



Independent Review Panel

Decision No. 08/21

In the matter of:

Vishnudutt Foollee

(Applicant)

v/s

Central Electricity Board

(Respondent)

(Cause No. 10/21/IRP)

Decision



A. History of the case

On 26th November 2020, the Central Electricity Board (the “CEB”, the “Respondent” or the “Public Body”) invited bids on an Open National Bidding basis for its Framework Agreement for Underground Cable Works. The project bore Procurement Reference No. CPB/50/20. The invitation for bids was launched on the e-procurement system, its reference being CEB/IFB/2020/1669.

A minimum of four contractors was sought as far as possible to participate in the Framework Agreement. Twelve bidders put in their application.

By virtue of the sums involved, this was a major contract for the CEB and was to be handled by the Central Procurement Board (the “CPB”) as per the procurement laws.

B. Evaluation

The BEC issued its report, the Bid Evaluation Report, on 23rd February 2021.

Four successful bidders were retained.

C. Notification of Award

On 5th April 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 bidders for both categories namely LV and MV cable Works (up to 22KV) and HV Cable Works (up to 66kV) are as mentioned below:

| Description | Name & Address of Selected Bidders |
|--|--|
| Framework Agreement for Underground Cable Works for LV & MV Cable Works (up to 22kV) | Gokhool Engineering & Construction Co. Ltd, Royal Road, Phoenix. |
| | Manser Saxon Contracting Ltd, IBL Business Park, Riche Terre. |
| | PKB Contracting Ltd, Valentina Industrial Zone, Phoenix. |
| | SAWON SNSR Co Ltd, Building and Civil Engineering Contractor, Petit Paquet Road, Montagne Blanche. |
| Framework Agreement for Underground Cable Works for HV Cable Works (up to 66kV) | Tooling and Engineering Products Ltd, Motorway M3, Riche Terre, Terre Rouge. |
| | Gokhool Engineering & Construction Co. Ltd, Royal Road, Phoenix. |
| | PKB Contracting Ltd, Valentina Industrial Zone, Phoenix. |
| | SAWON SNSR Co Ltd, Building and Civil Engineering Contractor, Petit Paquet Road, Montagne Blanche. |
| | Tooling and Engineering Products Ltd, Motorway M3, Riche Terre, Terre Rouge. |

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The Applicant had also been informed by an email dated 5th April 2021 that his bid had not been retained for award of both categories of work, namely LV and MV cable works (up to 22KV) and HV cable works (up to 66KV).

D. The Challenge

On 8th April 2021, the Applicant challenged the procurement proceedings on the following grounds:

- “1. I, Vishnudutt Foolee is working with the CEB for more than 15 years for underground cable work, both in Mauritius and Rodrigues.
2. I am a registered CIDB Contractor Grade E and BRN Number I07017483
3. I own all necessary equipments (sic) required for such works and recently investment nearly Rs 10 Million in a “hole Hammer” for excavation of holes.
4. I have 40 employees in my payroll and more than 15 on casual basis as and when required.
5. I have never received any complaint on the performance of my contract with CEB

It is with despair that I have taken not of not being retained for the award of the LV and MV Cables work (up to 22KV) and HV Cables works (up to 66KV). I am making a humble request to inform me reasons as to why I have not been selected, after having successfully completed by projects since more than 15 years.

Moreover, I would make a humble and humanitarian appeal to reconsider me for such works as the rate are fixed by CEB and there are no price differences.

I have responsibility of all those workers on my company and also invested huge amount for such contracts and I would have no choice to close my company and lay off my workers. Moreover, I will fail to honor my engagements with the banks for my loan.

I am counting on your humble consideration and judgement to add my company for this contracts (sic) and would be very much grateful.”



E. The Reply to Challenge

On 14th April 2021, the Public Body made the following reply to the challenge and stated that:

“Please refer to your Challenge dated 08 April 2021 made under Section 43 of the Public Procurement Act 2006 for the above mentioned bidding exercise.

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AS *J*

We wish to inform you that your bid was not retained for award since you did not propose any Civil Engineer duly registered with the Council of Registered Professional Engineers of Mauritius (Key Personnel), which is a major criterion as per Clause 11.4 (Table A, Item 2) of the Instructions to Contractors.

Based on the above, your bid was considered to be non-responsive to this mandatory requirement.”

F. Grounds for Review

On 9th April 2021, the Applicant seized the Independent Review Panel for review on the following grounds:

“The evaluation of the public body is erroneous and perverse in the circumstances in respect of both categories namely LV and MV Cable Works (up to 22KV) and HV Cable works (up to 66 KV) in as much as the applicant did propose two registered civil engineers in his bid.”

G. The Hearing

A Hearing was held on 30th April 2021.

Mr A. Domingue, Senior Counsel appeared for the Applicant. Mr R. Chetty, Senior Counsel appeared for the Respondent together with Miss B. Dulthummon, instructed by Mr Attorney D. Boolauky.

Counsel were also requested to file written submissions and we are very grateful to Counsel for their thorough submissions filed by Mr Chetty on 6th May 2021 and Mr Domingue (7th May 2021, electronic MS Word version; 10th May 2021 signed version).

H. Findings

We have perused the Application for Review itself, the Statement of Case of the Applicant together with the annexes submitted in support, the Respondent's Statement of Reply, the Bid Evaluation Report and the Bidding Documents and have considered the testimony on record and submissions made.

Was the evaluation of the Bid Evaluation Committee (the “BEC”) of the Central Procurement Board erroneous and perverse? Did the BEC rightly reject the Applicant's bid?



It is for all to see that the present case turns on one simple question. Has the Applicant provided the requisite information to the CPB through the e-procurement portal at the time of bid submission? Indeed, this is common ground and Counsel for both the Applicant and the CEB have submitted that this is the crux of the case.

In relation to the essence of Applicant's complaint, the starting point must be the Bidding Documents, in this case the Instructions to Contractors (**the "ITC"**). It is not disputed by either party that **ITC 11.4 (Table A, item 2)**, of the Bidding Documents set out a mandatory requirement of the proposed Contract, namely that Contractors were to provide the qualifications of key personnel, among whom, a Civil Engineer for the Contract who must be duly registered with the Council of Required Professional Engineers of Mauritius.

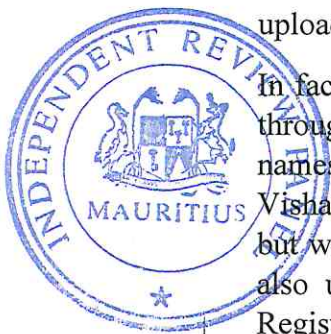
The BEC concluded in its Report that the Applicant failed to abide by this Clause by not proposing any Registered Civil Engineer. Hence his bid was found to be non-responsive.

In evidence, the Applicant maintained that he had, through his Clerk, Mr Paramen Lutchmoodoo submitted on the E-Procurement System all the required documents as per **ITC 11.4 (Table A, item 2)**. The latter was responsible to provide the list of names of the personnel of the Applicant for the Contract. Mr Lutchmoodoo had electronically uploaded the Applicant's bid which consisted of 39 items, printouts of which he produced at the hearing. He admits to not having put the name of the Civil Engineer, Mr Ravindranath Damry on the Form PER – 1 Proposed Personnel as expected, that Form being provided as a template together with the bidding documents to be filled in. The heading of the Form PER – 1 reads: "*Form of Personnel (to be filled and uploaded on the 'Any other Documents' template of the e-PS)*". However, he testified having uploaded a document separately whereby the Registrar of the Council of Professional Registered Engineers of Mauritius certified on the 12th of July that Mr Ravindranath Damry is a professional Civil Engineer registered with the Council. He uploaded the certificate of Mr Damry as an 'other document'.

In fact, as evident from his Statement of Case, the Applicant maintained that he did, through his employee, Mr Lutchmoodoo, propose in the e-procurement form the names of two registered Civil Engineers, namely the above-named Mr Damry and Mr Vishal Jahajeeah. Mr Jahajeeah, as per Mr Lutchmoodoo, is not relevant for the bid but was included anyway. In addition to inserting the names of the two engineers, he also uploaded two letters dated 11.03.2002 and 12.07.2018 from the Council of Registered Professional Engineers of Mauritius which he marked as annexures 8 and 9 in the e-procurement form.

The Applicant also strongly pressed the fact that he was a long-standing contractor of the Respondent, for more than 15 consecutive years, and it was not the first time that he was taking part in a similar public procurement exercise for the Central Electricity Board.

He had gone through a similar exercise in 2018 when he had been "*pointedly*" – as submitted by his Counsel – required by means of CPB's letter to submit the certificate of registration of its civil engineer which, he did. This letter was produced at the



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(Handwritten signatures)

hearing. The Applicant averred that the underground cable works undertaken by him for the Respondent were under the supervision of the proposed two registered civil engineers. He has always satisfactorily delivered all works as certified by the latter.

This was submitted as a comparison but the distinction, on the facts, is a conclusive one: in 2018, the engineer's name was on the personnel list within the body of the bidding forms and the certificate had not been submitted. This time around, the name of the engineer was omitted but the certificate was allegedly submitted. However, it is a point made moot since the BEC member testified before us that it would have taken into consideration the certificate had it been filed.

Be that as it may, that representative of the BEC of the Central Procurement Board deponed to the effect that the Applicant had neither filed the particulars of their Civil Engineer nor uploaded same on the e-procurement system. Hence the submission of the bid of the Applicant was not compliant in that it failed to satisfy the mandatory requirement of providing the name and qualifications of the civil engineer for the contract.

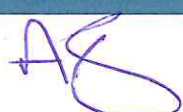
Further, the Respondent did not receive the documents that the Applicant alleged having uploaded on the E-Procurement System because the Respondent, as a public body, cannot for reasons of transparency and independence take part or be seen to take part in the selection of bidders for contracts above the statutory threshold and or which are not statutorily exempt.

Indeed, it is the BEC set up by the CPB which verifies whether the bid of the Applicant is compliant, i.e whether all the required documents have been submitted by the bidders, including the Applicant. And as the body performing the bid opening exercise, the CPB is the only body which can confirm whether the documents, allegedly uploaded, namely the letters of 11th March 2002 and 12th July 2018 (the two annexures 8 and 9 to the Statement of Case before us) were indeed part of the bidding documents submitted by the Applicant.

In its letter dated 23rd April 2021 (Annex C to the Statement of Defence), the CPB provided its comments to the Statement of Case of the Applicant and it states that the names of the civil engineers did not appear in the '42 documents' submitted by the Applicant. As for paragraph 10(b) of the Statement of Case, the CPB replies as follows: *"During the assessment of the applicant bid (sic) by the Bid Evaluation Committee these two annexures 8 and 9 were in fact not found on the e-procurement system as averred by the applicant."*

This Panel is therefore faced with the word of one against the other. From the documents produced before us, it appears that the Applicant's bid, included, amongst the uploaded documents, the certificate of registration of the above-named Civil Engineer, although the name of the engineer was omitted in the personnel form PER-1. The Applicant maintained he did fulfil the mandatory requirement in question. The BEC is adamant the documents were never submitted.

There was also a confusion between 39 and 42 documents, as described by the Applicant and BEC/CPB respectively. We can easily resolve this confusion by stating that the documents uploaded by the Applicant and received by the BEC, on the CPB


server, translated into **42 computer files**, of different file types. One page may be a computer file but not necessarily one document. There was, on the server of the CPB, 42 files representing '37 documents'.

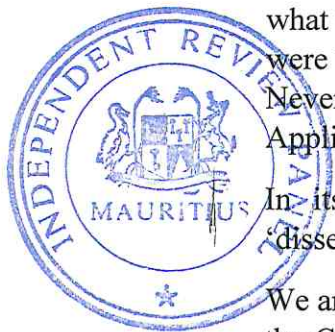
To us, it is clear that there is no reason why the representative of the BEC would not be telling the truth to the Panel. On the other hand, admittedly, we were not too impressed by the Applicant's witness. Why would a person not indicate the name of the engineer in the list of personnel on the form about personnel? Why would he seek to rely on a footnote to **ITC 3** to conclude that he could limit himself to uploading the certificate of the 'nameless' engineer as an 'any other document' under **ITC 3** instead of mentioning the name in the PER-1 Form? Why would he also allegedly upload the certificate of an electrical engineer who is not even relevant to the bid in addition to the certificate of the civil engineer? Be that as it may, if he did upload the certificate of Mr Damry (the civil engineer), in the way he asserts, it was a risky move to say the least.

On a side note, as this bidding exercise was conducted electronically on the E-Procurement system of the CPB, we suggested that one way to conclusively settle the matter between the parties would be for the electronic copies of the Applicant's uploaded documents to be made available to all parties – since neither the Applicant nor the CEB knew what documents the BEC had received. Both Senior Counsel supported this suggestion. We, the Panel had received a CD-ROM directly from the CPB which contained all the document uploaded to its server by Mr Foollee (or, more precisely, Mr Lutchmoodoo). The CPB's representative asked for time because she had to check whether this course could indeed be taken. It was suggested that from the moment files are uploaded by a bidder to the E-Procurement system, it is no longer his document but that of the CPB. We do not feel we are the arena which should answer such intricate questions of logistics and public administration. Our suggestion bore in mind the efficiency of proceedings since we, the Panel, knew the answer as to what was on the server already while the parties before us, the Applicant and the CEB were both left in the dark and had to spend time and money in the proceedings before. Nevertheless, the Panel officially invited the CPB to consider providing the Applicant's files it had received on its server to both the Applicant and the CEB.

In its response, the CPB left it to the Panel the 'responsibility' whether to 'disseminate' the information to the parties in the case.

We are grateful that the CPB responded somewhat positively to our request but, again, the CPB is not even a party before us as per the Public Procurement Act 2006 in its current form and we feel that a judicial body would be overstepping were it to don the cloak of a herald. The moreso that, in line with our duty to give reasons, we would, anyway, have provided the 'answer', in our judgment as we have done above. The certificate of the civil engineer was not received on server of the CPB, and we do not doubt the veracity of this fact.

This leads to the inescapable conclusion that the BEC was right not to retain the bid of the Applicant which was found to be lacking since he failed to provide even an inkling of information about the civil engineer's identity – unlike what he had done in the 2018 project which he himself referred to before us. Such failure to provide






crucial information (here, Key Personnel) cannot be cured without creating an unfair advantage for the careless bidder against his competitors. A bid evaluation committee is not expected, either, to assume that a bidder must have a civil engineer on his payroll or as his contractor and actively seek out the identity of the personnel. Here, we bear in mind the thorough clauses of Directive No.3 of the Procurement Policy Office on the responsiveness of bids which contains exceptions, and we find that the failure to indicate the very name of the civil engineer in the PER-1 Form does not fall within any such exception.

I. Conclusion

In the circumstances, the present Application for Review is set aside for being devoid of merit.

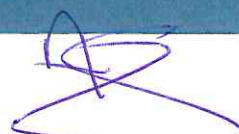
J. Observations

The Panel feels it would be remiss were it not to set out the points made by Counsel on the workings of electronic procurement. Mr Domingue, who was in a way supported by Mr Chetty, strongly submitted that the CPB, being made, in effect, the statutory agent of the Respondent public body and taking into its hands, on behalf of the latter, the responsibility of conducting the bid evaluation exercise, was bound to place before the Applicant and the Respondent all of the documents of which the Applicant's bid consisted of. The CPB's failure to do so might affect the fairness of the procurement exercise and the hearing itself *"if the parties do not get to see the key documents which have been made to the panel"*.

One point of concern rightly raised by Counsel for the Applicant is that the e-procurement system put in place by the Procurement Policy Office and in use by the CEB and all other parastatal bodies is not transparent as it does not enable either the applicant or the respondent to secure an electronic copy of an electronically submitted bid. As we alluded to above, this also caused a case to proceed when the answer was 'there all along' and the parties could have reconsidered their positions had they been made privy to that particular piece of information. On that score, we feel much sympathy for the parties before us.

We do agree that this might be an unsatisfactory state of affairs and a matter of concern. We would also be the first to agree that there is, indeed, *"a statutory duty cast on all stakeholders to ensure that the procurement process should be fair and transparent and be clearly and manifestly seen to be so towards the parties thereto, more especially towards the applicant bidder and the respondent public body."*

There should be made available a way for bidders to know what files they have submitted either by way of a backup or log, or at the very least, an acknowledgement



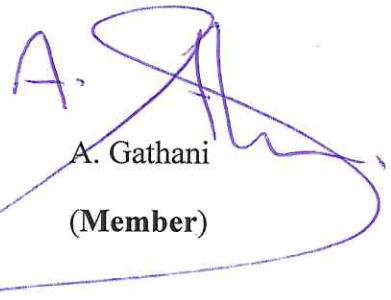
of receipt with the filenames of the documents uploaded. And if there is one such mechanism, it should be drawn to the attention of bidders so that there is certainty and confidence in the process.



J. Ramano
(Chairperson)



A. K. Namdarkhan
(Member)



A. Gathani
(Member)

Dated: 17th May 2021



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