



# Independent Review Panel

**Decision No. 14/20**

**In the matter of:**

**Sinohydro Corporation Limited**

**(Applicant)**

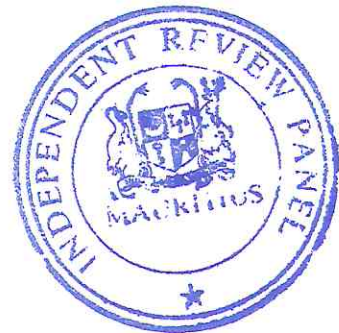
**v/s**

**Road Development Authority**

**(Respondent)**

**(Cause No. 18/20/IRP)**

**Decision**



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### A. History of the case

Following a prequalification exercise, given that this was a large and complex tender, in the form of an Open International Bidding) carried out by the Central Procurement Board (“CPB”) in October 2019, (**REF: CPB/77/2019 – Construction of La Vigie – La Brasserie – Beaux Songes Link Road (Phase 1)**) for the Road Development Authority (“RDA”), nine entities were shortlisted, including Applicant. A letter of invitation was issued to all the prequalified entities on 16<sup>th</sup> January 2020 with closing date 18<sup>th</sup> March 2020. Six bids were received by the CPB

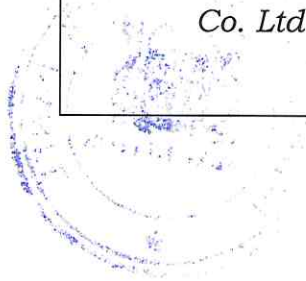
### B. Evaluation


Following opening of the Bids, the CPB constituted a Bid Evaluation Committee (BEC) for evaluation of the Bids. Given that all substantially responsive bids were above the updated estimated costs by more than 15% and the re-bid exercise was not considered practical, the Central Procurement Board initiated negotiation procedures.

### C. Notification of Award

On 17<sup>th</sup> November 2020, the Public Body in response to the Invitation for Bids informed the Applicant, that an evaluation of the bids received has been carried out and the particulars of the successful bidder are as mentioned below:

<i>Name of Bidder</i>	<i>Address</i>	<i>Negotiated Price (excl. VAT)</i>
<i>General Construction Co. Ltd</i>	<i>Plaine Lauzun P.O Box 503 Port Louis</i>	<i>MUR 570,248,707.66</i>







**D. The Challenge**

On 20 November 2020, the Applicant challenged the procurement proceedings on the following grounds:

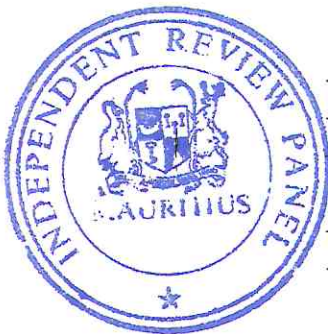
- “1. IN THE PRESENT PROCUREMENT, THE CENTRAL PROCUREMENT BOARD COULD NOT VALIDLY HAVE INITIATED AND OVERSEEN NEGOTIATIONS BETWEEN THE PUBLIC BODY AND ANY BIDDER NOR COULD THE PUBLIC BODY HAVE VALIDLY ENGAGED IN NEGOTIATIONS THEREUNDER AT ALL WITH ANY SUCH BIDDER, IN AS MUCH AS THIS IS NOT A FIT CASE FOR NEGOTIATIONS IN SPECIAL CIRCUMSTANCES: THIS IS INDEED NOT A CASE WHEREIN THERE WAS ONLY ONE RESPONSIVE BID.**

**IN THE ALTERNATIVE, IF NEGOTIATIONS WERE POSSIBLE IN THE PRESENT PROCUREMENT:-**

- 2. BEING GIVEN THAT SINOHYDRO CORPORATION LIMITED WAS THE LOWEST EVALUATED SUBSTANTIALLY RESPONSIVE BIDDER IN THE PRESENT PROCUREMENT, THE CENTRAL PROCUREMENT BOARD COULD NOT VALIDLY HAVE ENVISAGED, INITIATED AND OVERSEEN NEGOTIATIONS AT ALL BETWEEN THE PUBLIC BODY AND ANY BIDDER OTHER THAN SINOHYDRO CORPORATION LIMITED; NOR COULD THE PUBLIC BODY HAVE VALIDLY ENGAGED IN NEGOTIATIONS THEREUNDER AT ALL WITH ANY BIDDER OTHER THAN SINOHYDRO CORPORATION LIMITED.**

**IN THE FURTHER ALTERNATIVE, IF NEGOTIATIONS WERE POSSIBLE IN THE CIRCUMSTANCE AND IF SUCH NEGOTIATIONS WERE POSSIBLE WITH OTHER RESPONSIVE BIDDERS:-**

- 3. THE CENTRAL PROCUREMENT BOARD WAS WRONG IN LAW IN THE PRESENT PROCUREMENT TO HAVE INITIATED AND OVERSEEN NEGOTIATIONS WITH THE SECOND LOWEST EVALUATED SUBSTANTIALLY RESPONSIVE BIDDER AND THE PUBLIC BODY WAS WRONG TO HAVE OPENED AND ENGAGED IN NEGOTIATIONS WITH THE SECOND LOWEST SUBSTANTIALLY RESPONSIVE BIDDER THEREUNDER WITHOUT HAVING AT ALL MATERIAL TIMES FIRST CALLED OFF NEGOTIATIONS WITH SINOHYDRO CORPORATION LIMITED AND WITHOUT HAVING EXPRESSLY NOTIFIED THE LATTER ACCORDINGLY; BY ACTING IN THE MANNER THEY DID, BOTH THE CENTRAL PROCUREMENT BOARD AND THE PUBLIC BODY ACTED IN BREACH OF DUE PROCESS.**



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**4. [Left Blank Voluntarily]**

**4.1.** THE CENTRAL PROCUREMENT BOARD AND THE PUBLIC BODY WERE WRONG TO HAVE CONSIDERED THAT THE OFFER OF SINOHYDRO CORPORATION LIMITED OF THE 5 AUGUST 2020 WAS A “LAST AN NON-NEGOTIABLE” ONE, HAVING REGARD TO THE EXPRESS STAND AND UNEQUIVOCABLE CONDUCT OF SINOHYDRO CORPORATION LIMITED ALL ALONG AND AT ALL MATERIAL TIMES.

**4.2.** IN THE ALTERNATIVE, IF THE CENTRAL PROCUREMENT BOARD AND THE PUBLIC BODY WERE RIGHT TO HAVE CONSIDERED THE OFFER OF SINOHYDRO CORPORATION LIMITED OF 5 AUGUST 2020 AS FINAL, THE CENTRAL PROCUREMENT BOARD AND/OR THE PUBLIC BODY WERE WRONG AND/OR ACTED UNREASONABLY IN DISREGARDING THE STAND EXPRESSED AT ALL MATERIAL TIMES BY SINOHYDRO CORPORATION LIMITED THAT IT WAS OPEN AND IN FACT, READY AND WILLING TO FURTHER NEGOTIATE ON THE BID PRICE AND THIS IN THE FACE OF THE FACT THAT:-

(a) THE PROCUREMENT PROCESS WAS STILL ONGOING,

(b) THE VALIDITY OF THE BID, UPON SEVERAL REQUESTS FROM PUBLIC BODY, HAD BEEN EXTENDED TO THE 29 JANUARY 2021 WHEREAS THE VALIDITY OF THE BID SECURITY WAS EXTENDED TO 28 FEBRUARY 2021; AND

(c) THE CENTRAL PROCUREMENT BOARD AND/OR THE PUBLIC BODY HAD NOT CALLED OFF NEGOTIATIONS WITH SINOHYDRO CORPORATION LIMITED YET.

**5.** THE CENTRAL PROCUREMENT BOARD AND THE PUBLIC BODY HAVE CREATED FOR SINOHYDRO CORPORATION LTD A LEGITIMATE AND REASONABLE EXPECTATION THAT THE BID PRICE COULD BE THE SUBJECT OF FURTHER DISCUSSIONS/NEGOTIATIONS, CONSIDERING THE FACT THAT:-

(A) THE OFFER OF SINOHYDRO CORPORATION LTD OF 05 AUGUST 2020 NEVER WAS A LAST AND NON NEGOTIABLE OFFER AND THAT SINOHYDRO CORPORATION LTD WAS AT ALL MATERIAL TIMES





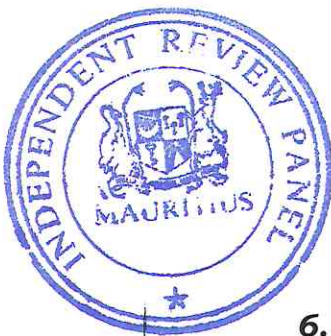
*ALWAYS OPEN TO CONTINUED DISCUSSIONS ON THE BID PRICE*

- (B) THE CENTRAL PROCUREMENT BOARD HAD EXPRESSLY STATED AT ALL MATERIAL TIMES THAT THE PROCUREMENT PROCESS WAS STILL ONGOING,*
- (C) NEGOTIATIONS WITH SINOHYDRO CORPORATION LTD HAD NOT BEEN CALLED OFF AT ALL MATERIAL TIMES;*
- (D) SINOHYDRO CORPORATION LTD HAD, ON SEVERAL OCCASIONS, BEEN REQUESTED TO EXTEND THE VALIDITY OF ITS BID AND BID SECURITY AND THIS BEYOND THE YEAR 2020*

*SO MUCH SO THAT THE CENTRAL PROCUREMENT BOARD AND THE PUBLIC BODY ACTED UNREASONABLY AND/OR IN BREACH OF THE RULES OF NATURAL JUSTICE BY:-*

- (A) DECLINING FURTHER DISCUSSIONS/ NEGOTIATIONS WITH SINOHYDRO CORPORATION LTD ON THE BID PRICE EVENTUALLY; AND*
- (B) INITIATING, ENGAGING AND COMPLETING NEGOTIATIONS WITH THE SECOND LOWEST EVALUATED SUBSTANTIALLY RESPONSIVE BIDDER IN RANK THEREAFTER*

*AND THIS TO THE PREJUDICE OF SINOHYDRO CORPORATION LTD*



**6.** *AS BORNE OUT BY THE LETTER OF NOTIFICATION OF THE PUBLIC BODY DATED 17 NOVEMBER 2020, THE BID OF SINOHYDRO CORPORATION LTD AND THE BID OF GENERAL CONSTRUCTION CO. LTD WERE NOT ASSESSED ON THE SAME BASIS FOR THE DETERMINATION OF THE SUCCESSFUL BIDDER.*

**7.** *IF IT WAS POSSIBLE IN THE PRESENT PROCUREMENT FOR THE CENTRAL PROCUREMENT BOARD TO INITIATE AND OVERSEE DISCUSSIONS WITH SINOHYDRO CORPORATION LTD AND THE SECOND LOWEST EVALUATED SUBSTANTIALLY RESPONSIVE BIDDER IN RANK OR ANY OTHER RESPONSIVE BIDDER FOR THAT MATTER AND FOR THE PUBLIC BODY TO ENGAGE INTO*

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*DISCUSSION THEREUNDER, THE NEGOTIATION PROCESS AS INITIATED, OVERSEEN AND ENGAGED IN HAS BEEN DEPLOYED AND CARRIED OUT IN BREACH OF THE PRINCIPLES OF TRANSPARENCY, EQUITY, EQUALITY OF OPPORTUNITY AND FAIRNESS APPLICABLE UNDER THE PUBLIC PROCUREMENT ACT.”*

## **E. The Reply to Challenge**

On 27 November 2020, the Public Body made the following reply to the challenge and stated that:

### **“1. Unlawful Negotiation (SCL)**

*In the present procurement, the Central Procurement Board could not validly have initiated and overseen negotiations between the public body and any bidder nor could the public body have validly engaged in negotiations thereunder at all with any such bidder, in as much as this is not a fit case for negotiations in special circumstances: This is indeed not a case wherein there was only one responsive bid.*

***In the alternative, if negotiations were possible in the present procurement:-***

### **Reply:**

*The Negotiation was carried out in strict compliance with Sub- Section 40 (2A) – Award of procurement Contracts of the Public Procurement Act and regulation 8 (a) of the Public Procurement Regulations.*

*Actually, it was the case for the current project where the lowest evaluated substantially responsive bid was more than 15% above the cost estimate and the Public Body determined that a re-bid exercise was not practical and recommended the CPB to proceed with negotiations as per the provisions of the PPA.*

### **2. Failure to call off negotiations with Sinohydro Corporation Limited (SCL)”**

*Being given that Sinohydro Corporation Limited was the lowest evaluated substantially responsive bidder in the present procurement,*







*the Central Procurement Board could not validly have envisaged, initiated and overseen negotiations at all between the Public Body and any bidder other than Sinohydro Corporation Limited; nor could the Public Body have validly engaged in negotiations thereunder at all with any bidder other than Sinohydro Corporation Limited.*

**Reply:**

***In the further alternative, if negotiations were possible in the circumstances and if such negotiations were possible with other responsive bidders:-***

*The Negotiation was carried out in strict compliance with Sub – Section 40(2A) of PPA and PPO Circular NO. 15 of 2008 and Circular No. 7 of 2010.*

*Section 40(2A) of the PPA clearly provides that negotiations may be carried out with “a selected bidder or **other bidders** (emphasis added)”. Therefore, negotiations could have been envisaged with SCL as well as with the next lowest evaluated substantially responsive bidder.*

**3. Disregarding the willingness of Sinohydro Corporation Limited for further discussions (SCL)**

*The Central Procurement Board was wrong in law in the present procurement to have initiated and overseen negotiations with the second lowest evaluated substantially responsive bidder and the Public Body was wrong to have opened and engaged in negotiations with the second lowest substantially responsive bidder thereunder without having at all material times first called off negotiations with Sinohydro Corporation Limited and without having expressly notified the latter accordingly; by acting in the manner they did, both the Central Procurement Board and the Public Body acted in breach of due process.*

**Violation of legitimate and reasonable expectation of Sinohydro Corporation Limited”**

**Reply:**

*It is to be noted that exhaustive negotiation meetings were held on 23 July 2020, 30 July 2020 and 04 August 2020 starting with a discount*

*offer of MUR 12 Million, then MUR 18 Million, then MUR 20 Million and then MUR 25 Million.*

*During the last round of negotiation SCL requested for a break for a call to its head office in China and finally offered a discount of MUR 30 Million as a last and non-negotiable final commercial discount.*

*Pursuant to Sub-Section 40(2A) of PPA, negotiation was closed with bidder Sinohydro Corporation Limited on 04 August 2020 when SCL made a final and non-negotiable offer as confirmed in its letter of 05 August 2020.*

*There was no representation from the Public Body capable of giving rise to any legitimate expectation by SCL.*

- 4.1.** *The Central Procurement Board and the Public Body were wrong to have considered that the offer Sinohydro Corporation Limited of the 5 August 2020 was a “Last and Non-negotiable” one, having regard to the express stand and unequivocal conduct of Sinohydro Corporation Limited all along and at all material times.*

**Reply:**

*The “last and non-negotiable offer” was the term used by SCL during the last meeting of 04 August 2020 and confirmed same in writing on 05 August 2020 (see also reply at 3 above).*

- 4.2.** *In the alternative, if the Central Procurement Board and the Public Body were right to have considered the offer of Sinohydro Corporation Limited of 5 August 2020 as a final, the Central Procurement Board and/or the Public Body were wrong and/or acted unreasonably in disregarding the stand expressed at all material times by Sinohydro Corporation Limited that it was open and in fact, ready and willing to further negotiate on the bid price and this in the face of the fact that:-*

- a) The procurement process was still ongoing,*
- b) The validity of the bid, upon several requests from Public Body, had been extended to the 29 January 2021 whereas the validity of the bid security was extended to 28 February 2021; and*





- c) *The Central Procurement Board and/or the Public Body had not called off negotiations with Sinohydro Corporation Limited yet.*

**Reply:**

*Negotiation was closed with SCL on 04 August 2020.*

*SCL never expressed its intention for further negotiation in its letter dated 05 August 2020.*

*It was only when CPB started negotiation with the second lowest bidder on 21 October 2020, that SCL first informed CPB on 28 October 2020 of its intention to be agreeable for further negotiation.*

*All bidders were invited to extend validity of bid until award in line with Sub- Section 19.2 of Instruction to Bidder of the Bidding Documents as per standard practice.*

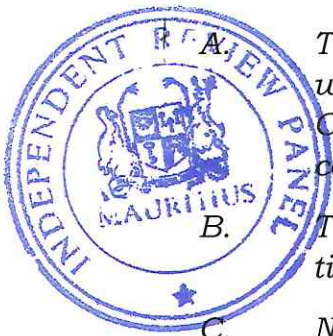
5. *The Central Procurement Board and the Public Body have created for Sinohydro Corporation Ltd a legitimate and reasonable expectation that the Bid Price could be the subject of further discussions/negotiations, considering that fact that:-*

*The offer of Sinohydro Corporation Ltd of 05 August 2020 never was a last and non negotiable offer and that Sinohydro Corporation Ltd was at all material times always open to continued discussions on the bid price.*

- A. *The Central Procurement Board expressly stated at all material times that the procurement process was still ongoing,*
- B. *Negotiations with Sinohydro Corporation ltd had not been called off at all material times;*
- C. *Sinohydro Corporation Ltd had, on several occasions, been requested to extend the validity of its bid and bid security and this beyond the year 2020.*

*So much so that the Central Procurement Board and the Public Body acted unreasonably and/or in breach of the rules of natural justice by:-*

- A. *Declining further discussions/negotiations with Sinohydro Corporation Ltd on the bid price eventually; and*
- B. *Initiating, engaging and completing negotiations with the second lowest evaluated substantially responsive bidder in rank thereafter*



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*And this to the prejudice of Sinohydro Corporation Ltd*

**Reply:**

*SCL was aware that negotiation was concluded on 04 August 2020 and confirmed its final bid price after special discount vide letter 05 August 2020. Notwithstanding the above, SCL was duly notified vide letter 04 November 2020 that CPB had concluded negotiation with SCL. On 10 November 2020 CPB informed SCL that it was pursuing negotiation with the next lowest evaluated substantially responsive bidder.*

*All the above was in strict compliance with the Sub Section 40 (2A) of PPA.*

*While all bidders were invited to extend validity of bid until award in line with Sub- Section 19.2 of Instruction to Bidder of the Bidding Documents as per standard practice this cannot be construed as providing a legitimate and reasonable expectation for further negotiation with SCL.*

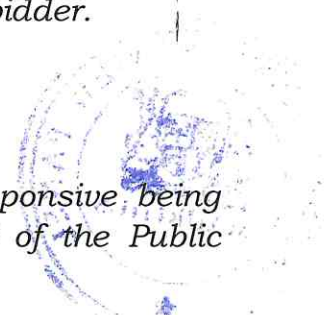
- 6.** *As borne out by the letter of notification of the Public Body dated 17 November 2020, the bid of Sinohydro Corporation Ltd and the bid of General Construction Co. Ltd were not assessed on the same basis for the determination of the successful bidder.*

**Reply:**

*The bid price of the lowest evaluated substantially responsive being Sinohydro Corporation Limited bid was more than 15% of the Public Body's cost estimate.*

*In this circumstance and pursuant to Sub-Section 40 (2A) of PPA, the CPB started negotiation with SCL in the first instance. The final bid offered by SCL after negotiation being higher than 15% of the Public Body's updated cost estimates, the negotiation was considered **not** successful.*

*Thereafter, the CPB invited the second lowest evaluated bidder for negotiation. The final bid price offered by that bidder after negotiation was within 15% of the Public Body's updated cost estimates and was concluded as being successful pursuant to PPO Circular No. 15 of 2008 and No. 7 of 2010.*





7. *If it was possible in the present procurement for the Central Procurement Board to initiate and oversee discussions with Sinohydro Corporation Ltd and the second lowest evaluated substantially responsive bidder in rank or any other responsive bidder for that matter and for the Public Body to engage into discussions thereunder, the negotiation process as initiated, overseen and engaged in has been deployed and carried out in breach of the principles of transparency, equity, equality of opportunity and fairness applicable under the Public Procurement Act.*

**Reply:**

*The Negotiation was carried out based on pre-determined negotiation strategy, approved by the CPB in strict compliance with provisions of the PPA.”*

**F. Grounds for Review**

On 03 December 2020, the Applicant seized the Independent Review Panel for review on the following grounds:

**Ground 1**

*The Central Procurement Board was wrong in law in the present procurement exercise to have initiated and overseen negotiations with the second lowest evaluated substantially responsive bidder and the Road Development Authority was wrong to have opened and engaged in negotiations with the second lowest substantially responsive bidder thereunder in as much as:*

- *Sinohydro Corporation Ltd was never informed, expressly or tacitly, that the meeting of 4<sup>th</sup> August 2020 was “a last round of negotiation”*
- *Sinohydro Corporation Ltd never intimated that its offer made in writing by letter dated 5 August 2020 was a last and non-negotiable final commercial discount and;*
- *Sinohydro Corporation Ltd had the legitimate expectation for further discussions/negotiations*

**Ground 2**



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*The Central Procurement Board and the Road Development Authority were wrong to have considered that the offer of Sinohydro Corporation Limited of 5 August 2020 was a “last and non-negotiable” and:-*

- (i) having regard to the express stand and unequivocal conduct of Sinohydro Corporation Limited all along and at all material times: and also*
- (ii) Sinohydro Corporation Limited never expressly, impliedly or tacitly used the term “last and non-negotiable offer” be it during the last meeting of 04 August 2020 or in the letter of Sinohydro Corporation Limited dated 05 August 2020.*
- (iii) In the absence of an express communication by the public body as to whether it either accepted or refused the offer made on 05 August 2020, Sinohydro Corporation Limited legitimately considered that negotiations were not closed yet.*

### **Ground 3**

*Neither the Central Procurement Board nor the Road Development Authority that they were engaging in negotiations with the second lowest evaluated substantially responsive bidder on 21 October 2020. There was, to all intents and purposes, no means for Sinohydro Corporation Ltd to suspect that negotiations were being carried out with any other party other than itself.*

*It was only on 4 November 2020 that the Central Procurement Board informed Sinohydro Corporation Limited that no further negotiation was envisaged with it and even then it did not inform Sinohydro Corporation Limited that it was engaged in negotiation with the second lowest evaluated substantive responsive bidder; it did so on 10 November 2020 only.*

*It was in the absence of any response from the Central Procurement Board and the Road Development Authority that Sinohydro Corporation Limited wrote on 22 October 2020 to intimate to the latter that it remained open to further discussions. Therefore, it is not correct to say, as alleged, that the 28 October 2020 was the first time when Sinohydro Corporation Limited first informed the Central Procurement Board that it was agreeable to further negotiations.*

### **Ground 4**

*The Central Procurement Board and the Road Development Authority have created for Sinohydro Corporation Limited a legitimate and*



*reasonable expectation that the bid price could be the subject of further discussions/negotiations so much so that Central Procurement Board and the Road Development Authority acted unreasonably and/or in breach of the rules of natural justice by:-*

- (a) *declining further discussions/negotiations with Sinohydro Corporation Ltd on the bid price eventually; and*
- (b) *initiating, engaging and completing negotiations with the second lowest evaluated substantially responsive bidder in rank thereafter without having first notified Sinohydro Corporation Limited that (i) negotiations with it had ended and more importantly that (ii) it was engaging in negotiations with the next lowest substantive responsive bidder.*

*and this to the prejudice of Sinohydro Corporation Ltd*

### **Ground 5**

*The Central Procurement Board and/or the Road Development Authority failed to properly assess the bids of Sinohydro Corporation Limited and of General Construction Co Ltd.*

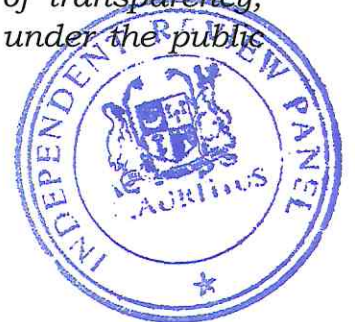
### **Ground 6**

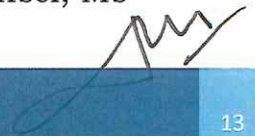
*If it was possible in the present procurement for the Central Procurement Board to initiate and oversee discussions with Sinohydro Corporation Ltd and the second lowest evaluated substantially responsive bidder in rank or any other responsive bidder for that matter and for the Road Development Authority to engage into discussions thereunder, the negotiations process as initiated, overseen and engaged in has been deployed and carried out in breach of the principles of transparency, equity, equality of opportunity and fairness applicable under the public procurement act.”*

### **G. The Hearing**

A Hearing was held on 22<sup>nd</sup> December 2020.

The Applicant was represented by Mr N. Pillay of Counsel together with Ms P. Ramdhian, instructed by Mr P. D. Lallah, Attorney while the Respondent was represented by Mrs G. Topsy-Sonoo, Parliamentary Counsel, Ms O. Ombrasine, Principal State Counsel, Ms



K. Domah, Ag Senior State Counsel, all instructed by Deputy Chief State Attorney.

The Successful Bidder was present and was not assisted by Counsel or Attorney.

## H. Findings

### PART I - BACKGROUND

Mr Zhou Lin, representative of Sinohydro, was called to testify by Mr Pillay. He described what is the business of Sinohydro and that he has been involved with the company since 2009. From 2011 onwards, he has been in Mauritius and has handled a great many procurement proceedings on behalf of the Applicant – the vast majority of which were public procurement under the Public Procurement Act 2006 (the “**Act**” or the “**PPA**”). He then provided a detailed account of the steps that were followed by the CPB when negotiating with Sinohydro concluding with the final meeting of 4<sup>th</sup> August 2020 and the letter issued by the Applicant the following day (the “**Letter**”). He also took us through all the correspondence exchanged between the Applicant and the CPB following the sending of the Letter by the Applicant. We propose to refer to specific parts of Mr Lin’s testimony as and when they apply to our findings and observations below.

We are very grateful to Mr Pillay and to Parliamentary Counsel and other Counsel and State Counsel appearing for both the Applicant and the Respondent for their thorough written submissions filed before the Panel between 22<sup>nd</sup> and 30<sup>th</sup> December 2020.

Coming to the Grounds for Review, we note that Grounds 1 and 2 take issue with the fact that the Applicant was never informed that negotiations had been completed with it, thereby thwarting its legitimate expectations while Ground 3 relates to the Applicant not being informed that negotiations were being carried out with GCC.

Ground 4 relates to the fact that the Applicant had a legitimate expectation that the CPB would not decline further negotiations with it and to be informed of that negotiations were being carried out with GCC.



Ground 5 is a general complaint that the bids of Sinohydro and of GCC were not evaluated properly.

Ground 6 is an overarching grievance that there has been a breach of the principles of transparency, equity, equality of opportunity and fairness under the PPA.

## **PART II - THE ISSUES**

### **Negotiations in the context of the PPA and Public Procurement Regulations 2008 (the “PPR”)**

The PPA has a very strict default position when it comes to negotiations with bidders (‘selected bidder’ and ‘other bidders’) and allows these only in special circumstances. This position is enshrined in sections 40(2) and 40(2A) of the Act:

*“(2) There shall be no negotiation between a public body and a selected bidder or other bidders except in such special circumstances as may be prescribed.*

*(2A) In the case of a major contract, the Board shall, where special circumstances provided in subsection (2) apply, initiate and oversee the negotiation between a public body and a selected bidder or other bidders in accordance with such instructions as may be issued by the Policy Office.”*

The PPR provides for those special circumstances at Regulation 8 (as amended) which reads as follows:

#### **“8. Special circumstances for negotiation**

*Negotiations may be carried out with a bidder or supplier where -*

*(a) the lowest evaluated substantially responsive bid is substantially above the updated estimated costs and a re-bid exercise is considered not practical;*

*(b) direct procurement from a single source under section 25(2)(b) of the Act is resorted to; or*

*(c) emergency procurement under section 21 of the Act is resorted to.”*

As alluded to in the Act, the Procurement Policy Office (“PPO”) has set down a number of detailed rules and instructions to be followed by the CPB and public bodies when carrying out negotiations. They are contained in two Circulars issued by the PPO, namely Circular 15 of 2008 and Circular 7 of 2010- the latter simply setting the threshold



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for negotiations at 15% above the updated estimated cost for works procurement contracts.

### Estimates

Both divisions of the Panel, recently, have had the opportunity to address the all-important matter of estimates of costs in the cases of **Security and Property Protection v Mauritius Ports Authority Decision No.11/20** and **NEC XON v Mauritius Ports Authority Decision No.13/20**. Cost estimates are, indeed, the DNA, the blueprint from which the whole procurement proceedings will flow. Public bodies are the guardians of the cost estimates. In accordance with their internal workings or by directions from relevant ministries (especially, the Finance Ministry) and/or Cabinet, public bodies will have a cost estimate allocated for various projects which estimate may be 'updated' before a tender is floated. Following any final revision arriving at an updated cost estimate, the first thing a public body will be able to determine is whether it is a major contract for it or a non-major; major contracts having to be handled from start to finish by the CPB.

Following opening of bids, those bids whose price are more than 15% below the updated estimated costs will have to be dealt with in accordance with the PPO's Directives No.46 and No.52 on abnormally low bids which were published in the course of this year.

If following a first round of evaluation, the lowest evaluated substantially responsive bid is substantially (15% for works contracts) above the updated estimated costs, it would trigger the negotiations mechanism set out by the PPO in line with the PPR and PPA.

Costs estimates, in the spirit of the PPA, are meant to be confidential to public bodies to preserve the integrity of the procurement process and ensure future competitive tenders are as open and efficient as possible. It is not unlikely, at all, that knowledge of costs estimates by bidders will allow them to quote prices that are near them and the country will lose the opportunity of paying less for any given procurement contract.

On that basis, we do not accept the position of Mr Lin on behalf of the Applicant that he ought to have known the costs estimates and how far off Sinohydro's bid was. In fact, we will refrain from providing, in this judgment, any indication (direct or indirect) of what the updated estimated costs were for this project. The Respondent and CPB has given such indications in the statements of case and correspondence and we feel that it ought to remain within the audience present during





this case before is. Suffice it to say that the bids of all bidders were far above the costs estimates and even the 15% excess threshold.

We pause here to express our disagreement with the Respondent's submissions that Sinohydro could have derived the costs estimates by an arithmetic exercise. It could not. It only had its bid at Rs 612 million and knew that this was above 15% of the estimated costs but it could not know by how much it was above.

On that score, we, equally, reject the Applicant's contention that it would have helped it knowing whether it was close to the 15% excess of costs estimates (by 15.1%, it suggested) which we find to be misconceived. We find that the very fact that the lowest substantially responsive bidder being 15% or more in excess triggers the negotiation process. The target is not and never was meant to bring the negotiated bid prices down to below the 15% mark, the only thing required of the CPB was to carry out negotiations to get a more acceptable price for the benefit of the State, which negotiated prices could be within the 15% or not, or could even be below the costs estimates altogether.

#### Negotiations with the Applicant

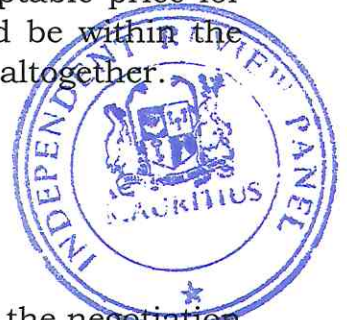
We have gone through the minutes of meetings kept by the negotiation team (the "Minutes") in respect of both bidders and we have given due consideration to what Mr Lin has given in evidence. His evidence has not been rebutted by the RDA but has been tested through cross-examination by Parliamentary Counsel.

Mr Lin provided quite a detailed account of the negotiations between the CPB and the Applicant; he also referred, with our leave, to his notes that he had taken, in Chinese, during the meetings.

In submissions by Counsel on both sides, much has been made about the disputed and undisputed facts. We agree with Mr Pillay that many issues of fact remain disputed and since no witnesses were called on behalf of the RDA and/or CPB, we will restrict ourselves to the evidence of Mr Lin as tested by cross-examination.

On the whole, we find that there is much common ground between the versions of the Applicant and of the Public Body, especially as regards the meetings. Some confusion then arose which we will address later.

In short, there were three meetings held with the Applicant - who had been invited first since it was the lowest bidder 'in the race' - one on



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23<sup>rd</sup> July 2020, a second one on 30<sup>th</sup> July 2020 and a final one on 4<sup>th</sup> August 2020.

The Public Body's version is that it suggested a discount of Rs 60 million during the first meeting while the Applicant stated that a 10% discount was asked for on that day. 10% of the initial bid price amounted to some Rs 61.2 million – as near as makes no difference on this scale.

During the first meeting, Mr Lin asked for time (one week as per the Minutes) to determine a commercial discount after having made the position of Sinohydro clear – that its bid was reasonable with increasing costs because of the COVID-19 pandemic. He also states having asked for the costs estimates which we have already addressed above and had queries about which bills could be the focus of negotiations.

Over the course of the second and third meetings, according to Mr Lin, a most certainly shrewd negotiator, who had in mind the interests of Sinohydro as well as an undoubted willingness to cooperate with the CPB-RDA negotiating team, kicked off by suggesting a discount of Rs 12 million which rose to Rs 18 million during the second meeting, then to Rs 20 million. Then, he initially stated before us, the negotiating team suggested the figure of Rs 40 million which prompted a counter-offer at Rs 25 million. Finally, after a call to Sinohydro Head Office, an offer for a discount of Rs 30 million was made by Mr Lin.

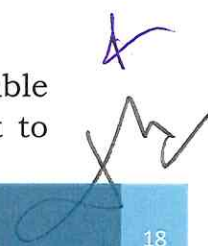
In cross-examination, however, he conceded that he is not certain an offer of Rs 40 million was made by the negotiating team.

Be that as it may, the figure of Rs 30 million was arrived at and, in Mr Lin's words, the negotiating team were 'happy' with that and would get it approved by 'higher quarters'. He was asked to send an official letter to the CPB offering a discount of Rs 30 million.

As per the Minutes, the negotiating team following the offer of Rs 25 million by Mr Lin, 'convinced' him and his assistant for a 'final effort' following 'further discussions.' To which Sinohydro's representatives agreed to a 'last and non negotiable Commercial discount' of Rs 30 million and they were asked to submit this in writing at the earliest.

Previously, at the meeting of 30<sup>th</sup> July 2020, as per the Minutes, Sinohydro was even told that its figure of Rs 18 million 'will not be 'successful' and it was 'subtly informed' that the negotiation team 'will have to pursue negotiation with other bidders.'

To us, the versions of both parties seem consistent to a considerable degree. What Mr Lin terms as 'happy', on balance, is tantamount to





the last push the negotiating team initiated to reach the figure of Rs 30 million. The ‘higher quarters’ described by Mr Lin means the CPB hierarchy and its Board which, by law, as clearly set out in the PPA, PPR and the PPO’s circulars, has the final say.

Finally, we note, as rightly put by Parliamentary Counsel in her cross-examination of Mr Lin, that at the end of the third meeting of 4<sup>th</sup> August 2020, unlike the previous two, there was no adjournment and, to all intents and purposes, this closed the round of negotiation with the Applicant.

#### The Letter (of 5<sup>th</sup> August 2020)

The Applicant obliged and, as it had undertaken at the last meeting, issued the Letter on 5<sup>th</sup> August 2020. In it, it confirmed offering a ‘special commercial discount of MUR 30,000,000.00 (exclusive of VAT)’. It goes on to say: ‘And our final bid price after the discount shall be MUR 582,692,448.13 (exclusive of VAT).’

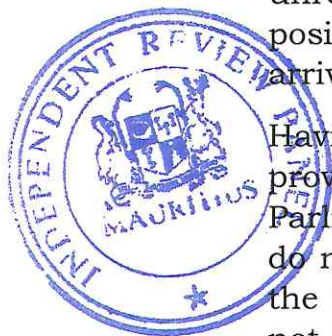
The CPB acted on the basis that it was a final offer because of the use of the word final. In addition, it is the CPB’s case that, as can be clearly seen from the Minutes, the discount of Rs 30 million was a last and non negotiable one.

In Parliamentary Counsel’s submissions, we cannot interfere with this finding of the CPB unless it amounts to being *Wednesbury* unreasonable in that no reasonable authority placed in the same position would have reasonably reached the conclusion that was arrived at.

Having regard to all circumstances, including the detailed account provided by Mr Lin, we subscribe with the submissions of Parliamentary Counsel on behalf of the RDA. Final means final and we do not feel it necessary to include the Oxford Dictionary definition of the word, here, given its very wide usage and understanding. We do not feel we can read into it that it was a ‘revised’ bid price or an ‘updated’ one.

We also note that in a letter dated 29<sup>th</sup> June 2020, where Mr Lin was asked to confirm the CPB’s revision of its bid price as allowed by law, he used the word ‘adjusted’.

On the whole, we see no reason to interfere with the conclusion of the CPB following the letter of Sinohydro with its final bid price after discount of Rs 30 million.





### The period of negotiations with GCC

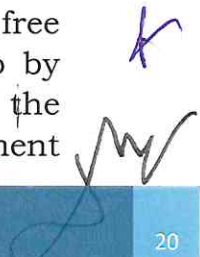
At the outset, we feel it is necessary to state that the CPB thoroughly considered the final bid price submitted by Sinohydro, standing at Rs 582 million. It then decided to initiate a round of negotiations with the next lowest bidder, GCC, to see if a better deal could be obtained—without any certainty as to what discount could be obtained from the second bidder. It must be noted that GCC’s initial price was at Rs 630 million, Rs 18 million above Sinohydro (pre-discount). GCC might, therefore, have to give a discount of at least Rs 48 million to even match Sinohydro.

We do not feel it is appropriate to give, in our judgment, much in terms of details relating to the negotiations carried out with a party that chose not to give evidence. Suffice it to say that a similar approach was taken by the negotiation team, beginning 21<sup>st</sup> October 2020. As per the parts of the Minutes relating to GCC, the steps required by the PPO were meticulously followed. A suggested discount of Rs 60 million was proposed by the negotiating team at the very beginning of negotiations and GCC reverted immediately with a figure very, very close to that. Further discussions concluded in that small increase to achieve a discount of Rs 60 million. Soon after, GCC submitted a written offer of a ‘firm, final and non-negotiable’ discount of Rs 60 million bringing its negotiated price to some Rs 570 million.

Interestingly, right at the time the negotiation process in line with the PPO circulars were initiated, the following day in fact, Sinohydro wrote to the CPB, after 2 months and half, requesting for copies of the Minutes (relating to it) and to be apprised of the ‘status’ of the procurement process ‘at the earliest’. It also included a line to say that negotiations with it were successful, according to its understanding. There began a sustained exchange of correspondence led by Sinohydro.

The CPB responded on 26<sup>th</sup> October 2020 and apprised Sinohydro that the CPB’s Minutes are confidential and only official letters, in effect, matter, such as the Letter of 5<sup>th</sup> August 2020. It also informed Sinohydro that the procurement was still on-going – which it, indisputably, was.

On the issue of CPB minutes being communicated to bidders, we agree with the position of the CPB. Moreover, there is no evidence of any undertaking being given by the negotiating team to provide CPB minutes (taken by a secretary appointed by the CPB). Bidders are free to take their own notes, like Mr Lin has – as rightly alluded to by Parliamentary Counsel in cross-examination. We also note that the CPB graciously informed Sinohydro of the status of the procurement





proceedings but we feel it was not necessary, in line with our legal framework, that provides for informing successful bidders and unsuccessful bidders alike after a bidder is selected, with debriefing of bidders ensuing.

Coming back to the sequence of correspondence, Sinohydro then repeatedly stated that negotiations were still open with it and there was prospect of further discounts. The CPB replied that following the submission of the Letter and the final bid price, no further negotiations were envisaged with Sinohydro. The latter wrote again on 6<sup>th</sup> November 2020 only to state that negotiations were still open. The CPB responded on 10<sup>th</sup> November 2020 and explained that further negotiations were not possible with Sinohydro and that due process required that negotiations be carried out with the second-lowest bidder. Sinohydro wrote once again on 17<sup>th</sup> November 2020 stating its position, which is essentially a summary of its case before the Panel.

We note that this sustained exchange lasted until the day when GCC was selected as successful bidder with its negotiated price of Rs 570 million.

### **Conclusion on the issues surrounding negotiations with Sinohydro**

We have given anxious consideration to all the evidence and the points made in submission and it is our considered view that the negotiations were properly carried out by the CPB-RDA all in accordance with the PPA, PRR and the PPO's Circulars.

In normal circumstances, a bidder who is the lowest among the substantially responsive is the winner of the bidding match. In cases where that bidder is substantially above the costs estimates, a new match begins. This is what we find the law to provide and it comforts our view expressed above that costs estimates cannot be changed after a bid is floated.

This new match, in effect, places everyone almost back to square one. The only nuance is that the lowest bidder is given the first bite at the cherry and takes pride of place as the first bidder with whom negotiations are to be carried out. He is free to bring down his price by Rs 1 or by Rs 100 million, or he may stand fast and decline to lower his quote. The corollary to this is that it places bidders with whom negotiations are carried in pretty much the same position as they were before bid submission: nobody knows the discount offered by the other one and what negotiated price is being reached.



Our legal framework allows negotiations with bidders, and for major contracts, these must in line with the instructions (or, more aptly, the rules) of the PPO. The PPO leaves it to the CPB to carry out successive negotiations or parallel negotiations. We see no reason to interfere with the CPB's approach in this case, which was a sequential one giving one chance (or round of negotiation) to bidders according to their initial rank. It set an internal agenda and targets. It went to Sinohydro and got the best discount it could negotiate. It then evaluated the tender on that basis and formed the view that it could try with the next lowest bidder and was very much successful in doing so.

### The failure to inform Sinohydro

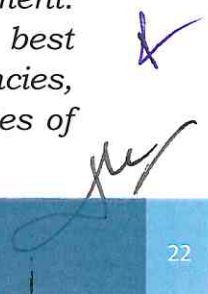
The thrust of case for the Applicant before and during the hearing was on the facts, mostly that negotiations with it had not been concluded. In his submissions, Mr Pillay, understandably laid more emphasis on the failure by the CPB-RDA to inform Sinohydro that negotiations were being carried out with GCC.

We have noted above that Sinohydro could have understood this fact from the reply of the CPB on 10<sup>th</sup> November 2020 about due process 'required' to be followed.

The point made by Sinohydro is that it should have been informed that negotiations were to be carried out with GCC before those began. In support, Sinohydro relies on the model laws for procurement by UNCITRAL on which Mr Pillay has laid much emphasis in his written submissions.

He begins with a quote from Hansard at the time of the passing of the Public Procurement Bill in 2006 which would become the PPA. The then Minister of Finance, Mr Sithanen, said in his concluding remarks before commending the Bill to the House:

*“Mr Speaker, Sir, the House may wish to note that the Public Procurement Bill is based on the United Nations Commission on International Trade Law (UNCITRAL), the Model Law on Procurement of Goods, Construction and Services and the Model Public Procurement Law as per the WTO Agreement on Government Procurement. The basic principles and procedures set in the Model Law are the international benchmarks and standards in respect of public procurement. Additionally, the provisions contained in the Bill meet the best standards as generally required by international financing agencies, and they are also in conformity with the COMESA harmonised rules of procurement.”*



Mr Pillay then refers the Panel to extracts from the judicial review cases of **Bérenger v Goburdhun 1985 MR 209** and of **Hurnam v The Judicial and Legal Service Commission 2002 SCJ 53**. In *Bérenger*, the Supreme Court held:

*“...where our rules of procedure are silent, it will follow English practice, or be guided by it. But it has also said, and this in our view is the more correct approach, that it will not blindly and in every respect apply to Mauritius the English Rules of the Supreme Court [See Murdaye v. Commissioner of Police [1984 MR 118].”*

In *Hurnam*, the Supreme Court found that:

*“... in the silence of the law, any appropriate procedure could be adopted subsequent to the challenge being made. To be appropriate, however, the procedure would have to be in conformity with basic principles of law.”*

He contends that the PPA and PPR are silent on how to carry out negotiations and we should therefore look to the very detailed model laws on procurement by UNCITRAL. The underlying contention and the thrust of his argument is that during consecutive negotiations, the first/preceding bidder must be informed of the closure of negotiations with him before the public procuring entity moves on to the next bidder. He relies on the UNCITRAL Model Law on Procurement of Goods, Construction and Services, 1994 (the “**1994 Model Law**”) and also, with which we agree, he explains that the position, in the 2014 version of the Model Law, has not changed in matters relevant to the present case before us.

We note, however, that Mr Pillay relies on article 44 of the 1994 Model Law. It is apposite to mention that the initial model law dates from 1993 - UNCITRAL Model Law on Procurement of Goods and Construction (1993) (the “**1993 Model Law**”) - which was for the public procurement of goods and for construction. In 1994, provisions for the procurement of services were adopted and were merged with the 1993 Model Law resulting in the 1994 Model law. Article 44 applies to the procurement of services and falls under “**CHAPTER IV PRINCIPAL METHOD FOR PROCUREMENT OF SERVICES.**” The corresponding provisions, or those as similar as can be, for the procurement of construction works (as defined in article 2 and which apply in this case) are somewhat rougher, as it were. For convenience, we reproduce them below. They are at article 19 of the 1994 Model Law and correspond to article 17 in the 1993 Model Law:



**“Article 19. Conditions for use of two-stage tendering, request for proposals or competitive negotiation**

(1) (Subject to approval by ... (the enacting State designates an organ to issue the approval),) a procuring entity may engage in procurement by means of two-stage tendering in accordance with article 46, or request for proposals in accordance with article 48, or competitive negotiation in accordance with article 49, in the following circumstances:

(a) It is not feasible for the procuring entity to formulate detailed specifications for the goods or construction or, in the case of services, to identify their characteristics and, in order to obtain the most satisfactory solution to its procurement needs,

(i) It seeks tenders, proposals or offers as to various possible means of meeting its needs; or,

(ii) Because of the technical character of the goods or construction, or because of the nature of the services, it is necessary for the procuring entity to negotiate with suppliers or contractors;

(b) When the procuring entity seeks to enter into a contract for the purpose of research, experiment, study or development, except where the contract includes the production of goods in quantities sufficient to establish their commercial viability or to recover research and development costs;

(c) When the procuring entity applies this Law, pursuant to article 1 (3), to procurement involving national defence or national security and determines that the selected method is the most appropriate method of procurement; or

(d) When tendering proceedings have been engaged in but no tenders were submitted or all tenders were rejected by the procuring entity pursuant to article 12, 15 or 34 (3), and when, in the judgement of the procuring entity, engaging in new tendering proceedings would be unlikely to result in a procurement contract.

(2) (Subject to approval by ... (the enacting State designates an organ to issue the approval),) the procuring entity may engage in procurement by means of competitive negotiation also when:

(a) There is an urgent need for the goods, construction or services, and engaging in tendering proceedings would therefore be impractical,






*provided that the circumstances giving rise to the urgency were neither foreseeable by the procuring entity nor the result of dilatory conduct on its part; or,*

*(b) Owing to a catastrophic event, there is an urgent need for the goods, construction or services, making it impractical to use other methods of procurement because of the time involved in using those methods.”*

One notes that there is no provision for consecutive negotiation when it comes to procurement of construction works but, rather, the Model Laws allow for competitive negotiations. These are more fully described and explained at article 49 of the 1994 Model Law (article 39 of the 1993 Model Law):

**“Article 49. Competitive negotiation**

*(1) In competitive negotiation proceedings, the procuring entity shall engage in negotiations with a sufficient number of suppliers or contractors to ensure effective competition.*

*(2) Any requirements, guidelines, documents, clarifications or other information relative to the negotiations that are communicated by the procuring entity to a supplier or contractor shall be communicated on an equal basis to all other suppliers or contractors engaging in negotiations with the procuring entity relative to the procurement.*

*(3) Negotiations between the procuring entity and a supplier or contractor shall be confidential, and, except as provided in article 11, one party to those negotiations shall not reveal to any other person any technical, price or other market information relating to the negotiations without the consent of the other party.*

*(4) Following completion of negotiations, the procuring entity shall request all suppliers or contractors remaining in the proceedings to submit, by a specified date, a best and final offer with respect to all aspects of their proposals. The procuring entity shall select the successful offer on the basis of such best and final offers.”*

In fact, one can see the spirit of articles 37 to 45 (Chapter IV, dealing with procurement of services) of the 1994 Model Law in our own section 24 of the PPA which provides for a distinct and well-demarcated framework of request for proposals for consultancy services. We do not believe these principles find their application in the present matter. Similarly, the general prohibition for negotiations (article 35 of the 1994 Model Law, article 34 of the 1993 Model Law) seems to be the basis of our own section 40(2) of the PPA. However, the legislator has specifically provided for ‘special circumstances’ for



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negotiation in the PPA which then refers us to the PPR and the PPO instructions (*vide* sections 40(2) and 40(2A) of the PPA).

These provisions, in the PPA and PPR, were brought by the same Minister of Finance, Mr Sithanen, and the same Parliament that had passed the Public Procurement Bill in 2006. The legislature provided for a specific mechanism for public bodies and/or the CPB to carry out negotiations. In fact, Mr Sithanen, immediately after making the statement quoted above, added:

*“Mr Speaker, Sir, apart from being benchmarked with international standards and best practices, the Bill aims at modernising the public procurement system in Mauritius by bringing fundamental institutional changes which are necessary to transform the procurement system into one which –*

- (i) achieves transparency in the procedures, simplifies the processes and decisions relating to public procurement;*
- (ii) promotes integrity, fairness, accountability and public confidence in the procurement process;*
- (iii) promotes competition and provides equal access without discrimination to all eligible and qualified suppliers of goods, works and services;*
- (iv) enables faster bidding which would result into a more rapid start and completion of projects with minimum cost overruns, and*
- (v) maximises economy and efficiency in public procurement and seeks best value for public expenditure on behalf of all taxpayers.”*

Even though we do not find that there are interpretation issues to be addressed in respect of the clear provisions of sections 40(2) and 40(2A) of the PPA and the connected Regulations, which might have necessitated reference to and use of the Hansard and parliamentary debates, we do bear in mind the comments of the legislature that has passed those provisions.

### **Conclusion on the UNCITRAL model laws**

On the whole, although we see the merits and the force in Mr Pillay’s suggestion that the model laws offer guidance and should be applied so that bidders must be informed that negotiations are concluded with them first before negotiations begin with another bidder, we very much doubt that article 44 of the 1994 Model Law would be applicable to create some form of legitimate expectation of procedural fairness or



to be deemed a basic principle of law that would override/regulate the method used by the CPB to negotiate – not only because in the 1994 Model Law itself it is intended to be used for the procurement of services but also because we do not find that our law is silent on the method of negotiating in the *Bérenger* sense (above). The provisions of the PPA and PPR are very clear and the mandatory instructions of the PPO through its Circulars are publicly available. That is not silence.

It may be that our legislative framework is not fully aligned with various model laws but this warrants intervention by the legislator and it is not for us to make new law or read into laws what seems to be specifically excluded, or contradicted. We also subscribe to the submissions of Parliamentary Counsel who drew a parallel with the International Arbitration Act 2008 – when our legislator desires that a treaty or model law be part of our local law, he expressly provides for this and, sometimes, incorporates such model laws and treaties verbatim.

We, therefore, hold that there was no duty on the CPB-RDA to inform Sinohydro that negotiations were taking place with GCC or any other bidder or such negotiations were being considered.

#### Legitimate expectations

The point of legitimate expectation has been made either expressly or may be implied in many of the Grounds for Review as couched. In this respect, we feel it is warranted to set out the principles relating to legitimate expectations as a feature of administrative law in our jurisdiction.

Initial guidance may be sought from the White Book 2017:

#### ***“Procedural Impropriety***

##### 54.1.6

*Judicial review will lie where there has been a breach of the common law rules of natural justice or procedural fairness (Ridge v Baldwin [1964] A.C. 40) or where there has been a failure to comply with any statutory procedural obligation, such as an obligation to consult prior to taking action. Broadly, the rules of natural justice require that a person be given a fair hearing before a decision affecting them is taken and that the decision maker is unbiased in the sense that there is no real danger that the decision maker will unfairly favour or disfavour that person R. v Gough [1993] A.C. 646; Re Medicaments and Related Classes of Goods (No.2) [2001] 1 W.L.R. 700 and Porter v Magill [2002] 2 A.C. 357. Whether the rules of natural justice or procedural fairness*





*apply to a particular decision-making process, and what the actual requirements of fairness require, depends on the circumstances of the particular case: see R. v Secretary of State for the Home Department Ex p. Doody [1994] 1 A.C. 531 at p.560. The rules of natural justice will normally apply where the decision concerned affects a person's liberty or their rights as where their property is being taken or where they are dismissed from a public office (as in Ridge v Baldwin [1964] A.C. 40 where a chief constable was dismissed by the police authority). A person may also have a legitimate expectation that they will be given a hearing or consulted before a decision is taken (even if the decision is not one that would normally attract the duty to observe the principles of natural justice). Such a legitimate expectation might arise either because of a promise that a person would be consulted or a past practice of consulting or, if a person has enjoyed a benefit, they may have a legitimate expectation that they will be consulted before the benefit is removed: see, generally, Council for Civil Service Unions v Minister for the Civil Service [1984] A.C. 374." (our emphasis)*

A more direct and binding pronouncement to our Mauritius jurisdiction can be found in the judgment of the Judicial Committee of the Privy Council - overturning a finding of the Supreme Court that an applicant's legitimate expectations had been thwarted - in the case of the **State of Mauritius v The (Mauritius) CT Power [2019] UKPC 27** extracts of which are reproduced below:

*'55. Mr Basset SC, for CT Power, accepts that in order to show that a legitimate expectation has arisen it is necessary to identify a promise or assurance by the relevant decision-maker which is "clear, unambiguous and devoid of relevant qualification" (per Bingham LJ in R v Inland Revenue Comrs, Ex p MFK Underwriting Agents Ltd [1990] 1 WLR 1545, 1569; approved in R (Gaines-Cooper) v Inland Revenue Comrs [2011] UKSC 47; [2011] 1 WLR 2625, paras 28-29).*

*[...]*

*58. It may be that the assurance given by the Ministry of Finance referred to above created a procedural legitimate expectation that the Ministry would consider whether any bank comfort letter submitted by CT Power was in the form of the draft bank comfort letter agreed at the meetings on 15 and 16 January 2015. The Ministry did consider whether the Avendus letter was in the form of the draft bank comfort letter; accordingly, it complied with such a procedural legitimate expectation, if there was one. However, there could be no question of the Ministry being subject to any substantive legitimate expectation arising out of what was said at the meetings on 15 and 16 January 2015 that it would confirm that Condition 15 was satisfied when it received the Avendus letter, both because the Ministry rationally and*



*lawfully concluded that that letter was not in the form of the draft which had been agreed and also because the Ministry of Energy was not prepared to sign the Implementation Agreement (whether in the draft then proposed by CT Power or in any other version).*

59. *CT Power enjoyed no legitimate expectation to the kind relied upon by the Supreme Court in its judgment. In the Attorney General of Hong Kong case, the Board stated the relevant principle in relation to procedural legitimate expectations as follows, at [1983] 2 AC 629, 638:*

*“... when a public authority has promised to follow a certain procedure, it is in the interest of good administration that it should act fairly and should implement its promise, so long as implementation does not interfere with its statutory duty. The principle is also justified by the further consideration that, when the promise was made, the authority must have considered that it would be assisted in discharging its duty fairly by any representations from interested parties and as a general rule that is correct.”*

Based on the evidence on record in this case, we do not find the conduct of the CPB-RDA in these proceedings, which meticulously followed the applicable PPO circulars with the added mechanism of going about one round of negotiation with each bidder sequentially and according to their initial rank, amounts to any promise or an indication of such which could have created any legitimate expectation in the mind of the Applicant that was later defeated with any resulting breach of expectation requiring our intervention.

Accordingly, Grounds No.1,2,3,4 and 6 do not succeed.

#### Bid evaluation

Ground No.5 has not been the subject of much focus in submissions and in evidence. However, we have perused the Bid Evaluation Report and we see no reason to interfere with the findings of the Bid Evaluation Committee set up by the CPB. We may say that both bids of Sinohydro and of GCC were very much compliant and the financial evaluation based on negotiated prices was the determining factor.

As such, we hold that Ground No.5 is also devoid of merit.

#### **Part III - CONCLUSION**

In light of the above, we find that this Application for Review is devoid of merits and is, accordingly, set aside.


The Applicant was given a proper and equal opportunity, and first rank, to review its price downwards, which it did. However, it

understandably drove a hard bargain bearing in mind the various interests and factors and the pandemic situation but, ultimately, it drove too hard a bargain.

We must express our appreciation to the Applicant and its representatives and legal advisors for the conduct of its case which has given the Panel the opportunity to address a very intricate matter under our procurement laws. We also wish to express our appreciation to Counsel on both sides for their thorough submissions and authorities filed in a very prompt manner, despite the time of year – these have greatly assisted the Panel in handing down this judgment.



H. Guresh  
**(Ag. Chairperson)**



A. K. Namdarkhan  
**(Member)**



R. Mungra  
**(Member)**

**Dated: 31<sup>st</sup> December 2020**

