



# Independent Review Panel

**Decision No. 04/21**

**In the matter of:**

**Manser Saxon Facilities Ltd**

**(Applicant)**

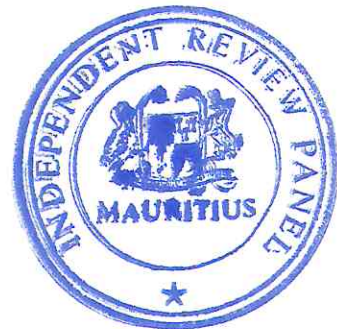
**v/s**

**The Judiciary**

**(Respondent)**

**(Cause No. 04/21/IRP)**

**Decision**



### A. History of the case

On 09 December 2020, the Respondent invited for bids for the Procurement of Operation and Maintenance of Mechanical, Electrical and Plumbing Engineering Services at the New Supreme Court Building, Port Louis (“the Project”). The Project bore Procurement Reference **ONB/4/2020-2021**.

### B. Evaluation

A Bid Evaluation Committee was set up to evaluate the bids received and identify the lowest evaluated substantially responsive bid that meets the qualifications criteria.

### C. Notification of Award

On 26 January 2021, 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>Contract Price</i>
<i>Rey &amp; Lenferna Ltd</i>	<i>Royal Road Bell Village</i>	<i>Rupees Eleven Million Four Hundred Thousand Eight Hundred and Sixteen and Cents Eighty-seven (Rs 11.400,816.87), inclusive of VAT</i>

### D. The Challenge

On 04 February 2021, the Applicant challenged the procurement proceedings on the following ground:

***“We deem the offer we submitted to be compliant with all requirements listed in the tender documents and that the offered price is less than the one that has been awarded”***



### E. The Reply to Challenge

On 09 February 2021, the Public Body replied to the challenge and stated as follows:

**“At page 93, Paragraph 4.2 – Personnel**, of the bidding document, mention is made that the successful bidder shall also provide one part time Registered CRPE Professional Electrical Engineer (**with at least five years post registration experience**) for part time visits, during major power shutdowns, during monthly monitoring meeting, and upon request.”

*The Registered Electrical Engineer proposed by Manser Saxon Facilities Ltd does not have the minimum of 5 years post registration experience as stipulated in the bidding documents.*

*The abovementioned shortcoming is considered as a major deviation and therefore your bid has not been retained.”*

### F. Grounds for Review

On 16 February 2021, the Applicant applied the Independent Review Panel for review on the following ground:

**“RESPONDENT HAS FAILED TO CONSIDER THE SHORTCOMINGS OF THE GROUNDS FOR REVIEW AS MAJOR DEVIATION”**

### G. STATEMENT OF CASE

The Applicant, filed a statement of case and the grounds for review are as follows:

#### C. Grounds for Review

- C1. *It is the contention of the Applicant that the Respondent failed to properly examine and evaluate bids that specifically meet the qualification criteria for the Project as per Section 38 of the Act and as per the requested criteria of the bidding documents.*
- C2. *It is the Applicant’s contention that the ground relied upon by the Respondent (as laid down in paragraph B3 above) cannot be considered as a major deviation. Clause 27.2 of the bidding documents relates as follows:-*



*[Handwritten signatures]*

*“A material deviation or reservation is one (a) which affects in any substantial way the scope, quality, or performance of the Services; (b) which limits in any substantial way, inconsistent with the bidding documents, the Employer’s rights or the Bidder’s obligations under the Contract; or (c) whose rectification would affect unfairly the competitive position of other bidders presenting substantially responsive bids.”*

- C3. *It is the Applicant’s contention that the Registered Engineer is not a permanent staff and the functions and duties of the latter are to attend monthly meetings, major issues or to act upon request. The Applicant further contends that the 5 years’ experience or 3 years will not make any difference since all the works are carried out by the onsite team. It is therefore submitted on behalf of the Applicant that the “3 years’ experience” criteria would not (a) affect in any substantial way the scope, quality or performance of the Applicant’s performance; and/or (b) affect the Applicant’s obligations under the Contract; and/or (c) affect unfairly the competitive position of other bidders.*
- C4. *It is the Applicant’s contention that the Respondent failed to query in relation to the post registration requirement. Post registration does not necessarily relates to experience. The Applicant further contends that its Registered Engineer having 3 years of experience can fully perform the expected scope of services under the Contract.*
- C5. *It is further submitted that (1) the Applicant’s bid is the least expensive bid and (2) the Applicant’s bid does not meet the specifications and the requirements of the bidding documents and, as such, that the bid should have been awarded to the Applicant.*




## **H. STATEMENT OF DEFENCE**

The Respondent filed a Statement of Defence which contained a preliminary objection and the Statement of Defence is reproduced below:

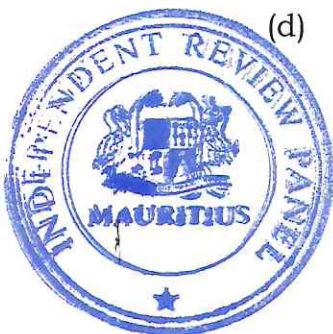
### **Preliminary Objection**

The Respondent moves that the present application be set aside on the ground that the application has been wrongly directed against it.



### On the merits

1. Save and except that it is admitted that Applicant is a company incorporated under the laws of Mauritius, Respondent takes note of the other averments at paragraph A1 of the Statement of case of the Applicant (hereinafter referred to as “the Statement of Case”).
2. Respondent admits the contents of paragraph A2 of the Statement of Case and avers as follows –
  - (a) a bid of the Procurement of Operation and Maintenance of Mechanical, Electrical and Plumbing Engineering Services at New Supreme Court Building, Port Louis was launched on 22 January 2021 under procurement reference ONB/4/2020-2021 (hereinafter referred to as “the project”)
  - (b) as per Clause 5.3 of the Instruction to Bidders and paragraph (e) under item ITB 5.3 of the Bid Data Sheet at page 25 of the Bidding Document, all bidders were required to provide the “*qualifications and experience of key site management and technical personnel proposed for the Contract as per compliance table*”;
  - (c) under Clause 1.0 of the Scope of Service and Performance Specifications, at page 43 of the Bidding Document, mention is made that “*Bidders shall draw to the attention of the client for any discrepancies, omissions or errors in the bidding document prior to bidding*”. A similar note is found at Clause 7.0 of the Scope of Service and Performance Specifications, at page 104;
  - (d) as per Clause 4.2 of the Scope of Service and Performance Specifications, at page 93 of the Bid Document, “*in addition to the skilled and experienced tradesmen required on site the successful bidder **shall** also provide the following staff:*
    - .....
    - *One part time Registered CRPE Professional Electrical Engineer (**with at least five years post registration experience**) for part time visits, during*

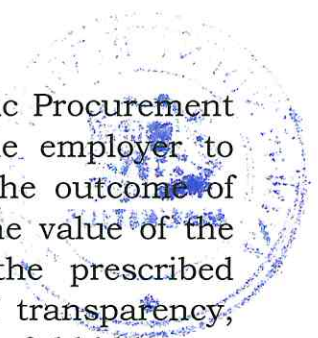


*major power shutdowns, during monthly monitoring meeting upon request.*

- .....”

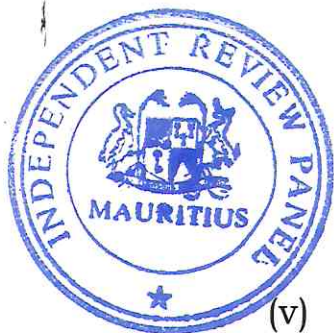
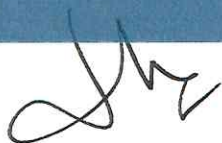
*(emphasis added)*

- (e) according to Clause 9.2 of the Instructions to Bidders, at page 11 of the Bid Document, **“the Bidder is expected to examine all instructions, forms, terms, and specifications in the bidding documents. Failure to furnish all information required by the bidding documents or to submit a bid not substantially responsive to the bidding documents in every respect will be at the Bidder’s risk and may result in the rejection of its bid”**; and
- (f) in addition, Clause 10.1 of the Instruction to Bidders, at page 11 of the Bid Document, mentions that *“A prospective Bidder requiring any clarification of the bidding documents may notify the Employer in writing or by facsimile at the Employer’s address indicated in the invitation to bid”*. As per records, no clarification was sought from the Honourable Master and Registrar by the Applicant.
3. Respondent admits the contents of paragraphs A3 and A4 of the Statement of Case.
4. Respondent admits the contents of paragraphs B1, B2 and B3 of the Statement of Case and –
- (a) is advised that –
- (i) in virtue of section 40(3) of the Public Procurement Act, there was no obligation on the employer to notify the unsuccessful bidders of the outcome of the bidding exercise inasmuch as the value of the procurement contract was below the prescribed threshold. However, for the sake of transparency, notification was given to the unsuccessful bidders;
- (ii) the challenge was lodged outside the prescribed delay but the said challenge was considered by the



employer in view of the explanation given by Applicant to justify the delay and a written decision to the challenge was given by the Honourable Ag Master and Registrar as per Annex B to the Statement of Case;

- (b) reiterates the averments at paragraph 2 above and avers that-
- (i) In accordance with Clause 27.1 of the Instructions to Bidders, the Employer evaluated the bids received and determined whether they were substantially responsive to the requirements of the bidding documents;
  - (ii) Clause 27.2 of the Instructions to Bidders mentions that *‘a substantially responsive bid is one which conforms to all the terms, conditions, and specifications of the bidding documents, without material deviation or reservation’*;
  - (iii) As per paragraph 5(iv)(g) of Directive No.2 issued pursuant to Section 7(b) of the Public Procurement Act, failure by a bidder to comply with minimum experience criteria as specified in the bidding document is a justifiable ground for rejection of the bid;
  - (iv) The Registered Electrical Engineer proposed by Applicant does not have the minimum of 5 years post registration experience and the Applicant thereby failed to comply with Clause 4.2 of the Scope of Service and Performance Specifications, at page 93 of the Bid Document referred to at paragraph 2 (d) above; and
  - (v) The failure by the Applicant to comply with a mandatory condition set out in the bidding document for the purposes of the project,



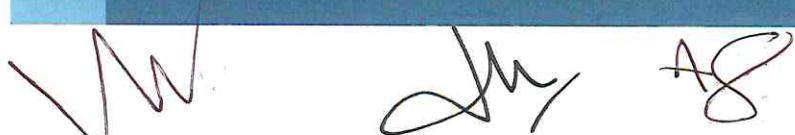
constituted a major deviation which rendered its bid substantially non-responsive and it was therefore not retained.

5. Respondent denies the averments at paragraphs C1 to C4 of the Statement of Case and puts the Applicant to the proof thereof. Respondent further reiterates the averments at paragraph 2 and 4(b) above and avers that the bidding exercise was carried out within the parameters of the law.
6. Without making any admission to the averments at paragraph C5 of the Statement of Case, Respondent reiterates the averments at paragraph 4(b) above. Respondent further avers that, in terms of Section 40 of the Public Procurement Act and the bidding documents, submissions of the least expensive bid is not the sole criterion for determining the responsiveness of a bid.
7. Respondent denies paragraph D of the Statement of Case and reiterates the averments at paragraphs 2, 4 and 6 above. Respondent is advised that the Independent Review Panel has no jurisdiction to grant the remedy sought by Applicant at paragraph D2 of the Statement of Case.
8. In light of the above, Respondent moves that the present application for review be set aside.

## I. The Hearing

The Hearing was held on 05 March 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 Burty Francois, Barrister together with Mrs Marie Joseph Ingrid Lecordier, whereas the Respondent was represented by Mrs S K Bissoonauth, Assistant Solicitor General together with Miss A Nuckchady, State Counsel instructed by V Nirsimloo (Miss) Chief State Attorney.

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Successful bidder was represented by Mr A Calleea, Barrister.

## J. Findings

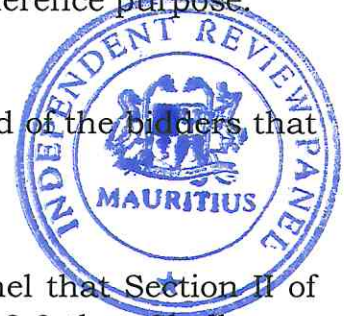
After exchange of Statement of Case and Statement of Defence, the Respondent took a preliminary Objection to the effect that the Application for Review is directed against the Judiciary and is wrongly directed. According to the Respondent it should have been directed against the Master and Registrar and/or The State.

In reply to the Preliminary objection, Counsel for the Applicant argued before this Panel that it has rightly directed its application against the Judiciary because as per the Bidding Documents issued on 9<sup>th</sup> December 2020, it mentioned that the employer is The Judiciary.


The Panel while examining the Bidding Documents found that in the whole document it is mentioned the Employer as The Judiciary.

Section II Bidding Data Sheet at page 24 of the Bidding Documents refer the Employer as The Judiciary. The Bidding Document, further under Section V- Scope of Service and Performance Specifications refers at page 100 as JUDICIARY. It is mentioned that for All intervention reports, inspection reports and maintenance checklist shall be duly certified by the representative of client/THE JUDICIARY. The original shall be remitted to THE JUDICIARY, the duplicate copy shall accompany and be used as evidence for any eventual claims, and, the triplicate copy shall be kept by the contractor for reference purpose.

The Panel is of the view that it was clear to the mind of the bidders that the employer was THE JUDICIARY.



Counsel for the Respondent pointed out to the Panel that Section II of the Bidding Documents it is mentioned under ITB 2.3 that Challenges shall be addressed to The Master and Registrar giving the address of the office of the Master and Registrar. In our Opinion this is only a specification of where the Challenges should be addressed.

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The Panel follows the decision of the Supreme Court in the case of *Air Mauritius v Gerard Tyack and Air Mauritius Limited v Gerard Tyack 2003 SCJ 256*. In this case the applicant was styled as AIR MAURITIUS which is not a legal entity, in fact the right appellation is Air Mauritius Limited. The Supreme Court pointed out that the mistaken appellation of the applicant did not cause prejudice to the respondent who had no doubt in his mind as to the identity of the party seeking the injunction and who had in fact joined issue with the applicant.

In this particular Application for Review, the Panel is of the opinion that the preliminary objection does not find its way as the Respondent itself in the bidding documents styled itself as the JUDICIARY and all along remained as JUDICIARY and the Panel will not now uphold the preliminary objection to set aside the review application.

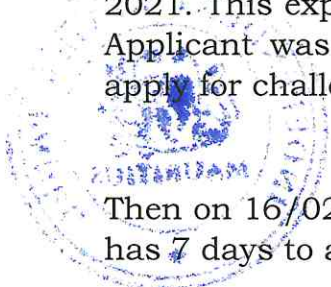
On the merits of the case, the Panel notes the following:

On 26<sup>th</sup> January 2021, the office of the Master and Registrar wrote to the Applicant informing it that its bid had not been retained for the Operation and Maintenance of Mechanical Electrical & Plumbing Engineering Services at The New Supreme Court Building, Port Louis and by same letter the Applicant was informed that it may within 7 days from date of Notification challenge the award and in case if the bidder is not satisfied with the Challenge or does not receive a response within 7 days, it may apply for review to the Independent Review Panel.

On 4<sup>th</sup> February 2021, the Applicant applied for challenge but further averred that it received the letter of notification in the evening of 2<sup>nd</sup> February 2021 and took cognizance of same only on the 3<sup>rd</sup> of February 2021. This explanation was given in its application for challenge as the Applicant was of the view that it was outside the delay of 7 days to apply for challenge.

Then on 16/02/2021 Applicant applied for review. The Applicant in fact has 7 days to apply for Review.

During hearing, the representative of the Applicant Mr Chinasamy confirmed to the Panel that the reply to Challenge reached the Applicant by fax on the same date that is on 16/2/2021. Now while applying the delay of 7 days within which the Applicant should have applied for review it falls on 15/02/2021. The Applicant has filed the



Application for review outside delay and this has remained unexplained. (see Section 45 (2) (c) of the Public Procurement Act and Rule 48(5) of the Regulations).

The Application for Review is therefore outside delay by one day and this is sufficient for this Panel to set aside the application.

Even while taking into account the only issue which arose before this Panel, that is the issue of Personnel where it required one part time Registered CRPE Professional Electrical Engineer (with at least five years post registration experience) the Applicant cannot succeed for the following reasons:

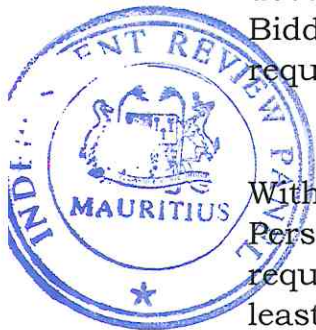
1.-The Bidding Documents –Under Section V Scope of Service and Performance Specifications 4.2 made it clear that the Successful Bidder **shall** provide the following staff, amongst others,


One part time Registered CRPE Professional Mechanical Engineer (with at least five years post registration experience) for part time basis, during monthly monitoring meeting, and upon request.

One part time Registered CRPE Professional Electrical Engineer (with at least five years post registration experience) for part time visits, during major power shutdowns, during monthly monitoring meeting and upon request.

The Applicant has proposed one Engineer with 3 years experience and when questioned by the Panel as to why the proposed engineer has only 3 years experience when the requirement according to the bidding documents should be 5 years, it referred the Panel to page 94 of the Bidding Documents where it is mentioned that the Personnel requirements are indicative.

With whatever intention the Public Body may have inserted that the Personnel requirements as indicative, but for this Panel the personnel requirements are mandatory. The Engineer should be a person with at least five years post registration experience. The Panel takes notice that the Supreme Court being a newly constructed building with 10 floors is of strategic importance.





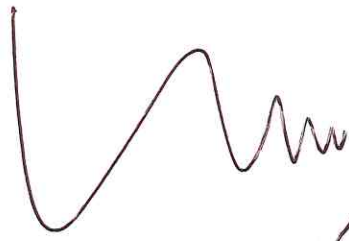

The Applicant has also failed to convince this Panel the reason for which it did not propose an engineer with at least five years post registration experience. This Panel therefore concludes that the requirements of an Engineer with at least five years post registration experience is mandatory.

**K. Conclusion**

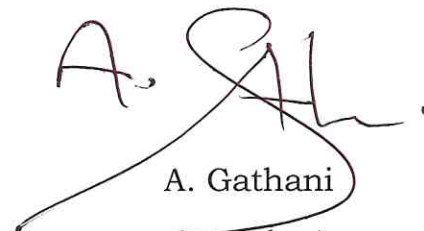
The Panel therefore concludes that the application is devoid of merits and is set aside.



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



V. Mulloo  
**(Member)**



A. Gathani  
**(Member)**



**Dated: 19 March 2021**