



# Independent Review Panel

**Decision No. 09/21**

**In the matter of:**

**Safety Construction Co. Ltd**

**(Applicant)**

**v/s**

**Wastewater Management Authority**

**(Respondent)**

**(Cause No. 08/21/IRP)**

**Decision**



### A. History of the case

On 04 December 2020, the Respondent issued the Bidding Document for Wastewater Rehabilitation Works at Dubreuil – Contract WW454W. The Applicant submitted its bid through the E-Procurement Platform on 20 January 2021.

### B. Evaluation

All the bids submitted were opened on 20 January 2021 and the bid price of each Contractor had been mentioned in the Bid Opening Sheet.

A Bid Evaluation Committee (BEC) was set up by the Respondent to evaluate the bids received and identify the lowest evaluated substantially responsive bid that meets the qualification criteria.

### C. Notification of Award

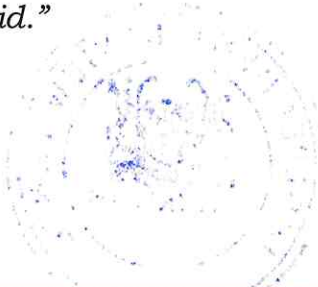
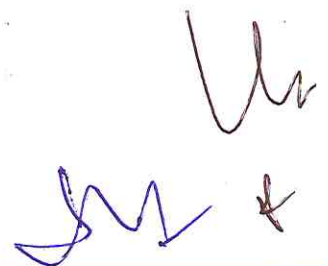
On 08 April 2021, the Public Body in response to the Invitation for Bids informed the Applicant, that an evaluation of the bids received had been carried out and the particulars of the successful bidder are as mentioned below:

<b>Name of Bidder</b>	H. Padiachy (Contractor) Ltd
<b>Address</b>	47, Remy Ollier Street, Beau Bassin
<b>Bid Amount</b>	MUR 21,450,000, Exclusive of VAT

### D. The Challenge

On 09 April 2021, the Applicant challenged the procurement proceedings on the following grounds:

*“Safety Construction Co Ltd has adequate past experiences and we submitted our bid duly completed and signed together with all necessary required documents. We believe our bid is responsive and has unjustly not been selected. Further, Safety Construction Co Ltd had submitted the lowest bid.”*

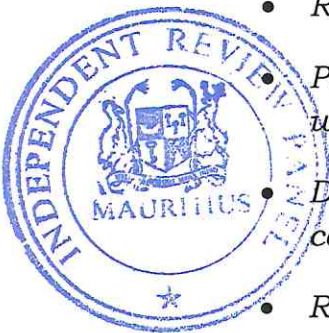
## E. The Reply to Challenge

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

*“The Wastewater Management Authority has carried out the bid evaluation exercise for the above mentioned procurement in line with the provisions of the Public Procurement Act 2006.*

*In accordance with Clause 1 of the Instruction to Bidders (ITB) of the bidding documents, the scope of works for the **Wastewater Rehabilitation Works at Dubreuil** is as follows:*

- *Design and construction of about: 660 m of new street sewer and re-connection of 55 existing house connections at Dubreuil, along Mahatma Gandhi Road and Main Road.*
- *Submission of Design Report with revised Bill of Quantities for WMA’s approval.*
- *Production of construction drawings,*
- *Decommissioning, removing and carting away of existing pitch fiber sewer lines and manholes.*
- *Asphaltic reinstatement works of roads, both temporary trench width and permanent full width resurfacing, including for milling works, if any.*
- *Provision/ Rehabilitation of individual house connections, if any.*
- *Decommissioning of existing house connections, wherever applicable,*
- *Decommissioning of existing cesspits and backfilling of same, if any and wherever applicable,*
- *Reinstatement works within private premises,*
- *Protection of existing services such as underground telecom lines, water pipes, amongst others,*
- *Design and rehabilitation of water works, wherever applicable in case of damages to existing water pipe.*
- *Raising of existing manholes, if any,*
- *Rivers/canal/drain crossings, if any,*




- *Refurbishment works to sewer appurtenances, if any, as may be directed.*

*In addition to the above, Instruction to Bidders (ITB) 1 of the Bidding Document further mentioned that: “**The Successful Bidder shall be responsible for both the design and construction of the said Works. This will require thorough investigations, surveys (including detailed house-to-house survey) along with a comprehensive Design Report, Revised Bill of Quantities and a full set of construction drawings prior to the start of works on site.**”*

*Furthermore, ITB 10 of the Instruction to Bidders (ITB) stipulates that Bidders shall have the following minimum qualification and experience:*

- (a) valid registration certificate with the CIDB under the grade that will enable the contractor to perform the works quoted for, under the following class(es): **Civil Engineering Construction Works**, specialization and experience as prime contractor in the construction of a minimum of two sewer works along public roads of a nature and complexity equivalent to the Work mentioned in the bidding document over a period of five years.*
- (b) Experience in two works of a similar nature over the last 5 years, each of value not less than **MUR 20 Million**.*
- (c) Contract Manager having as minimum qualification: A diploma in construction related field and 5 years’ experience in the construction sector; or any equivalent qualifications acceptable to the Public body.*
- (d) Minimum amount of liquid assets and/or credit facilities net of other contractual commitments of the Bidder be **MUR 2 Million**.*

*During the bid evaluation exercise, the Bid Evaluation Committee (BEC) noted that the following two (2) projects related to sewer works out of the list of projects were mentioned in your bid:*

- 1. Contract WW 380W – Design & Construction of House Connection in the Sewered areas of Mauritius*
- 2. Contract WW 381W – Sewer Extension works and Sewer Maintenance works*

*On 02 February 2021, the following clarifications were sought from your company to submit additional documentary evidence on the experience and on the value of works indicated in your bid concerning the aforementioned two projects:*

*f*  
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*W*

1. Confirmation on the exact value of works carried out under each Contract mentioned above for all works as at bid submission date.
2. The value of works carried out is to be substantiated by an official certification from the Client of the projects mentioned above

In your reply dated 04 February 2021, you submitted the following information with respect to the above two Projects:

1. Contract WW 380W – Design & Construction of House Connection in the Sewered areas of Mauritius: Evidence that you carried out 201 House Connections equivalent to an amount of MUR 26,452,903.07
2. Contract WW 381W – Sewer Extension works and Sewer Maintenance works: Evidence that you carried out sewer extension/diversion works equivalent to an amount of MUR 8,104,511.89

After careful examination of the information submitted, the BEC viewed that Safety Construction Co. Ltd has failed to demonstrate that it meets specific experience as prime Contractor as required under ITB 10 (a) and 10 (b) as follows:

**Under ITB 10 (a):**

**“valid registration certificate with the CIDB under the grade that will enable the contractor to perform the works quoted for, under the following class(es): Civil Engineering Construction Works, specialization and experience as prime contractor in the construction of a minimum of two sewer works along public roads of a nature and complexity equivalent to the Work mentioned in the bidding document over a period of five years”**

Contract WW 380 W relates to only house connection works and branch connection to existing main. Contract WW 381 W relates to only extension & maintenance of existing sewers at several distinct places.

According to the requirement of the bidding document, the Bidder should have specific experience in both house connection and construction of main sewer along public roads. Consequently, the BEC viewed that the experience mentioned by Safety Construction Co. Ltd is not of similar complexity for the scope of works required as per the bidding document. Furthermore, according to the BEC, working along a public road will require substantial project management and site



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*administration and which would entail the following required expertise among others from the Contractor:*

- *To carry out trial pits and the need to identify a suitable alignment to lay pipes.*
- *To work within the constraints of existing services and which may also require diversion or re-alignment of these services.*
- *Securing wayleaves from local Authorities and other private owners, if need be.*
- *Implementation of a proper Traffic Diversion Scheme after approval from Authorities and also the need for a temporary bus route diversion.*
- *Allowing local access to residential/commercial premises during works implementation*
- *Carrying extensive Public Relations exercise both before and during the implementation of the works and the need to maintain a Complaints Register.*
- *Planning for all Health & Safety requirements during the works.*
- *In the case of Rehabilitation works, the need to deal with live sewers to maintain the system functioning at all times and reconnection of existing house connections to newly laid pipes.*
- *The need to satisfy the Conditions laid down by local Authorities in regard to temporary and permanent reinstatement.*

***Therefore, Safety Construction Co. Ltd has failed to meet the minimum criteria under ITB 10(a).***

***Under ITB 10(b):***

***“Experience in two works of a similar nature over the last 5 years, each of value not less than MUR 20 Million.”***

*Under Contract WW 381W, the value of works executed is only MUR 8.1 M which is below the requirement of the Bidding Document for Specific Experience which is MUR 20M. Hence, under ITB 10(b), Safety Construction Co. Ltd has not met the minimum criteria of two works each of value not less than MUR 20 million.*

*In light of the above, the bid from Safety Construction Co. Ltd has not met the minimum requirement as “**prime contractor in the construction of a minimum of two sewer works along public roads of a nature and complexity equivalent to the works over a period of 5 years, each of value not less than MUR 20 Million as required in Instruction to Bidders (ITB) 10**” and was thus not retained”*

#### **F. Grounds for Review**

On 19 April 2021, the Applicant seized the Independent Review Panel for review on the following grounds:

- “ • **The Applicant is not satisfied with the decision of the abovementioned Public Body for the following reason(s):**
  - **ITB 10 of the bidding documents has failed to comply with the mandatory exigencies of Directive No. 30 issued by the Public Procurement Office.”**

#### **G. The Hearing**

The Hearing was held on 04 May 2021. There was on record a Statement of Case and a Statement of Reply, by Applicant and Respondent respectively. The Applicant further filed, supported by documents a reply to the Statement of Reply of the Respondent.

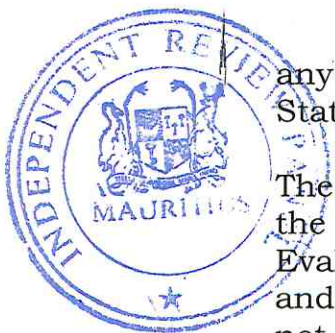
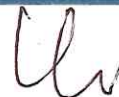
The Applicant was represented by Me J Maudarbaccus, Barrister whereas the Respondent was represented by Me Noor Husenee, Barrister.

The Successful Bidder was also represented by Me L Padiachy, Barrister.

#### **H. Findings**

On the day of Hearing, Counsel for the applicant did not tender any witness but relied on the Statement of Case filed and reply to the Statement of Reply of the Respondent.

The Respondent called one witness namely Mr Romjon, an Engineer at the Waste Water Management Authority and Chairperson of the Bid Evaluation Committee and who deponed on behalf of the Respondent and explained to the Panel the reasons for which the Applicant was not retained.

The only issue canvassed before the Panel was whether ITB 10 of the bidding documents was in compliance with Directive 30 issued by the Public Procurement Office.

First, this is a project for wastewater rehabilitation works at Dubreuil. As per ITB 10 (a) a Bidder was required to demonstrate that it meets specific experience as prime contractor as follows:

Under ITB 10(a) : a valid certificate with the CIDB under the grade that will enable the contractor to perform the works quoted for, under the following class(es): Civil Engineering construction works specialization and experience as prime contractor in the construction of a minimum of two sewer works along public roads of a nature and complexity equivalent to the work mentioned in the bidding document over a period of five years.

According to the Respondent, the two contracts produced by the applicant (a) WW 380 W relates to only house connection works and branch connection to existing main and (b) Contract WW 381 W relates to only extension & maintenance of existing sewers at several distinct places.

Mr Romjon deponing on behalf of the Respondent maintained that the Applicant failed to meet the requirements of showing two projects of similar nature and complexity. According to him the project was for wastewater rehabilitation works whereas Applicant submitted two contracts relating to Design & construction of House connection and the second one relating to extension works and maintenance.

The Applicant in reply to ITB 10(a) in its Statement of Case has submitted that for a specific class requirement there is no any specific Grade requirement and/or any specific specialisation requirement.

The requirement to be as prime contractor in the construction of a minimum of two sewer works along public roads of a nature and complexity equivalent to the work mentioned in the bidding document over a period of five years was to all intents and purposes abusive.

Counsel Noor Husenee pointed out that Section 43 (1) of the Public Procurement Act provides “A bidder who claims to have suffered or to be likely to suffer, loss or injury due to a breach of a duty imposed on a public body or the Board by this Act may, subject to Subsections (2) and (3) and Section 39(5) challenge the procurement proceedings before the entry into force of the Procurement contract.

An opportunity was opened to the Applicant at the very start of the bid process to challenge which it failed to do.



There is also a provision under the Regulation.

Regulation 48 (2) provides: For the purposes of Section 43(3) (b), a challenge shall not be entered unless within 5 days from the invitation to bid or from the opening of bids.

The Applicant failed to make use of this Section 43 of the Act and Regulation 48 to apply for a challenge and waited for the bidding process to be over to come to the Panel and raise that the requirements were abusive.

The Panel points out that it will consider the requirements of the bidding documents to be abusive only when good grounds are put before it by an applicant as to why it did not challenge under Regulation 48. Otherwise the Panel may on its own consider this issue where it deems it necessary and in the interest of justice.

On this score only the Panel can set aside the Application but the Panel has in all its wisdom and exceptionally looked at the other issues raised by Applicant.

Its Statement of Case the Applicant has contended that:

*“ITB 10(a) and ITB 10(b) of the Bidding Documents do not comply with the exigencies and requirements of Directive 30 issued by the Public Procurement Office; ITB 10(a) and 10 (b) is hence null and void to all intents and purposes.”*

### **Standard Bidding Document**

The Panel now refers to Section 10 of the Standard Bidding Documents for procurement of works under Open National Bidding method and Recommended for works of value up to Rs 50 million, which reads as follows:

#### **10. Qualification and Experience Criteria**

*Bidders should have the following minimum qualifications and experience:*

*(a) valid registration certificate with the CIDB under the grade that will enable the contractor to perform the works quoted for, under the following class(es): ..... and specialization .....  
[Public body to insert classes and area(s) of specialization as per Second and Third Schedule of the CIDB Act. If the Schedule does not cover the area of specialization for this particular work, insert N/A]*



(b) experience in two works of a similar nature over the last 5 years, each of value not less than [..... Public body to insert value];

(c) Contract Manager having a minimum qualification: A diploma in construction related field and 5 years experience in the construction sector; or any equivalent qualifications acceptable to the Public body.

(d) minimum amount of liquid assets and/or credit facilities net of other contractual commitments of the Bidder of [insert figure in Mauritian Rupees]

### **Directive 30**

Further, the relevant portion of Directive No 30 entitled

**Amendments to Standard Bidding Documents (Works) and (Consultancy Services), is given hereunder:**

The relevant portion of No. Directive 30 mentions that:

3. To enforce compliance with the registration requirement with the CIDB, public bodies shall henceforth prepare their bidding documents as follows:

#### **(a) For Procurement for Works:-**

(i) With the public body in specifying the minimum registration grade and the field of specialisation issued by the CIDB, that in respect of its specific work contract, bidders are henceforth not required to provide evidence of their general experience and annual return of constructions works executed;

(ii) The clause (i) above also applies to an intended or already constituted joint venture which as an entity satisfies the requirement of the public body regarding the grade and field of specialisation;

(iii) Where the public body considers that it is necessary to ensure that contractors bidding for a works contract to also have experience in one or more specialised fields to qualify for the specific work contract, the updated SBDs allow the public body to customise the bidding document accordingly. In such cases, contractors will have to satisfy both the registration requirements and also evidence of experience in those specialised fields.

(iv) Given that the CIDB also request evidence of history of ligation of contractors when they apply for registration, the SBDs have been amended for bidders to declare and provide details of current litigations only.

*(v) The remaining requirements related to financial soundness, cash flow, mobilisation of equipment and key personnel for contractors to satisfy as a single entity or a joint venture remain the same as has been applicable earlier.*

The Panel notes that Safety Construction Co. Ltd was registered at the CIDB on 01 July 2020, as a Grade B Contractor for Civil Engineering Construction Works including specialisation in:

CE (06) – Pipelaying, water storage and supply and sewerage works

The Applicant contends that the Public Body should have restricted itself to entering only the Class and Specialization of the Contractor under 10(a) and 10(b).

The Public Body emphasizes that the fields of Pipelaying, Water Storage and Supply and Sewerage Works are very wide for each field itself and a registration as in the fields cannot necessarily imply that the Contractor has all the required Skills, Expertise and Experience to deliver for a specific project related to Water Works or Sewerage Works.

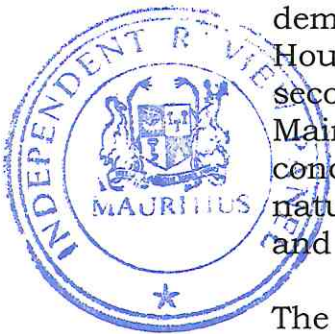
Hence, it is necessary that the requirements be customized in order to ensure that the Contractor selected has the appropriate experience and capability to execute each type of Sewerage Works. Moreover, such customization is allowed for under 10(a) (iii) above.

After giving due consideration to all the details of the Contract, the Panel agrees with the position of the Respondent.

The second issue raised before this Panel is under ITB 10(b) which provided that Bidders should have experience in 2 works of a similar nature over the last five years, each of value not less than MUR 20 million.

According to the Public Body, the applicant under contract WW 380W demonstrated that it carried out works in Design & Construction of House Connection for an amount of MUR 26,452,903.07 and the second works WW 381W was Sewer Extension works and Sewer Maintenance Works for an amount of MUR 8,104,511.89. It therefore concluded that the Applicant did not meet the requirements of similar nature and complexity equivalent to works over a period of 5 years and each of value not less than MUR 20 million.

The Applicant in its Statement of Case on this issue at page 6 under paragraphs 26 and 27 has mentioned that the Respondent has indirectly changed this bidding procedure from an open National Bidding to a Limited Bidding and Selective Tendering and by



qualifying this requirement as an abusive one against the rules of natural justice and being clearly unfair and biased as they purposely favoured a limited group of bidders.

Despite all these averments nothing has been substantiated before this Panel and as pointed out earlier that the Applicant had an opportunity to apply for challenge under Regulation 48 which it failed to do so.

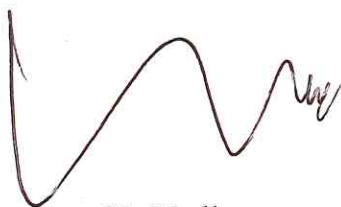
The Panel in the absence of any concrete evidence ushered before it save and except mere averments cannot intervene.

**I. Conclusion**

For all the reasons mentioned above, the Panel finds no merit in this Application for Review and dismisses the same.



H. Gunesh  
**(Vice-Chairperson)**



V. Mulloo  
**(Member)**



R. Mungra  
**(Member)**

**Dated: 17 May 2021**