Independent Review Panel

Decision No. 13/20

In the matter of:

NEC XON (South Africa)

(Applicant)

v/s

Mauritius Ports Authority

(Respondent)

(Cause No. 17/20/IRP)

Decision

INDEPENDENT REVIEW PANEL MAURITIUS

A. Background

The Respondent public body, the Mauritius Ports Authority (the "MPA" or the "Public Body") invited, by way of open international bidding, bids for security logistics and equipment for the port area of the island. There were eight bids received including that of the Applicant, NEC XON (South Africa), and that of the successful bidder, Brinks (Mauritius) Ltd.

The invitation to bid was issued by the Central Procurement Board and the eight bids were opened by the latter. It then sent all the bids to the MPA for continuation of the procurement process.

The MPA set up a bid evaluation committee and carried out the evaluation and selection exercise.

B. Notification of Award

On 23rd October 2020, the Mauritius Ports Authority ("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:

> ***"Name : Brinks (Mauritius) Ltd***
> ***Address : Industrial Zone, Solitude, Triolet***
> ***Corrected Contract Price: Rs 107,202,457.80 (Inclusive of VAT and Contingency)"***

C. The Challenge

On 28th October 2020, the Applicant challenged the procurement proceedings on the following grounds:

> *"- The MPA failed and/or neglected to comply with Section 11(2) of the Public Procurement Act 2006 inasmuch as it did not take into consideration the profile, experiences, technical expertise and the financial proposal made by NEC XON when it applied its:*
>
> *I. Evaluation criteria and methodology*
>
> *II. Qualification criteria and methodology disclosed in the bidding process*
>
> *III. Equal opportunity to all bidders*
>
> *IV. Fairness treatment to all parties*
>
> *V. The need to obtain the best value for money in terms of price, quality and delivery, having regard to set specifications; and*
>
> *VI. Transparency of process and decisions.*

- *The MPA notified NEC XON of its unsuccessful bid by a way of letter dated 23rd October 2020 bearing reference number 79/124. The particulars of the successful bidder given was Brinks (Mauritius) Ltd ("**the successful bidder**") with the contract price being Rs 107, 202, 457.80 (**Inclusive** of VAT and Contingency).*

- *At the public opening of bids held on Friday, 13th March 2020, it was recorded that **no discount** has been offered by the successful bidder and that the Bid amount after discount **exclusive** of VAT is Rs 99,996,592.07.*

  The price of the selected bid has undergone a very significant reduction and questions the regularity of the bid evaluation process since no discount had been offered by the successful bidder. Whilst NEC XON stated in the bidding submission that its bid is open to discounts, no clarifications were sought from NEC XON nor was NEC Xon offered the opportunity to revise its bid as was the case for Brinks (Mauritius) Ltd.

- *The award made by the MPA is in breach of ITB 15.7 and ITB 16.3 of the Bidding Data Sheet ("BDS").*

- *As set out in clause 28.3 of the Instruction to Bidders, "Only discounts and alternative offers read out at bid opening shall be considered for evaluation". Therefore, it is irregular that any discount has been considered in the evaluation of the successful bidder's bid post opening of the tenders.*

- *The decision to consider Brinks (Mauritius) Ltd as the successful bidder, and to award the tender to the latter is manisfestly wrong, unfair, unreasonable, irrational and untenable.*

- *The decision-making process of the MPA did not comply with the sacrosanct principles and procedures provided for under the Public Procurement Act 2006 and the directives issued by the Public procurement Office."*

D. The Reply to Challenge

On 3rd November 2020, the Public Body made the following reply to the challenge and stated that:

"Your bid dated 11 March 2020 included a bid security issued by a foreign bank in contradiction to the requirement of ITB 22.3 of the Bid Data Sheet, which required the bid security to be issued by a local bank or a foreign bank through a correspondent bank located in Mauritius. Moreover, the bid security was valid up to 9 July 2020 instead of 9 August 2020 as per the requirement of Addendum no.4 dated 20 February 2020 which is not in line with Regulation 29 of the Public Procurement Regulations 2008. As per the ITB 22.4 at Section I of the bidding document, any bid

not accompanied by an enforceable and substantially compliant Bid Security shall be rejected.

The above has been considered as a major deviation and accordingly, the offer from Nec Xon was not retained for further evaluation.

Your contention that the successful bidder was given the opportunity to offer a discount during the evaluation process is not founded and not in accordance with the Public Procurement Act 2006. Special circumstances for negotiation are governed by Regulation 8 of the Public Procurement Regulations 2008 and is applicable in case the lowest substantially responsive bid is above the estimated cost and a re-bid exercise is considered not practical. As such, no negotiation was held with the successful bidder.

Please note that pursuant to Section I – ITB 32.3 (a) of the Bidding Document, arithmetical corrections were made to the bid of the successful bidder. Furthermore, the successful bidder indicated 0% VAT on BOQ No. 1 – Main CCTV System and BOQ No. 2- Separate camera system for MPA buildings, leading to an award price of Rs 107,202,457.80 (Inclusive of VAT and Contingency).

We wish to inform you that the procurement procedures have been made in all fairness, transparency and in line with the Public Procurement Act 2006."

E. Grounds for Review

On 10th November 2020, the Applicant seized the Independent Review Panel for review on the following grounds:

"The decision of the Mauritius Ports Authority ("the Respondent" or "MPA") to award the tender Brinks (Mauritius) Limited ("the Successful Bidder"), is manifestly wrong, unlawful, unfair, unreasonable and untenable inasmuch as:-

1. *the bid security submitted by the Applicant was valid and ought not have been rejected by the Respondent.*
2. *the MPA failed and/or neglected to comply with Section 11(2) of the Public Procurement Act 2006 inasmuch as it did not take into consideration the profile, experiences, technical expertise and the financial proposal made by NEC XON when it applied its:*
   - *i. Evaluation criteria and methodology*
   - *ii. Qualification criteria and methodology disclosed in the bidding process*
   - *iii. Equal opportunity to all bidders*
   - *iv. Fairness treatment to all parties*

v. *The need to obtain the best value for money in terms of price, quality and delivery, having regard to set specifications; and*

vi. *Transparency of process and decisions.*

3. *The price of the selected bid for award has undergone a very significant reduction and questions the regularity of the bid evaluation process since no discount had been offered by the successful bidder. Whilst NEC XON stated in the bidding submission that its bid is open to discounts, no clarifications were sought from NEC XON nor was NEC XON offered the opportunity to revise its bid as was the case for Brinks (Mauritius) Ltd.*

4. *The award made by the MPA is in breach of ITB 15.7 and ITB 16.3 of the Bidding Data Sheet ("BDS").*

5. *As set out in clause 28.3 of the Instruction to Bidders, "Only discounts and alternative offers read out at bid opening shall be considered for evaluation". Therefore, it is irregular that any discount has been considered in the evaluation of the successful bidder's bid post opening of the tenders.*

6. *The decision to consider Brinks (Mauritius) Ltd as the successful bidder, and to award the tender to the latter is manisfestly wrong, unfair, unreasonable, irrational and untenable.*

7. *The decision-making process of the MPA did not comply with the sacrosanct principles and procedures provided for under the Public Procurement Act 2006 and the directives issued by the Public procurement Office."*

G. Statement of Case of Applicant

"1. ***INTRODUCTION***

1.1 On 06 December 2019, the Mauritius Ports Authority invited sealed bids from eligible and qualified Bidders for the Design, Supply, Installation and Commissioning of Centralised Access Control and CCTV Systems for Port Area Surveillance.

1.2 On 13 March 2020, NEC XON (South Africa) submitted its bid.

1.3 The sealed bids were opened on 13 March 2020 and recorded by the Respondent. The said record of the public opening of the bids confirms that the Applicant had submitted (i) the Bid Submission Form and Signed and (ii) the Bid Security.

The record of the bids received on 13 March 2020 is herewith annexed and marked ***Annex A.***

1.4 *By an email dated 29 May 2020, the Respondent requested the Applicant to extend the Bid Validity.*

The email dated 29 May 2020 is herewith annexed and marked ***Annex B.***

1.5 *By another email dated 04 June 2020, the Respondent requested the Applicant to extend the bid validity up to 30th October 2020 and to make arrangements for extension of the bid security until 28 November 2020.*

The email dated 04 June 2020 is herewith annexed and marked as ***Annex C.***

1.6 *By email dated 14 July 2020, the representative of the Applicant confirmed the bid validity until 30th October 2020 and further provided the Respondent with an extended bid security as requested on 04 June 2020.*

The email dated 14 July 2020 is herewith annexed and marked ***Annex D.***

1.7 *By letter dated 23 October 2020, the Respondent informed the Applicant that the successful bidder was Brinks (Mauritius) Limited and that the amount of the retained bid was Rs. 107202,457.80 (Inclusive of VAT and Contigency).*

A copy of the letter dated 23 October 2020 is herewith annexed and marked as ***Annex E.***

1.8 *On 28 October 2020, the Applicant challenged the decision of the Respondent to award the tender to Brinks (Mauritius) Limited.*

1.9 *On 03 November 2020, the Respondent replied to the challenge of the Applicant as follows:-*

'Your bid dated 11 March 2020 included a bid security issued by a foreign bank in contradiction to the requirement of ITB 22.3 of the Bid Data Sheet, which required the bid security to be issued by a local bank or a foreign bank through a correspondent bank located in Mauritius. Moreover, the bid security was valid up to 9 July 2020 instead of 9 August 2020 as per the requirement of Addendum no.4 dated 20 February 2020 which is not in line with Regulation 29 of the Public Procurement Regulations 2008. As per the ITB 22.4 at Section I of the bidding document, any bid not accompanied by an enforceable and substantially compliant Bid Security shall be rejected.

The above has been considered as a major deviation and accordingly, the offer from Nec Xon was not retained for further evaluation.

Your contention that the successful bidder was given the opportunity to offer a discount during the evaluation process is not founded and not in accordance with the Public Procurement Act 2006. Special circumstances for negotiation are governed by Regulation 8 of the Public Procurement Regulations 2008 and is applicable in case the lowest substantially responsive bid is above the

estimated cost and a re-bid exercise is considered not practical. As such, no negotiation was held with the successful bidder."

A copy of the letter dated 03 November 2020 is herewith annexed and marked as ***Annex F.***

2. GROUNDS FOR REVIEW

2.1 *The decision of the Respondent to award the tender Brinks* ***(Mauritius) Limited*** *("the Successful Bidder"), is manifestly wrong, unlawful, unfair, unreasonable and untenable inasmuch as:-*

a) *The bid security submitted by the Applicant was valid and ought not have been rejected by the Respondent.*

b) *The scope for the bid was too wide. It entitled the bidders to bid for various products and therefore made them subject to unreasonable comparison and evaluation, as such, the bidders were always facing an impossible task. The Applicant will explain that the product for which it made a bid was completely different and much more expensive than the product presented by the successful bidder, which was less expensive and less technically sophisticated. As such, the Applicant suffered from a disadvantage as a result of the unreasonably wide scope.*

c) *The MPA failed and/or neglected to comply with Section 11(2) of the Public Procurement Act 2006 inasmuch as it did not take into consideration the profile, experiences, technical expertise and the financial proposal made by NEC XON when it applied its:*

a. *Evaluation criteria and methodology*

b. *Qualification criteria and methodology disclosed in the bidding process*

c. *Equal opportunity to all bidders*

d. *Fairness treatment to all parties*

e. *The need to obtain the best value for money in terms of price, quality and delivery, having regard to set specifications; and*

f. *Transparency of process and decisions.*

d) *The price of the selected bid for award has undergone a very significant reduction and questions the regularity of the bid evaluation process since no discount had been offered by the successful bidder. Whilst NEC XON stated in the bidding submission that its bid is open*

to discounts, no clarifications were sought from NEC XON nor was NEC XON offered the opportunity to revise its bid as was the case for Brinks (Mauritius) Ltd.

e) *The award made by the MPA is in breach of ITB 15.7 and ITB 16.3 of the Bidding Data Sheet ("BDS").*

f) *As set out in clause 28.3 of the Instruction to Bidders, "Only discounts and alternative offers read out at bid opening shall be considered for evaluation". Therefore, it is irregular that any discount has been considered in the evaluation of the successful bidder's bid post opening of the tenders.*

g) *The decision to consider Brinks (Mauritius) Ltd as the successful bidder, and to award the tender to the latter is manifestly wrong, unfair, unreasonable, irrational and untenable.*

h) *The decision-making process of the MPA did not comply with the sacrosanct principles and procedures provided for under the Public Procurement Act 2006 and the directives issued by the Public procurement Office.*

3. THE CASE OF THE APPLICANT

3.1 *The decision of the Respondent communicated on 03 November 2020 to the Applicant, to disregard its bid on account of the fact that it purportedly submitted a bid security issued by a foreign bank valid up to 9 July 2020 is unreasonable, irrational and a breach of the legitimate expectations of the Applicant inasmuch as:*

3.1.1 the Respondent, acting through one of its préposé, did in fact acknowledge that the Applicant had duly submitted an original bid security (Annex A, B, C & D Refers).

3.1.2 The bid security was issued by Citibank N. A. South Africa and as per letter dated 04 June 2020 sent by the Respondent to the Applicant, the validity of the bid security had to be extended up to 28 November 2020.

3.1.3 This is confirmed by the email from the Applicant dated 14 July 2020 (Annex D refers) extending its bid security to 28 November 2020. 9. Further as evidenced by a letter dated 19 June 2020 sent by Citibank N.A. South Africa to the Respondent, it was noted that expiry date for the bank guarantee was amended to read 28 November 2020. Thereby, the Respondent's contention that the bid security expired on 9th July 2020 is untenable.

3.2 *In the circumstances, the Applicant contends that thus the issue of invalidity of the bid security by the Applicant never arose in the course of the procurement*

process and at any rate by the conduct of the Respondent's préposés, the Applicant's bid security is deemed to have been duly accepted.

3.3 The Applicant's bid was therefore substantially responsive and there could not have been any material deviation therein as alleged by the Respondent in view of the above. The Respondent has therefore acted in breach its own ITB and BDS in rejecting the Applicant's bid solely on the ground of an alleged invalidity of the bid security.

4. THE APPLICANT'S PRAYERS

4.1 The Applicant prays:

(i) For an Order suspending the procurement proceedings until the present application I is determined by the Review Panel pursuant to section 45 (4) of the Public Procurement Act 2006;

(ii) that the issue be determined within the prescribed period set by the Review Panel and that the Respondent does not proceed with the award of contract while the Review Panel is still adjudicating upon same; and

(iii) that no certificate to the effect that urgent public interest considerations require the procurement proceedings to proceed be issued pending the final determination of the present application for review.

4.2 The Applicant further prays the Independent Review Panel:-

(a) To prohibit the Respondent from acting or deciding in an unauthorised manner or from following an incorrect procedure;

(b) To recommend the annulment in whole of the decision of the Respondent;

(c) To recommend a re-evaluation of the bids and a review of the decision of the Respondent to award the tender to Brinks (Mauritius) Limited, specifying the grounds for such recommendation; and

(d) To recommend payment of reasonable costs incurred in participating in the bidding process where a legally binding contract has been awarded which, in the opinion of the Review Panel, should have been awarded to the Applicant."

H. Statement of Reply of Respondent

*"**Preliminary Objection***

The Respondent moves that the present application be set aside inasmuch as it has not been lodged within the prescribed delay of 7 days in breach of Section 45 (2) of the Public Procurement Act and Regulation 48 (5) of the Public Procurement Regulations.

On the merits

1. *Respondent admits the averments at paragraphs 1 and 1.1 to 1.9 of the Statement of Case of the Applicant (hereinafter referred to as "the Statement of Case").*

2. *Respondent denies the averments at paragraphs 2.1 of the Statement of Case and puts Applicant to the proof thereof.*

3. *Respondent denies the averments at paragraph 2.1 (a) of the Statement of Case and avers that on the closing date of the bid submission on 13 March 2020, the bid security, as submitted by the Applicant, was of a shorter period as compared to the requirements of Addendum No. 4.*

4. *Respondent denies the averments at paragraph 2.1 (b) of the Statement of Case and avers that the Applicant was entitled under Clause 8 of the Instructions to Bidders to seek clarifications from the Respondent and thereafter to submit technically responsive bids at competitive prices.*

5. *Respondent denies the averments at paragraph 2.1 (c) of the Statement of Case and avers that Section 11 (2) of the Public Procurement Act relates to the duties of the Board, which is the Central Procurement Board. Respondent further avers that-*

   (a) *all bids examined in accordance with the requirements set out in the bidding documents, including determination of a bid's responsiveness based on the contents of the bid itself;*

   (b) *the bid of the Applicant was not considered as responsive as the bid security was valid for a shorter period than required;*

   (c) *the bid of the Applicant disclosed a material deviation leading to its non-responsiveness and to its non-selection for further evaluation.*

6. *Without making any admission to the averments at paragraphs 2.1 (d) and (e) of the Statement of Case, Respondent avers as follows:*

   (a) *Clauses 15.7 and 16.3 of the Instructions to Bidders are in fact instructions to bidders;*

   (b) *as per Clause 15.7 in the Bid Data Sheet, the price quoted by a bidder shall not be adjustable. However, pursuant to Clause 32.3 of the Instructions to Bidders, provided that a bid is substantially responsive, arithmetical errors in the bid may be corrected;*

(c) *the price submitted by the successful bidder was not adjusted on the basis of any discount whatsoever.*

7. *Respondent denies the averments at paragraphs 2.1 (f), (g) and (h) of the Statement of Case and reiterates the averments at paragraphs 3, 4, 5 and 6 above.*

8. *Without making any admission to the averments at paragraph 3.1, 3.1.1, 3.1.2 and 3.1.3 of the Statement of Case, Respondent denies that its decision is unreasonable, irrational and a breach of the legitimate expectation of the Applicant and puts Applicant to the proof thereof. Respondent further avers that –*

(a) *as per Clause 22.3 of the Bid Data Sheet, it was a mandatory requirement that "the bid shall be in the form of an unconditional bank guarantee issued by a recognized bank in Mauritius or a foreign bank through a correspondent bank located in Mauritius"; and*

(b) *the Applicant did not comply with this mandatory requirement.*

9. *Respondent denies the averments at paragraphs 3.2 and 3.3 of the Statement of Case and reiterates the averments at paragraphs 5, 6, and 8 above.*

10. *Without making any admission to the prayers contained at paragraph 4 of the Statement of Case, Respondent is advised that all costs associated with the preparation and submission of bids are to be borne by the bidder and the Respondent is not responsible or liable for those costs, regardless of the conduct or outcome of the bidding process.*

11. *In light of the above, Respondent moves that the application be set aside."*

I. The Hearing

Hearings were held on 25th November 2020 and 30th November 2020.

The Applicant was assisted by Mrs P. Balgobin-Bhoyrul and Ms Desai instructed by S.K.Mardemootoo whereas the Respondent was represented by Mr K. Naghee-Reddy, Acting Assistant Parliamentary Counsel.

The successful bidder was in attendance.

J. Findings

This is the second application for review relating to these procurement proceedings conducted by the Mauritius Ports Authority, the other one having been lodged by Security and Property Protection Agency Co. Ltd **(CN 16/20/IRP)**. That other matter is being heard by a differently-constituted Panel and has been lodged on 9th November 2020 while the present application was lodged on 10th November 2020.

Both cases were called for hearing on the merits on 25th November 2020. Upon perusal of the documents provided by the MPA, it became apparent to this Panel, as it did to the other Panel, that a questionable process has been followed. Indeed, the present procurement proceedings were begun by the Central Procurement Board (the "CPB") and even bore a CPB reference. Upon opening of the eight bids, at the office of the CPB, it was decided by the latter to send all the bids back to the MPA for 'evaluation and award'. The reason being that six out of the eight bids were below the prescribed amount set for the MPA namely, Rs 100 million. The Deputy Chief Executive of the CPB, in his letter to the MPA, also stated that if the selected bidder was one of the two bidders having bid above that threshold (Rs 133 and 204 million), the MPA was to forward certain documents to the CPB.

In fairness, we sought submissions and the stand of Mr Reddy, Acting Assistant Parliamentary Counsel, on the matter and he moved for a postponement to seek further instructions and this would also allow the CPB to be in attendance at the subsequent hearing. At this point, the representatives of the MPA moved the Panel to issue a letter to invite the CPB to attend the subsequent hearing, which we had set for Monday 30th November 2020.

The Acting Chairperson of the Panel directed that a letter be issued in respect of both applications arising from these procurement proceedings seeking clarifications on the above issues and inviting the CPB to attend the hearings of 30th November 2020.

On 26th November 2020, the Panel received the response of the CPB, under the signature of its Chief Executive, to the effect that the CPB cannot approve award of contracts below prescribed limits and it has been the established practice of the Board to send bids back to public bodies when they were below the applicable prescribed amount with the caveat that, if the selected bidder is above the threshold designated by the lawmakers in respect of each government department, the public bodies are to revert to the CPB with all necessary document for the latter's consideration and decision. As such, the CPB was of the view that its attendance at the IRP hearings of the 30th November 2020 was not warranted.

At that second hearing before us, Mr Reddy stated, correctly in our view, that policies cannot thwart the law, and he expressed his doubts as to whether that practice of the CPB was legally sound. He moved that the matter be remitted back for the CPB to carry out the bid evaluation but he invited us to hand down a judgment setting out the Panel's views on the above issues, for the benefit of one and all. Representatives of the MPA stressed the importance of this project for the safety of the port area. They added that they did only what they were told by the CPB and that it had been a practice, even by the then Central Tender Board, that bids could move between public bodies and the expert evaluation boards.

Mrs Balgobin-Bhoyrul appearing for the Applicant moved that the whole procurement proceedings be annulled in light of those issues.

The Law

The case turns on the definition of what a major contract is. It cannot be disputed that the CPB must be the entity handling, assisting and advising on the procurement of major contracts.

The starting point must be section 2 of the Public Procurement Act 2006 **("PPA")** and its definition of the word 'major contract':

"major contract" means a contract for the procurement of goods or services or the execution of works -

(a) to which a public body is or proposes to be a party; and

(b) the estimate of the fair and reasonable value of which exceeds the prescribed amount;'

It stands to reason that one must then look at what is meant by the 'estimate of the fair and reasonable value', the moreso that the Public Procurement Regulations 2008 **("PPR")** are peppered with the word 'estimate', in respect of procurement value and cost of procurement, *inter alia*. We set out below one such instance where the word occurs in the context of estimated value, with which we are, here, concerned.

Regulation 10 of the PPR directs public bodies to stay within their designated estimates by carrying out procurement planning. Its sub-section (1) reads:

*"**10. Procurement planning***
(1) A public body shall engage in procurement planning in order to ensure that procurement is carried out within financial estimates allocated to it."

It seems to us crystal-clear that the prime consideration a public body must act upon is the estimate of the financial value of the procurement it proposes to initiate or cause to be initiated. Of course, Regulation 10(1) should, to us, be read as a strong word of advice and not a ceiling set in stone. Be that as it may, each public body will act upon and would know the financial estimates allocated to it for any given procurement. This estimated value then dictates the fate of whether the proposed procurement is a major contract or not by a simple reference to the Schedule of the PPA in line with section 2 as quoted above.

To our minds, this characterisation as major contract or not is, in truth and in fact, set in stone. It happens very, very early in the day, at the inception of a proposed procurement, and cannot change. A contract cannot move between the two categories for any policy reason when the law has so visibly created a dichotomous framework.

A major contract must be handled by the CPB from beginning to end until the latter's final recommendation to the client Public Body. We do not feel it necessary to set out the plethora of statutory provisions describing the duties of the CPB in relation to major contracts, both in the PPA and the PPR, including Regulation 4 of the PPR which provides for very details steps to be followed by the CPB. Suffice it, in our opinion, to set out section 14 of the PPA in full:

*"**14. Procedure of the Board***
(1) The Chief Executive Officer of a public body shall inform the Board in writing of any major contract that the public body intends to enter into and shall submit all the relevant documents to the Board.

(2) The Board shall, within such time as may be prescribed after having been notified in accordance with subsection (1), authorise the public body to call for bids or utilise another appropriate procurement method.

(3) The Board shall approve the award of every major contract.

(4) No public body shall -

(a) advertise, invite, solicit or call for bids in respect of a major contract unless authorised by the Board; or

(b) award a major contract unless the award has been approved by the Board.

(5) No person shall sign a major contract with a public body unless the award has been approved by the Board.

(6) For the avoidance of any doubt, this section shall not apply where the award of the contract is made following an emergency procurement under section 21 or a direct procurement under section 25."

On the facts, in this case, the MPA sought the intervention of the CPB because the estimated value was above Rs 100 million and by definition, a major contract. The CPB began performing its functions, in line with section 11 of the PPA, namely, it must have established internal procedures, vetted bidding documents and notices and opened the bids received at its offices. Upon seeing that 6 out of the 8 bids were below Rs 100 million, it simply sent all the eight bids to the MPA directing the latter to continue the procurement process. In effect, the CPB converted a major contract into a non-major contract midway through the process. Section 11(1)(d) *et seq* of the PPA was completely disregarded. Sub-section (1)(d) reads:

"(d) select persons from a list of qualified evaluators ***maintained by it*** *to act as members of a bid evaluation committee and oversee the examination and evaluation of bids; and"* (our emphasis)

It is not disputed that it was the MPA that set up a bid evaluation committee in this case.

The flaw of this process is made even more apparent by the fact that two out of the 8 bids were above the Rs 100 million mark and, by necessary implication, one may feel that the CPB had already made up its mind regarding those two bids. As fate would have it, one of those bidders is the Applicant before us and this goes to show what could be the consequences of the incorrect procedures being followed – the Applicant's bid of Rs 133 million was not evaluated by the body in whom the law has vested the power and duties to do so. We are, in fact, of the view that, even if all eight bids been below the prescribed Rs 100 million, it would not change the fact that this contract was a major one based on the definition based on the *'estimate of the fair and reasonable value'* of the procurement of goods, services or works.

True it is that the CPB indicated, in its letter to the MPA shortly after the opening of bids and in its letter to us, that the MPA was to revert if the bidder selected for award by the MPA was

one above Rs 100 million, but this Panel has seen no basis for such practice in the laws and nor has Mr Reddy. We also note, from its letter to us, that the CPB's focus has been on the procurement value at award stage and the statement that 'the Board cannot approve award of contracts below that limit'. With the utmost respect, this is patently misconceived. A contract must, first, be categorised as major or not. The estimated value comes in at that early stage to demarcate between the two categories. If it is a major contract, the CPB is expected to follow through even if the selected bidder, offering a particularly competitive price, would be below the prescribed amount. The Procurement Policy Office and the PPA have provided for safeguards in respect of low bid prices quoted that need no further discussion, here.

The corollary to this would be that if a non-major contract is advertised and the bidders are all above the prescribed amount, the public body would, in our opinion, have to ask itself if it could handle it or restart the process as a major contract with the help of the CPB; in case only a few bids, including the selected bidder, are above the public body's prescribed amount, then Regulation 10 of the PPR may assist the public body's officers in taking appropriate administrative decisions they feel are warranted. One may also look to section 39 dealing with cancellation of procurement proceedings. We say so because it has been intimated to us that it has also been a practice that public bodies, when faced with many bids above their prescribed amount, have sent the bids to the CPB for evaluation. Once again, this does not seem to have any basis in the prevailing laws. A non-major contract cannot become a major one midway since the characterisation rests on estimated value, which characterisation must be done at source.

We find further support for this reading of the law by the clear provisions contained in section 12(3) of the PPA which reads as follows:

"(3) Where -

(a) any variation in a contract price subsequent to the conclusion of a procurement contract entered into by a public body causes the total contract amount to exceed the prescribed amount by more than 20 per cent; or

(b) the lowest bid submitted in response to an invitation made by a public body exceeds the prescribed amount,

the matter together with all the bidding documents and the contract documents, if any, shall be referred to the Board for approval." (underlining is ours)

Thus, even if the selected bidder's contract price, at the time of award and signature, is more than 20% above the prescribed amount for any given public body or when the lowest bid, presumably at opening stage, is found to be above the prescribed amount, the public body needs to refer the matter, with all documents, to the CPB for approval. The legislator does not expect the CPB to evaluate the bids, as it would in the case of a major contract (as we have seen above). Even then, the minor contract was not expected, by Parliament, to be transformed into a major one. A breach of section 12(3) of the PPA by a public body's officer(s) that is discovered by the CPB entails a referral to the Head of Civil Service, *vide* sections 12(4) and (5) of the PPA.

The representatives of the MPA explained to us that they only followed the guidance of the CPB and we do not doubt that. They also stated to us that the practice of procurement bids moving to and fro the CPB and public bodies is a long-established one that dates back to the days of the Central Tender Board. We believe that this practice, thought to be a policy, cannot stand in the face of the law and no matter how long-lived it may have been; it is the first time, as far as we are aware, that it has been submitted to judicial scrutiny.

At one stage, one of the representatives of the MPA suggested that the estimate value is the price quoted by the selected bidder. Again, this is misconceived. First, an estimate is defined in the Oxford Dictionary as 'an approximate calculation or judgement of the value, number, quantity, or extent of something.'. By definition, therefore, estimates cannot exist after the opening of bids when the quoted price by each bidder becomes known. Secondly, were the estimated value (for the categorisation as major or non-major) to be assessed on or after evaluation stage, this would create a number of further breaches to the laws and the PPO's policy and the public bodies should do well to avoid such course of action. For example, if estimated value was assessed at evaluation stage, how could Directive No.46 of the PPO in relation to section 37(10A) of the PPA, and that section of the law itself, even apply? No bid could be 'abnormally low' – by being 15% or more lower than the estimated cost – because the bid itself would be the base figure! We do not propose to entertain further such a proposition.

Although we are conscious of the many operational issues faced every day by our fellow entities of the PPO and the CPB and by public bodies, all of them seeking to find pragmatic solutions to such problems for the efficiency of public procurement, we must answer by repeating the submissions by Mr Reddy that policy cannot thwart the law, and this is precisely what has happened, here. Mr Reddy has submitted that he has not found any policy directive or paper by the PPO nor any statutory provisions that would have allowed the CPB to act the way it has. We have not, either. We may go even further in that we do not believe the PPO itself could devise a policy about changing the category of contracts that could be reconcilable with the laws. The legislator has provided for a black or white approach and we feel that it is not for us, a quasi-judicial body, to create or condone a grey area, and it is certainly not for the Executive branch of government to do so. Only Parliament can intervene to provide for what has to be done if an intended major contract, advertised as such, is to be 'demoted' to a non-major one after the opening of bids.

Findings

We have had the benefit of reading the draft judgment of the other Panel, or division of the Panel, that has heard the case of Security and Property Protection Agency Co. Ltd v Mauritius Ports Authority **(CN 16/20/IRP)** and in light of their decision, we too find that a re-evaluation of the eight bids has to be carried by a bid evaluation committee set up by the CPB and the whole procurement proceedings be dealt with as a major contract, as should have been the case.

As suggested by the representatives of the MPA, after giving their stand on the evaluation process itself, all bidders are to be given an opportunity to extend any relevant matter pertaining to their bids.

Observations

Even though we have not had the opportunity to fully address the preliminary point raised by the MPA that this Application for Review has been lodged outside delay, we must urge applicants seeking redress before us to be mindful of the clearly set time-limits that obtain under the procurement laws, which time-limits this Panel has extensively addressed in the case of Agiliss Ltd v Ministry of Health and Wellness **(Decision 08/20)**.

We feel it appropriate to express our appreciation and our gratitude to Mr Reddy, Acting Assistant Parliamentary Counsel, for his useful and fair-minded submissions before us that have been of much assistance.

A. K. Namdarkhan
(Member)

V. Mulloo
(Member)

A. Gathani
(Member)

Dated: 8th December 2020