



Independent Review Panel

Decision No. 01/21

In the matter of:

RBRB Construction Ltd

(Applicant)

v/s

The Municipal Council of Beau Bassin – Rose Hill

(Respondent)

(Cause No. 01/21/IRP)

Decision



A. History of the case

The Public Body, through Open International Bidding, invited bids for the Renovation of Plaza Theatre (Phase III), bearing Procurement Reference No: **MBBRH/01B/2018/2019**. Being a major contract, it was handed over to the Central Procurement Board (“CPB”) bearing Procurement Reference: **CPB/31/2019**. The deadline for submissions of bids was fixed for 27 February 2020 which was later extended by the Public Body to 06 October 2020.

Three (3) bids were received including the Applicant and Public Opening was carried out on the same day in the Conference Room at the CPB.

B. Evaluation

A Bid Evaluation Committee was set up by the Central Procurement Board to evaluate the bids received and identify the lowest evaluated bid that meets the qualification criteria.

C. Notification of Award

On 28 December 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 its bid has not been retained for award.

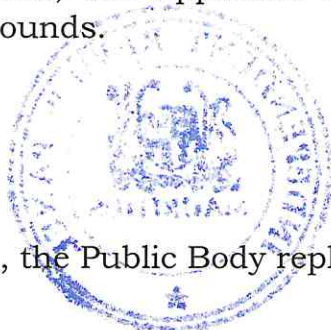
“The particulars of the successful bidder is Tianli Construction Co. Ltd of Military Road, Tombeau Bay for the corrected sum of Rs222,546,947.51 (Two hundred and twenty two million five hundred and forty-six thousand, nine hundred and forty seven rupees and fifty one cents only) excluding VAT.”

D. The Challenge

On 30 December 2020, the Applicant challenged the procurement proceedings on 12 grounds.

E. Reply to Challenge

On 06 January 2021, the Public Body replied to the challenge.



F. Grounds for Review

On 11 January 2021, the Applicant being not satisfied with the reply to challenge, seized the Independent Review Panel for review on the following grounds:

“1. The Bid Evaluation Committee decision goes against the Procurement Policy Office, Directive No. 46

(a) which was applicable, operative and continued at the time Tianli Construction Company Ltd (hereinafter referred to as “TCCL”) put in its submissions and same until the duration of the evaluation period which ended 29/11/2020 as per the CBP Project Status posted online.

(b) The Public Body according to the above Directive No. 46 should have refused to accept the bid from TCCL.

2. The selected bidder has submitted an abnormally low bid as defined in Directive No. 46 (Abnormally low bids) from the Public Procurement Office.

The estimated project value is Rs 300M including VAT and the tendered price is more than 15% lower than the budgeted estimate of the Employer.

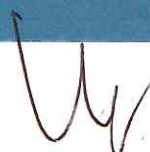
3. The selected bidder is in breach of the mandatory bidding requirement as provided in Clause 2.2.1 of Section III of the Evaluation Criteria (Historical Contract Non-Performance) of the Bidding Documents.

Circular No.4 of 2015 issued by the Procurement Policy Office of the Ministry of Finance and Economic Development issued on the 20th August 2015 disqualifies TCCL from participating in any Public Procurement exercise until the 19th August 2016.

*The letter states unequivocally that TCCL is disqualified from participation in any public procurement for a period of **one year with effect from 20 August 2015 to 19 August 2016** because of their poor performance and extreme delays in completion of a contract awarded to it by (Ministry of Education and Human Resources (MOEHR).*

*Furthermore, the Circular specifically request and direct the Heads of Public Bodies to ensure that TCCL does not receive any procurement documents to participate in any procurement exercise during the period of disqualification. **The period of disqualification was effective up to the 19th August 2016.***





The Public Body should not have allowed TCCL to participate in the bidding exercise when the bids were deposited at CPB on the 06th October 2020 by reason of a **“must meet requirement”** in the bidding document namely mandatory Clause 2.2.1 (History of non-performing contracts, Page 1-33 of the Bidding Documents) for poor performance during the last 5 years **effective from 19th August 2016**.

4. Pursuant to Section 35 of the Public Procurement Act 2006 and Regulation 14 of the Public Procurement (Disqualification) Regulations 2009, the selected bidder has been previously disqualified (debarred) as a result of **its poor performance and extreme delays** in the completion of a contract awarded by Ministry of Finance and Economic Development for a period of 1 year from 20 August 2015 to 19 August 2016.

5. The selected bidder has also been issued with a Prohibition Notice in June 2019 by the Ministry of Labour, Human Resources Development and Training for non-compliance with Health & Safety requirement and had violated the OSH Act, the notice was removed in April 2019 and February 2020.

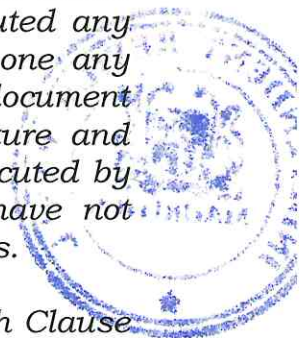
In addition to the above sanction TCCL has also been issued with Occupational Safety Health Prohibition notices by the Ministry of Labour, Human Resource Development and Training and this prior to the bid submission date under reference.

Three prohibition notices as listed below were issued and we have strong reasons to believe that this was not disclosed by TCCL:-

Date of Prohibition	Date Prohibition Order Removed
25.06.2019	06.02.2020
26.26.2019	06.02.2020
22.02.2019	03.04.2019

6. We strongly submit that the selected bidder does not have the required experience in renovation and refurbishment of Heritage Works such as the Plaza Theatre. This bidder has at date not executed any work related to National Heritage buildings nor have they done any renovation Works as stated in **heading** of the bidding document (“RENOVATION OF PLAZA THEATRE PHASE III”) of this nature and magnitude in Mauritius. We are attaching a list of projects executed by TCCL and Independent Review Panel will note that they have not executed any renovation works of Heritage Building in Mauritius.

We have reason to believe that TCCL is not in compliance with Clause 2.4.2 (a) of Page 1- 36 R1 (Specific experience) of the Bidding Documents.




7. It is submitted that Regulations 7(2) of the Public Procurement Regulations 2008 has not been complied with inasmuch as an advisor from the National Heritage Fund should at least have assisted in the evaluation exercises of the Bid Evaluation Committee.

8. It is submitted that TCCL has heavily underperformed on different projects namely:-

I. Design and Build Contract namely the Construction of New Recreational Centre for the Elderly and Disabled at Riambel where its Architect was Pixel Creation Ltee represented by Mr Hans Dwarka, who was working in the team of TCCL and under its instructions. The project was scheduled for execution in 18 months but was finally completed after more than four years after the start of Works.

It is submitted that the Ministry of National Infrastructure & Community Development formerly known as Ministry of Public Infrastructure & Land Transport has on several occasions warned this bidder on its poor performance and that its Performance Security would be forfeited for non-performance – the M.P.I will be summoned to adduce evidence of that issue before the Independent Review Panel.

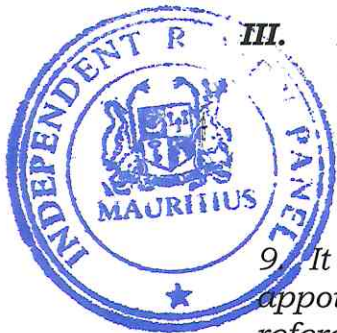
II. Design and Build of an Administrative Building for the District Council of Pamplemousses started around November 2018 where the Client was District Council of Riviere du Rempart and again the Architect was Pixel Creation Ltee by Mr Hans Dwarka working under the instruction of TCCL.

III. Recently, the construction of the National Wholesale Market at Five Ways, Belle Rive started around September 2018, where the Client was Ministry of Agro Industry and Food Security and the Architect was again Pixel Creation Ltee by Mr Hans Dwarka.

9. It is submitted that the Architect/Engineer, Pixel Creation Ltee appointed by the Public Body as their Consultant for the project under reference has been in a situation of conflict of interest inasmuch as he has worked in closed association with TCCL of numerous projects. See list of projects enclosed.

It is further submitted that the Architect/Engineer relative namely, one Mr Soochit Dwarka is the Secretary and the Shareholder of TCCL.

10. It is submitted that the Bid Evaluation Committee and the Public Body should have given due weight to RBRB Construction Ltd which is a 100% Mauritian owned Company with local shareholders and will





work with Mauritian Management and workers whereas Tianli Construction Company Ltd is fully foreign owned Company with foreign shareholders and directors with no labour of no such expertise.

It would be in the interest of our Country if the award of the Heritage project goes to RBRB Construction Ltd which has completed part of the renovation of the Plaza (Phase II) to the satisfaction of the Employer and the Consultants. RBRB Construction Ltd has successfully completed renovation Works for the old Municipal Theatre in Port Louis and Renovation works at Appravasi Ghat.

*In line of the above numerous short comings, poor performance, no due care of Occupational and Safety and Health, TCCL is **NOT** the best responsive offer and we strongly submit on the ability and experience of this bidder to perform this Contract and strongly contest that TCCL is in a position to execute and complete this project satisfactorily.*

We submit that Clause 2.4.2 (a) specific experience at Page 1 – 36 R1 in the Bidding Documents has been wrongfully drafted and should have read as follows:-

Renovation and Construction of Theatre/Historical/Heritage Buildings and in one contract relating to renovation or construction works of a timber structure inasmuch as the Works involved in the current Plaza Project is mainly of Timber works.

Statement of Applicant on economic interest: *We aver that it will be a major loss of Income for our Company.*

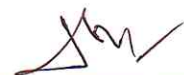
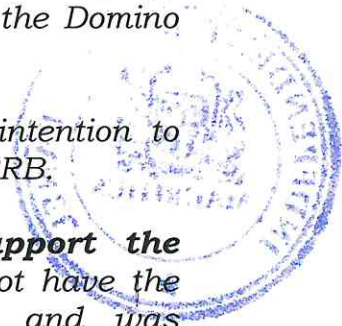
Special measure sought for: *We have to reduce our local workforce at a time when the livelihood of workers is at stake with the Domino effect resulting from the Pandemic Covid – 19.*


Relief requested: *To disqualify TCCL and cancel the intention to award the Contract to TCCL and to award the contract to RBRB.*

Reasons of request for specific documents to support the application: *We strongly believe that this bidder does not have the adequate experience in renovation of Heritage works and was disqualified from submitting offer by reason of Circular No 4 of 2015.*

The Public Body should not have accepted the bid from TCCL by reason of Circular No. 4 circulated to all head of Public Bodies.

Reasons of request for hearing: *The Public Body has failed to properly assess our bid and intended to award the contract to a contractor with no proven and relevant experience.”*



G. Reply to the Grounds for Review

The Respondent filed a Statement of Reply which are as follows:-

“Under Grounds of Review 1 and 2

4. *It is submitted that the Respondent is aware of the requirements under Directive No. 46 regarding Abnormally Low Bids. The Bid Evaluation Committee (the “BEC”) has followed the requirements under Directive No. 52 and under Section 37 (10A) (a) of the Public Procurement Act 2006 (the “PPA”).*
5. *It is submitted that the selected bidder was duly requested to submit additional substantial information regarding the adequacy of the rates quoted. It was only after that the information was taken into account and after thorough analysis that the BEC was satisfied that the works could be carried out while respecting the requirements and specifications. The BEC had therefore no further concerns as to the ability of the bidder to perform the procurement contract.*
6. *The Respondent further avers that the estimated project value is not MUR 300M inclusive of VAT as alleged by the Applicant.*

Under Grounds of Review 3 & 4

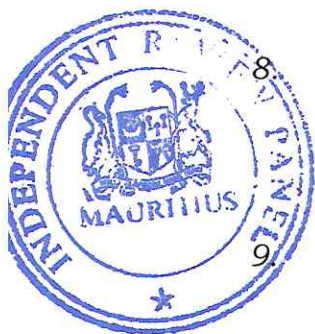
7. *It is submitted that the closing date for the bid submission was the 6th October 2020. The selected bidder was disqualified by the PPO from participating in public procurement from the 20th August 2015 to the 19th August 2016.*

It is therefore submitted that non-performance of contract occurred prior to 20th August 2015 which is outside the five years’ period from the closing date as per the requirement of Item 2.2.1 of Section III – Evaluation and Qualification Criteria.

It is submitted therefore that the selected bidder could not be disqualified under the Item 2.2.1 of Section III – Evaluation and Qualification Criteria (Historical Contract Non-Performance).

Under Ground of Review 5

10. *Under this ground of review, it is submitted that the prohibition notices mentioned therein have no bearing on this procurement exercise.*



11. *Furthermore, during this procurement exercise on the other hand, it has come to the attention of the BEC that the Applicant did have prohibition notices from the Ministry of Labour, Human Resources Development and Training. However, as mentioned above the prohibition notices have not been considered as they have no bearing on this procurement exercise.*

Under Ground of Review 6

12. *Under this ground of review, it is submitted that experience in renovation and refurbishment of Heritage works was not a requirement in the Evaluation and Qualification Criteria for this current bidding exercise.*
13. *It is therefore submitted that this ground of review is devoid of any merit.*

Under Ground of Review 7

14. *Under this ground of review, it is submitted that Regulation 7 (2) of the Public Procurement Regulations 2008 applies to **'Bid evaluation procedures for contracts other than major contracts.'***
15. *A **'major contract'** is defined under the PPA as a contract for the procurement of goods or services or the execution of works (a) to which a public body is or proposed to be a party; and (b) the estimate of the fair and reasonable value of which exceeds the prescribed amount.*
16. *It is submitted that the BEC has been constituted by the CPB under Section II (1) (d) of the PPA. Therefore, this ground of review should also be set aside.*

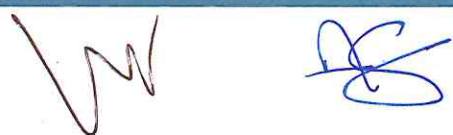
Under Ground of Review 8

17. *The Respondent submits that the averments made under this ground of review are irrelevant and have no bearing at all on this current bidding exercise.*
18. *It is submitted that there were neither poor performance reports nor debarment/suspension with regards to the projects mentioned.*

Under Ground of Review 9

19. *It is submitted that Tianli Construction Ltd is a private **domestic** company limited by shares duly incorporated with the Registrar*





of Companies in the year 2004 bearing registration number C51963.

20. This ground of review should be set aside as it is devoid of any merits.

Under Ground of Review 10

21. It is submitted that the reasons advanced by the Applicant under this ground of review in themselves totally smack of unfairness. The submissions of the Applicant made under this ground of review are irrelevant. It is submitted that the selected bidder had complied with the eligibility requirements.
22. The Respondent further reiterates that renovation and refurbishment of Heritage works was not a requirement in the Evaluation and Qualification Criteria for this current bidding exercise. Therefore, this ground of review should also be set aside.
23. In the light of the above submissions, the Respondent moves that this review be dismissed.”

H. The Hearing

The Hearing was held on 26 January 2021. There was on record a Statement of Case and a Statement of Reply, by Applicant and Respondent respectively.

The Applicant was represented by Mr S. C. Lallah, Senior Counsel, together with Counsel Mithilesh Lallah whereas the Respondent was represented by Ms T. Choomka of Counsel.

The Successful Bidder was represented by K. Audit, Barrister.



I. Findings

The Panel shall deal with each and every ground of application for review separately.

Grounds 1 and 2

The issue of abnormally low bid raised by the Applicant is dealt in Section 37(10A) (a) of the Public Procurement Act 2006 and Directive 46 and now superseded by Directive 52 issued by the Procurement Policy Office (PPO) on 02 December 2020. We read from Section 37(10A) of the Act as follows:

Where a Public body or the Board-

- (i) Is of the view that the price, in combination with other constituent elements of the bid, is abnormally low in relation to the subject matter of the procurement; and*
- (ii) Has concerns as to the ability of the supplier to perform the procurement contract,*

it may request in writing from the supplier such information as it considers necessary. (the underlying is ours)

Furthermore, as per Directives 46 and 52, any evaluated substantially responsive bid, which is less than the updated estimated cost by 15% or more, should potentially be considered as an Abnormally Low Bid (ALB). Directive 52, sets down the procedures to deal with ALBs. The Panel examined the issue raised by Applicant that any bid which is abnormally low, should not be retained or accepted by the Public Body. It is noted that nowhere is so provided that when a bid is abnormally low by 15% or more of the Estimated Cost the bid should be rejected. Had the Bid Evaluation Committee (BEC) followed the reasoning that any ALB ought to be rejected outright, then both the Applicant and the successful bidder's bids would have been rejected as they were above the 15% threshold.

The Panel also noted that the BEC followed the appropriate course of action in line with Directive 52 by identifying the ALBs and followed the procedures for dealing with them. The BEC sought additional information and clarification from the bidders, compared and examined bill items in detail against the updated cost estimates and finally the lowest substantially responsive bidder was requested to substantiate on his ability to carry out the works according to the requirements and specifications of the Public Body.





Moreover, the submission by the Applicant that Directive 52, issued on 2nd December 2020, should not have been followed and applied, as it came after the BEC had completed their evaluation, the Panel perused the Bid Evaluation Report, dated 17 December 2020 and found that the BEC had requested for further information and clarification, in compliance with the Directive, from the bidders on 3rd of December 2020, that is one day after the Directive coming into force. It is obvious to the Panel, that the evaluation process continued well after the 2nd of December 2020 and ended on 17 December 2020. Hence, we find that it was appropriate for the BEC to carry out further investigation.

Notwithstanding the above, the outcome of the bid evaluation exercise would have been the same whether Directive 46 was applied or Directive 52. Therefore, Grounds 1 and 2 do not stand.

Grounds 3 and 4

The Successful bidder, as per Circular no.4 of 2015 was disqualified from participating in Public Procurement for a period of one year that is with effect from 20/08/2015 to 19/08/2016 for poor performance in completion of a contract awarded to it by the Ministry of Education and Human Resources, Tertiary Education and Scientific Research. The Public Body in response to these two grounds has replied that the closing date for submission was 06/10/2020 and the selected bidder was disqualified by the Public Procurement Office for a period of one year starting from 20/08/2015 to 19/08/2016 and therefore it was eligible to bid.

Under Section III- Evaluation and Qualification Criteria

*Non-performance of a contract did not occur within the last **five (5) years** prior to the deadline for application submission, based on all information on fully settled disputes or litigation. A fully settled dispute or litigation is one that has been resolved in accordance with the Dispute Resolution Mechanism under respective contract, and where all appeal instances available to the bidder have been exhausted. The underlining is ours.*

On a close scrutiny, we note that the deadline for application submission was 06/10/2020 and while going 5 years back we reach to 05/10/2015. The Panel is of opinion that the Non-performance contract occurred prior to 20/08/2015 and therefore these two grounds for review fail.



Ground 5

It is the contention of the Applicant that the successful bidder has been issued with a prohibition notice in June 2019 by the Ministry of Labour, Human Resources Development and Training and the notice was in regard to non-compliance with Health & Safety requirements.

The Panel agrees with Counsel for the Respondent that this has no bearing on the bid for renovation works. In fact the prohibition order was in regard to non-compliance with Health & Safety requirements under the OSH Act. This ground therefore does not stand.

Ground 6

The Applicant has raised the issue that the Successful Bidder does not have the required experience in renovation and refurbishment of Heritage Works such as Plaza Theatre.

The Panel has had the opportunity to go through Section III - Evaluation and Qualification Criteria but did not find any such criteria where experience was required in the renovation and refurbishment of Heritage Works. The Panel cannot travel beyond the Evaluation and Qualification Criteria of the bidding documents. This Ground also fails.

Ground 7

The Applicant is of the view that an advisor from the National Heritage Fund should have assisted in the evaluation exercise. The Applicant has referred to Regulations 7(2) of the Public Procurement 2002 which read as follows:

'When constituting a bid evaluation committee, a public body shall take into account the proper combination of expertise required and ensure that the selected evaluators have the required competence and expertise'

The Panel after careful scrutiny of the composition of the Bid Evaluation Committee notes that at least two members of the said committee (one Lead Architect and one Senior Engineer) formed part of the Bid Evaluation Committee and we therefore consider that they have the required competence and expertise.



Ground 8

Under this ground the Applicant has moved that the Successful Bidder has heavily underperformed on previous projects and has on several occasions warned the bidder on its poor performance. Unfortunately, this Panel cannot go beyond what is on record. This is only mere averment on the part of the Applicant which has not been substantiated by concrete and supportive evidence.

Ground 9

It is averred under this ground that the successful bidder has breached clause 5.4 and 5.4 (d) of Section Instructions to Bidders and has all the reasons to believe that the Architect/Engineer is in a situation of conflict of Interest with the selected bidder.

“Clause 5.4 of the Instructions to Bidders provides

A Bidder shall not have a conflict of interest. All Bidders found to have a conflict of interest shall be disqualified. A Bidder may be considered to have a conflict of interest with one or more parties in this bidding process, if :

- (a) They have a controlling partner in common; or*
- (b) They receive or have received any direct or indirect subsidy from any of them; or*
- (c) They have the same legal representative for purposes of this bid; or*
- (d) They have a relationship with each other, directly or through common third parties, that puts them in a position to have access to information about or influence on the Bid of another Bidder, or influence the decisions of the Employer regarding this bidding process; or*
- (e)*

The Applicant on this issue has referred this Panel to a document referred to as annexures 9 and 10.

Annex 9 refers to two photos and Annex 10 refers to a document from the CPB dated 19 September 2018 showing Public Opening of bids together with plan designed by Pixel Creation Ltee represented by Architect Hans Dwarka. The plan clearly shows that the Client is the District Council of Pamplemousses and therefore the Panel finds that Architect Hans Dwarka acted for the District Council of Pamplemousses and not the Successful Bidder.

In the absence of concrete evidence before this Panel we cannot see in what manner there is conflict of interest.

Ground 10

Under this ground the contention of the Applicant is that the Public Body should have given due weight to RBRB Construction Ltd which is a 100% Mauritian owned Company with local Shareholders whereas Tianli Construction Company Ltd is a fully foreign owned company with foreign shareholders and directors.

We do not agree on this ground as, as per the bidding document we note that it was an Open International Bidding and we also found out that the Successful Bidder is a private domestic company limited by shares duly incorporated in Mauritius.

J. Conclusion


Having found no merits in all the grounds for review, the Panel dismisses the application.



H. Gunesh
(Ag. Chairperson)



A. Gathani
(Member)



V. Mulloo
(Member)

Dated: 9 February 2021