poullé was included in the Bid documents. The requirement of the Item 6.3 (d) of the Bidding Data Sheet is that the Project Manager shall be a Civil Engineer. The CV of Mr Packiry Poullé **expressly states his profession as a Structural/Civil Engineer**. Mr Packiry Poullé, holder of B.Tech (Civil), MSc (Structures) FIAStructE is a **Civil Engineer** duly registered as Engineer, **Registration No. 247, with the Council of Registered Professional Engineers Mauritius**. Mr Packiry Poullé was registered by the CRPE in 1981 and has about **40 years of post-graduate experience** in the design and in the project management of building works.

20. Section 6.3 of the Bidding Data Sheet required **three (3) specific key site personnel**, namely:

- a) One Project Manager, Civil Engineer with least five (5) years post registration experience
- b) One M&E Coordinator with a minimum Diploma or Certificate in electrical and/or mechanical installation NTC level 3, with at least 3 years' experience in the coordination and supervision of building services installation.
- c) One General Foreman on full time with minimum 10 years'

21. Section 6.2 of the Instruction to Bidders, requires that '*Bidders shall include the information and documents listed*' with their bids which include '*qualifications and experience of **key site** personnel and technical personnel proposed for the contract;*'

22. As a requirement of section 6.2 and 6.3 of the tender document, 3 Curriculum Vitae of specific key personnel was annexed with the bid document. These included:







(i) The CV of Mr Packiry Poullé, B.Tech (Civil), MSc (Structures) FIAStructE RPEM, **Chartered Civil Engineer, duly registered with the CRPE** and having **40 years post registration experience**.

(ii) The CV of Mr Clency Mozart, Dip. Eng BSc (Electrical), MIEE RPEM, **Chartered Electrical Engineer, duly registered with the CRPE** and having **40 years post registration experience**.

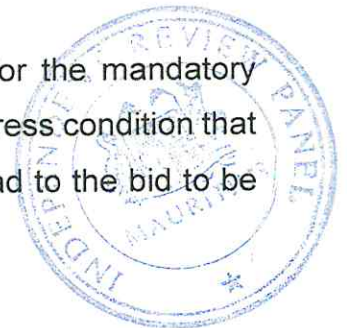
(iii) The CV of Mr Riad Peerally, **Foreman with 30 years' experience**.

23. Respondent has never requested applicant to provide any document 'alleged to be missing' nor has requested any clarification during the bid evaluation exercise. The **Guidance on the Responsiveness of Bids** issued pursuant to section 7(b) of the Public Procurement Act considers that non-submissions of documents related to qualifications, experience and eligibility is a **minor omission**.

24. Third and final reason given by the respondent for not awarding the bid is not justified. The Applicant had submitted a copy of Certificate from a CNA Associates who is a Professional Registered Accountant in its bid in November 2019. The Certificate from the Professional Registered Accountant confirms that the applicant has the minimum amount of MUR 2,500,000 as liquid assets or credit facilities net of other contractual commitments to execute the contract.

25. There is no express requirement in the tender document for the mandatory submission of **originals** of the Certificate nor is there any express condition that failure to submit **originals** of this particular document will lead to the bid to be declared non-responsive or rejected.

26. The Bid of the Applicant is therefore fully responsive and is the lowest evaluated substantially responsive bid. The Price quoted by Applicant is **Rs 13,693,425** **exclusive of VAT** and is **lower by Rs 1,438,655** compared to the Bid Price of Messrs. BHOLAH JEETUN CO. LTD (Rs 15,132,080 exclusive of VAT). The



Applicant submits that the decision of the Respondent for not retaining its Bid for award is manifestly wrong, unlawful and unreasonable.

### PRAYERS

27. The Applicant therefore prays from the Independent Review Panel for a review of the Respondent's Decision to award the contract for the Construction of Six Additional Classrooms at La Ferme College, Rodrigues to Messrs. BHOLAH JEETUN CO. LTD for the sum of Rs 15,132,080 exclusive of VAT for the reasons set forth above; and
28. Recommend payment of all costs, fees and expenses incurred in participating in the bidding process and all costs, fees and expenses incurred in the Challenge and Review.
29. Alternatively, the Applicant prays from the Independent Review Panel for an order ordering the Respondent to pay to the Applicant all reasonable costs, fees and expenses incurred in participating in the bidding process.

### **G. Statement of Reply**

#### ***Facts***

1. *Following bid evaluation, a Notification to Selected Bidder was issued on 7<sup>th</sup> May 2020 and sent to the successful bidder Bolah Jeetun Co. Ltd for a Contract Price of Rs. 15,132,080. A notification to unsuccessful bidders dated 7<sup>th</sup> May 2020 was sent to the Applicant.*
2. *The Applicant made a challenge to the above on 8<sup>th</sup> May 2020 together with a request for debriefing. The Respondent replied to same on 12<sup>th</sup> May 2020 wherein the 3 reasons below were communicated to the Applicant.*
3. *A Letter of Acceptance dated 12<sup>th</sup> June 2020 was issued by the Respondent and sent to the successful bidder.*
4. *The Respondent was notified by the Independent Review Panel on 26<sup>th</sup> June 2020 that the Applicant had made an application for review on 26<sup>th</sup> June 2020.*



**Reason 1 (ITB 6.3(a) Non-qualification)**

5. In reply to paragraph 18 of the Applicant's Statement of Case (hereinafter referred to as "A1"), the Respondent avers that during the evaluation exercise, the Bid Evaluation Committee ("BEC") has referred itself to the CIDB Amendment Act 2016. Further investigation by the BEC has revealed that the CIDB Amendment Act 2016 was itself amended on 25<sup>th</sup> July 2019 in the Finance (Miscellaneous Provisions) Act 2019, further to which the Applicant is qualified to quote for a value of up to MUR 15 Million. The requirement under this ITB is satisfied.

**Reason 2 (ITB 6.3 (d) Non-qualification)**

6. The Bid Data Sheet under ITB 6.3(d) requires inter alia a civil engineer as Project Manager with at least 5 years post registration experience.
7. On the basis of the documents submitted by the Bidder, the BEC found that the Project Manager proposed by the Bidder is one Mr Erick Azie. Copies of 2 documents dated 19<sup>th</sup> November 2019 from the Applicant's bid are hereby attached and marked as Annexes A and B, for ease of reference.
8. Mr Erick Azie's CV was not submitted.

**Reason 3 (ITB 6.3 (e) Liquid assets and/or credit facilities)**

9. Under the above ITB, a Bidder must submit documentary evidence of its liquid assets and/or credit facilities.
10. The documentary evidence submitted by the Applicant is a copy of a certificate from a registered professional accountant dated 19<sup>th</sup> November 2019 (hereby attached and marked as Annex C). This document includes a disclaimer/reservation clause which reads as follows:

*"This certificate has been prepared on the basis of the information and documents supplied by you to this office. It must not be made available or copied in whole or part to any other party without any prior express consent in writing, such consent to be given or withheld by us at our absolute discretion".*

11. In the absence of such express written consent, the BEC in determining the responsiveness of the relevant bid, considered this as a material reservation as per ITB 29.2 and 29.4.
12. For all the reasons set out in this Reply, the Respondent prays that this Review is set aside by the Panel."

**H.****APPLICANTS REPLY & COMMENTS TO RESPONDENT'S REPLY DATED 07/07/2020****Facts**

1. The Application for Review to the IRP was made on 18 May 2020 by email during the Covid-19 National Lockdown period (hereinafter referred to as the "Covid-19 period"). There was an impossibility for the Applicant to call in at the office of the Independent Review Panel (hereinafter referred to as the "IRP") and submit hard copies of the Statement of Case and the bank cheque due to the unavailability of flight and the office of the IRP was closed.
2. The Applicant has since made all possible efforts to submit the hard copy of the statement of case and the bank cheque to the IRP.
3. The Applicant's first opportunity to make a proper application to IRP was on 26 June 2020. Prior to this date it was impossible to complete the application due to the unavailability of flights from Rodrigues. It is noteworthy that the flight on 24 June 2020 was a special flight for Rodrigues students limited for selected full time students studying in Mauritius only. All public flights only resumed on 1 July 2020 after the lock down.
4. The Applicant forwarded a copy of the Application for Review to the Respondent on 18 May 2020. The Respondent has therefore been fully aware of the Applicant's Application for Review to the IRP since 18 May 2020. **(Annex 1)**
5. The Application was called Proforma on Monday 6 July 2020 at 1.00 pm. No representative of Respondent was present before the IRP. The Chairperson of the IRP informed that a letter of acceptance dated 12 June 2020 was issued by Respondent to a successful bidder. The Applicant was to take a stand as to regards to the review.





6. On 8 July 2020, Applicant took the stand to proceed with application for review and subsequently the application was fixed for hearing on Friday 17 July 2020.
7. The Respondent was required by the IRP to submit its reply and comments on the Statement of case by the deadline of 2 July 2020. The Respondent requested for an extension of time till **Tuesday 7 July 2020**. It is only on **10 July 2020** that Applicant received the 'Reply of Respondent' by email. The 'Reply of Respondent' was signed and dated 7 July 2020.
8. Paragraphs 1,2 and 3 of Respondent's reply are taken note of. The Respondent was already aware that the Applicant had communicated to the public body (Respondent) by letter dated 18 May 2020 letter ref: **EWC/3175/2020 (Annex 2)** that it had already contacted IRP and Public Procurement Office and was initiating steps to apply to IRP within the 'Covid-19 period'. The Applicant made his Application for Review to the IRP but it was in the impossibility to complete the formality requirements because of the 'Covid-19 period'.

#### Reason 1

9. Applicant records the admission of Respondent at paragraph 5.

#### Reason 2

10. As per Respondent's reply at paragraphs 6 to 8, the Applicant has submitted three CVs. The Respondent **Annex B of Respondent's Reply** provides details of Human resources in the employment at Erick Contracting & Waterproofing Ltd. This Annex B gives the general information on the company's organigram and include all his staff including his director, administration staffs, leading hands, watchman, amongst others and is not specific to this project. The **three CVs** of key site personnel required on this project were duly submitted as requested in the Bidding Data Sheet and all three CV fully complies with the requirement of the bid document. The Respondent never sought any clarification whatsoever in this respect.

#### Reason 3

11. The reason averred in paragraph 10 and 11 in Respondent's reply is a fresh averment and this point has never been raised previously. The reason given by the Respondent for rejecting the Applicant's bid in its letter of 12 May 2020 was the '**non-submission of the original document**'. This point was further clarified and confirmed when the Respondent further stated that '**document submitted is a copy of certificate made by an Accountant**'. The Applicant therefore contends that the Respondent cannot give new averments now that it realize that the reasons put forward is not valid.



12. Notwithstanding any prejudice to the above, the Applicant further avers that it submitted a specific letter in its bid document, that authorized the Respondent to seek reference from his Accountant, CNA Associate as evidenced by **Annex A of Respondent's Reply at paragraph 14 of letter** dated 19 November 2019. Furthermore, the letter of the Accountant is a standard format submitted to client for tender purposes as per letter dated 15 July 2020 from CNA Associates Ltd. **(Annex 3)**

13. On the whole of the Respondent's reply, Applicant avers that:

- 13.1. Applicant had already communicated to the Respondent its intention to apply to the IRP for the review of the decision prior to the 12/06/2020;
- 13.2. By offering to the successful bidder the letter of acceptance, the Respondent acted in bad faith; and
- 13.3. On account of the admission made by Respondent at paragraph 5 of Respondent's reply, it is unequivocal that Applicant has been victim of the negligence and ill-informed members of the Bid Evaluation Committee and the Public Body. It seems that the Applicant may not be the only victim of such evaluators selected to conduct a Bid Evaluation exercise, considering that amendments have been brought to the CIDB ACT since 25<sup>th</sup> July 2019.

14. In the circumstances, Applicant on account of admission of Respondent in Paragraph 5 of Respondent's reply, Applicant has no other alternative than to amend the prayers sought in the statement of case as follows:

- (i) The Applicant therefore prays the IRP for a review of the Respondent's Decision to award the contract for construction of Six Additional Classrooms at La Ferme College Rodrigues to Messrs. BHOLAH JEETUN CO.LTD for the sum of Rs 15,132,080 exclusive of VAT for reasons set forth; and
- (ii) To prohibit Respondent from following incorrect procedures, act in unauthorized manner and pretend of not being aware of same; and
- (iii) To prohibit members of this Bid Evaluation Committee to conduct evaluation of bid evaluation exercise.
- (iv) To prohibit Respondent from following incorrect procedures, act in unauthorized manner and pretend of not being aware of same; and
- (v) To recommend the annulment in whole or in part of any unauthorized act or decision of Respondent; and
- (vi) Recommend payment of all costs, fees and expenses incurred in participating in the bidding process and all costs, fees and expenses including costs



incurred by representative of applicants to come to Mauritius from Rodrigues for the purpose of hearing on two occasions, and expert and legal fees and expenses incurred in Challenge and Review.

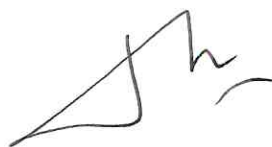
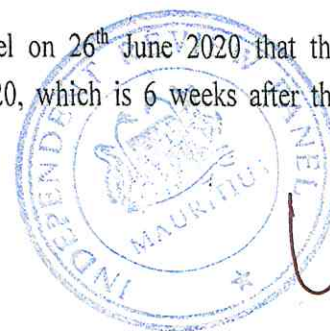
- (vii) Alternatively, the Applicant prays from the IRP for an order ordering the Respondent to pay the Applicant all reasonable costs, fees and expenses incurred in participating in the bidding process.

## I. Written Submissions of behalf of Respondent

### Facts

1. Following bid evaluation, a Notification to Selected Bidder was issued on 7<sup>th</sup> May 2020 and sent to the successful bidder Bolah Jeetun Co. Ltd for a Contract Price of Rs. 15,132,080. A notification to unsuccessful bidders dated 7<sup>th</sup> May 2020 was sent to the Applicant.
2. The Applicant made a challenge to the above on 8<sup>th</sup> May 2020 together with a request for debriefing. The Respondent replied to same on 12<sup>th</sup> May 2020.
3. A Letter of Acceptance dated 12<sup>th</sup> June 2020 was issued by the Respondent and sent to the successful bidder.
4. The Applicant sent an email dated 18<sup>th</sup> May 2020 to the Panel with the Respondent in copy, with an 'Application for Review under section 45 of the Public Procurement Act 2006 (hereinafter referred to as "the Act")' purportedly attached. However, what was attached is simply a one-page document dated 18<sup>th</sup> May 2020 (annexed in Applicant's reply).
5. The Applicant sent an email dated 5<sup>th</sup> June 2020 to the Panel with the Respondent in copy, where it states that it has requested its *'legal adviser to prepare the statement of case and we are waiting (sic) same to submit to you'*. This was nearly a month after the Respondent's letter dated 12<sup>th</sup> May 2020 and more than 3 weeks after Applicant's email dated 18<sup>th</sup> May 2020.
6. The Respondent was notified by the Independent Review Panel on 26<sup>th</sup> June 2020 that the Applicant had made an application for review on 26<sup>th</sup> June 2020, which is 6 weeks after the Respondent's letter dated 12<sup>th</sup> May 2020.

### Preliminary points of law


7. Under section 45 of the Act, subsection 2 (ba), an application for review ‘*shall be accompanied by a statement of case*’ the content of which is defined under subsection 2A, and within such time as may be prescribed. Such time is prescribed under Regulation 48(5) of the Public Procurement Regulations 2008 (hereinafter referred to as “the Regulations”) where such application must be filed ‘*within 7 days of receipt of the decision of the public body*’. It is submitted that this delay was not respected by the Applicant inasmuch as its Statement of Case was sent on 12<sup>th</sup> June 2020 to the Panel, nearly a month after its email dated 18<sup>th</sup> May 2020 and one month after the Respondent’s decision in its letter dated 12<sup>th</sup> May 2020. Under s45(2B) the Applicant should have submitted the documents specified under s45(2) in its application for review, which it failed to do.
8. It is submitted that despite the Covid-19 situation, the Applicant had access via email to making a proper application to the Panel according to the provisions of the Act and the Regulations as is seen from its correspondence with the Panel. However, neither has it done so on 18<sup>th</sup> May 2020, 5<sup>th</sup> June 2020, and arguably 12<sup>th</sup> June 2020 too as it was not until 26<sup>th</sup> June 2020 that the Panel notified the Respondent that the Applicant had made an application for review. The Applicant is using the Covid-19 situation as an excuse for its failures and shortcomings with regard to the procedure laid down under the Act and the Regulations.
9. It is submitted therefore that this Application should be dismissed as the Applicant failed to comply with the exigencies of section 45 of the Act and the Regulations, and filed in an untimely manner with respect to deadlines for filing an application for review by the Panel.
10. Should the Panel allow the Applicant to proceed with its application for review, which is strongly resisted by the Respondent, it is submitted that the prayers in the Applicant’s Statement of Case and Reply, do not fall within the provisions of section 45(10)(d) of the Act being given that the contract has already been awarded, the only remedy available to the Applicant is under s45 (10)(d) of the Act. The reliefs sought by the Applicant should therefore all be set aside save for the remedy provided for under the said subsection.
11. Under s45(10)(d) which it is submitted is the only remedy applicable in this matter, the test for the Applicant to be eligible for the remedy under this provision of the Act, is whether in the opinion of the Panel, the legally binding contract that has been awarded, should have been awarded to the Applicant instead. It is submitted that this is not the case, as per the reply of the Respondent and the further submissions below regarding the responsiveness of Applicant’s bid.
12. It is further submitted that the Applicant has not supported its claim for reasonable costs in participating in the bidding process.
13. Following the remarks made by the Panel and the submissions of the Applicant regarding an extension of time under the **Covid-19 (Miscellaneous Provisions) Act**, particularly section 28 (c) which introduces a new section 39A to the Interpretation and General Clauses Act 1974, which is reproduced below for ease of reference:

*39A. Extension of time during COVID-19 period*

- (1) *Where, under an enactment, a time is imposed to institute or lodge judicial proceedings and the time expires, or falls wholly or partly, during –*



- (a) the COVID-19 period; or  
 (b) a period of 30 days after the COVID-19 period lapses,

*the judicial proceedings may, notwithstanding the time imposed, be instituted or lodged not later than such period as may be prescribed by regulations under that enactment.*

14. The Respondent therefore submits that in the absence of such amendments to the existing regulations (Public Procurement Regulations 2008) ‘*under that enactment*’ (Public Procurement Act 2006), the above submissions regarding the failure of the Applicant to respect the applicable delays, are maintained.

**Reason 1 (ITB 6.3(a) Non-qualification)**

15. The requirement under this ITB is satisfied.

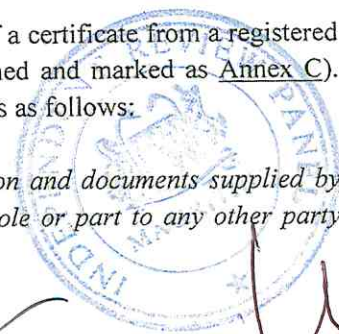
**Reason 2 (ITB 6.3 (d) Non-qualification)**

16. The Bid Data Sheet under ITB 6.3(d) requires *inter alia* a civil engineer as Project Manager with at least 5 years post registration experience.
17. On the basis of the documents submitted by the Bidder, the BEC found that the Project Manager proposed by the Bidder is one Mr Erick Azie. Copies of 2 documents dated 19<sup>th</sup> November 2019 from the Applicant’s bid are hereby attached and marked as Annexes A and B, for ease of reference.
18. Mr Erick Azie’s CV was not submitted.
19. The Respondent is not averring that Mr Erick Azie satisfies the relevant ITB according to the Bid Data Sheet, instead averring that there are 3 CVs in its bid of 3 persons who satisfy the relevant requirement. However, from the Annexes A and B from Respondent’s Reply, it is clear that the Applicant had designated Mr Erick Azie and not the three other persons’ whose CVs were included in its bid. The list of documents lists the CVs for different positions but not that of Project Manager.

**Reason 3 (ITB 6.3 (e) Liquid assets and/or credit facilities)**

20. Under the above ITB, a Bidder must submit documentary evidence of its liquid assets and/or credit facilities.
21. The documentary evidence submitted by the Applicant is a copy of a certificate from a registered professional accountant dated 19<sup>th</sup> November 2019 (hereby attached and marked as Annex C). This document includes a disclaimer/ reservation clause which reads as follows:

*"This certificate has been prepared on the basis of the information and documents supplied by you to this office. It must not be made available or copied in whole or part to any other party"*



*without any prior express consent in writing, such consent to be given or withheld by us at our absolute discretion".*

22. In the absence of such express written consent, the BEC in determining the responsiveness of the relevant bid, considered this as a material reservation as per ITB 29.2 and 29.4, which affected the validity of the certificate. It is submitted that it was incumbent on the Applicant to include such document in its bid and the Respondent was not bound to seek same from the Applicant or from its accountant for that matter.
23. For all the reasons set out in this Reply, the Respondent prays that this Review is set aside by the Panel.

## **J. The Hearing**

Hearing was held on 17 July, 2020. There was on record a Statement of Case and a Statement of Reply, by Applicant and Respondent respectively. The Applicant and the Respondent made further written submissions dated 16 July 2020 and 17 July 2020 respectively.

The Applicant was represented by Me. V. Dudhee, Barrister whereas the Respondent was represented by Me. J. Mosaheb, Barrister.

## **K. Findings**

### **ISSUE OF LAW**

The Respondent has moved that the application for review be set aside as the applicant has applied for review outside the Statutory Delay.

The Panel finds the following from the provisions of the Law:

The COVID-19 (MISCELLANEOUS PROVISIONS) ACT 2020 came into force on 16<sup>th</sup> May 2020.

### **COVID-19 PERIOD**

Section 28 amends the Interpretation and General Clauses Act and Section 39A provides for Extension of time during COVID-19 period.





Section 28(a) stipulates that COVID-19 period means the period-

- (a) Starting on 23 March 2020; and
- (b) Ending on 1 June 2020 or ending on such later date as the Prime Minister may, by regulations, prescribe under this Act;

Now Section 39A (2) provides

“where, under an enactment, a time is imposed to make a payment and the time expires, or falls wholly or partly, during-

- (a) The COVID-19 period; or
- (b) A period of 30 days after the COVID-19 period lapses;

The payment may, notwithstanding the time imposed, be made not later than such period as may be prescribed by regulations under that enactment.

Section 39A(7) reads as follows:

“where, under any enactment, a time is imposed to serve a notice or any other document and the time expires, or falls wholly or partly, during-

- (a) The COVID-19 period; or
- (b) A period of 30 days after the COVID-19 period lapses;

The notice or document may, notwithstanding the time imposed, be served not later than such period as may be prescribed by regulations under that enactment.

Section 39A(8)

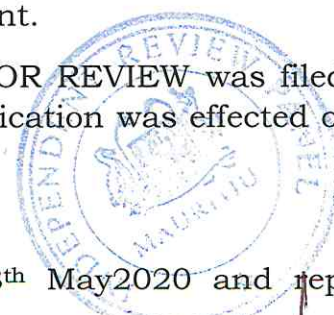
“where, under any enactment, a time is imposed on a person to do or refrain from doing any other act or thing and the time for doing or refraining from doing that other act or things expires, or falls wholly or partly, during-

- (a) The COVID-19 period; or
- (b) A period of 30 days after the COVID-19 period lapses;

The person may, notwithstanding the time imposed, do or refrain from doing that other act or thing not later than such period as may be prescribed by regulations under the enactment.

In this particular case, the APPLICATION FOR REVIEW was filed 26<sup>th</sup> June 2020 and payment to process the application was effected on the same date.

The applicant applied for challenge on 08<sup>th</sup> May 2020 and reply to challenge is dated 12<sup>th</sup> May 2020.



*[Handwritten signatures and initials]*

All these events took place in Rodrigues. However, it is to be noted that the seat of the Independent Review Panel is found in Port Louis, Mauritius and the application obviously could not complete the whole procedures established for application for review by Law as Mauritius was under confinement.

While applying the provisions of the COVID-19, it is clear that the applicant had 30 days after the COVID -19 to complete the formalities and in the opinion of this Panel the applicant has complied with the provisions of the Law.

The Panel therefore concludes that the application has been made within the delay and sets aside the preliminary point raised by Respondent and proceeds on the merits of the application.

### **ON THE MERITS**

The applicant has applied for review on three grounds.

#### **Ground 1**

In its reply to the Challenge of the Applicant, the Respondent contended that the Contractor has quoted beyond the value of contracts it is allowed to undertake under CIDB Grade G, whereas the Applicant has claimed that it is eligible to quote for a value of works up to MUR 15 Million.

*“ITB 6.3 (b) The Contractor should be duly registered with the CIDB for Building Construction Works in appropriate grade that would allow him to perform the value of works for which he is submitting his bid.*

*Classes of works of contractors: -*

*Main Contractor: Building Construction Works”*

In the Reply of the Respondent, the latter has explained that during the Bid Evaluation exercise, the Bid Evaluation Committee (BEC) had referred to the Construction Industry Development Board (CIDB) Amendment Act 2016, where the Grade G Contractors are allowed to undertake works up to MUR 10 Million. However, the CIDB Amendment Act 2016 was itself amended on 15 July 2019 in the Finance (Miscellaneous Provisions) Act 2019, whereby the threshold value for Grade G Contractors was revised upward from 10 to 15 MUR Million.

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The Respondent has before this Panel admitted that the Applicant was indeed responsive.

## **Ground 2**

The Respondent has considered that the Applicant's Bid does not satisfy the Qualification requirement under ITB 6.3 (d)(i) regarding the proposed Project Manager. The Applicant contends that it satisfies this requirement, since it proposed a Project Manager (not a Professional Engineer), along with a Site Manager, who is a registered Professional Engineer.

As regards the staff requirements, the relevant clauses of the Bid Document read as follows:

### ***“ITB – 6.3 (d)***

*A Contract Manager/ Supervisor with five years' experience in works of an equivalent nature and volume, including no less than three years as Manager or as otherwise **specified in the BDS**; and”*

This requirement is further specified in the Bid Data Sheet (BDS) as follows:

- “ITB 6.3 (d)*** · *One Project Manager, Civil Engineer as defined in CIDB Act, Section 2(c) and having at least five (5) years post registration experience in works of similar nature*
- *M&E Co-ordinator with a minimum Diploma or Certificate in electrical and/or mechanical installation NTC level 3, with at least 3 years' experience in the coordination and supervision of building services installation.*
  - *One General Foreman on full time with minimum 10 years' experience and having worked on at least two projects of similar nature”*

The Applicant has presented an organigram wherein it proposes the following key positions:

Project Manager  
Site Engineer  
M&E Coordinator  
General Foreman



Whilst the qualifications required for the M&E Coordinator and the General Foreman are satisfied, the Project Manager proposed is not an Engineer as required under 6.3 (d)(i). A Civil Engineer is proposed as

*[Handwritten signatures]*

Site Manager. However, this position is not required under the 3.6 (d)(i) of the Bid Data Sheet.

The Applicant has argued that the qualification requirements for the position of Project Manager under 6.3(d) of the ITB, but further specified at 6.3(d)(i) of the BDS are ambiguous and has led to different understanding on its side.

The Panel finds that there is no ambiguity as to what is required in the Bid Document. The Panel therefore finds that the Applicant is non-responsive under this ground and the decision of the Respondent to eliminate the Bidder on this ground is correct.

### **Ground 3**

The third Ground for rejection of the Applicant, is that it did not submit the Original Document evidencing the minimum amount of liquid assets and/or credit facilities of MUR 2.5 Million and that the document submitted is a copy of a Certificate made by an Accountant. It has moreover argued that the document contains a reservation clause at the bottom stating that *“it must not be made available or copied in whole or part to any other party without any prior consent given or withheld by us at our absolute discretion”*.

The Respondent considers that the above clause, in the absence of a consent letter from the Accountant is being considered as being a material deviation. In view of the above, The Respondent therefore considers that the Bidder does not satisfy the qualification required at BDS – 6.3(e)

*“ITB 6.3 (e) The minimum amount of liquid assets and/or credit facilities net of other contractual commitments of the successful Bidder shall be MUR 2,500,000/-.*

*The bidder should submit documentary evidence mentioning the name of the project and its procurement reference. Non submission of the supporting documents may lead to rejection of the bids.*

*Documentary evidence may comprise but not limited to:*

- (1) Bank certificate*
- (2) Certificate from Auditors*
- (3) Certificate from a Professional Registered Accountant”*

The Panel considers that the Applicant did produce an evidence of adequacy of works capital, in the form of a copy of a certificate from an Accountant. The Panel has not come across any requirement in the Bid Document for this certificate to be an original. The letter is signed and



addressed to the Applicant and it includes all references to the Bid under reference.

That there is also a clause regarding authorisation for use, thereof does not in our view annul the certification of financial capability of the Applicant. Should the Respondent insist on obtaining the original letter for verification and record, this is permissible under Directive 3 of the PPA, which deals with determination of responsiveness during the bid evaluation process.

The Panel therefore finds that Ground 3 of the Respondent for declaring the Applicant's Bid non responsive is not a valid ground.

**Observations:**

1.-The Panel has noted that during the bid evaluation process, the bid evaluation committee considered the applicant's bid as non responsive with regard to the value of works for which it could bid whereas in fact this was not the case as the appropriate legislation had been amended. It is therefore recommended that Bid Evaluation Committees should be more cautious in future.

2.-It is unfortunate that the Respondent despite being well aware that the applicant was making all efforts to apply for review and in defiance of the provisions of the COVID-19 Act proceeded with the award.

**L. CONCLUSION**

The Panel after making the above observations has come to the conclusion that the application for review is set aside and cannot award costs since applicant has failed under ground 2.



**Ag. Chairperson**  
(H. Gunesh)



**Member**  
(V. Mulloo)

  
**Member**  
(R. Mungra)

**Dated: 24 July 2020**

