



Independent Review Panel

Decision No. 10/21

In the matter of:

Safety Construction Co. Ltd

(Applicant)

v/s

Wastewater Management Authority

(Respondent)

(Cause No. 09/21/IRP)

Decision



A. History of the case

On 09 December 2020 the Respondent issued Bidding Document for Sewer Extension Works and Sewer Deviation Works at Nicolay (Port Louis) and Coromandel – Contract WW460W. The Applicant submitted its bid through the E-Procurement Platform on 20 January 2021.

B. Evaluation

A Bid Evaluation Committee 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 has been carried out and the particulars of the successful bidder are as mentioned below:

Name of Bidder	H. Padiachy (Contractor) Ltd
Address	47, Remy Ollier Street, Beau Bassin
Bid Amount	MUR 18,538,450.00, 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 accordance with the provisions of the Public Procurement Act 2006.”



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In accordance to Clause 1 of the Instruction to Bidders (ITB) of the bidding documents, the scope of works under the abovementioned Contract include, inter alia the following:

(i) Extension works at Impasse Nicolay, Nicolay Road, Port Louis

- Production of construction drawings.
- Construction of about 185 m of sewer line along with a river crossing across Riviere Latanier and 17 house connections.
- Road reinstatement.
- Refurbishment works, if any, as may be directed.
- Other related works.

(ii) Extension works to connect the Coromandel Fire Station

- Production of construction drawings.
- Construction of about 375m of sewer line within Coromandel Industrial Estate and connection of Coromandel Fire Station.
- Protection of existing services such as underground telecom lines, water pipes, etc.
- Road reinstatement.
- Refurbishment works, if any, as may be directed.
- Other related works.

(iii) Rehabilitation Works within the Coromandel Industrial Estate

- Production of construction drawings.
- Replacement and realignment of about 300m sewer pipe with a 300mm diameter pipe.
- Refurbishment of associated manholes.
- Protection of existing services such as underground telecom lines, water pipes, etc.
- Road reinstatement.
- Refurbishment works, if any, as may be directed.



- *Other related works.*

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:*

Class: Civil Engineering Construction Works

Specialization: Not Applicable

- (b) *Experience in two works of a similar nature over the last 5 years, each of value not less than MUR 10 Million;*

During bid evaluation exercise, the Bid Evaluation Committee (BEC) noted the following two (2) projects related to sewer works out of the list of projects 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 05 February 2021, the following clarifications were sought from your company regarding the aforementioned two projects.

- (i) *Provide exact value of works carried out under both contracts for all works as at bid submission date and substantiate the information by an official certification from the Client for the aforesaid projects*
- (ii) *Provide details of works performed under each Contract to demonstrate experience in works of similar nature.*

In your reply dated 08 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 26,631,013.79.*
- 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 bidder Safety Construction Co.Ltd has failed to demonstrate that it meets specific experience as prime Contractor as required under ITB 10(a) and ITB 10(b) as follows:

Under ITB 10 (a):

- (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:**

Class: Civil Engineering Construction Works

Specialization: Not Applicable

Contract WW 380W – Design & Construction of House Connection in the Sewered areas of Mauritius relates to only house connection works & branch connection to existing main.

According to the requirement of the bidding document, the Bidder should have specific experience in house connection, construction of main sewer along public roads, replacement of existing sewer and river crossing. 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.

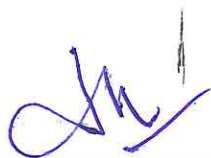
Therefore, Safety Construction Co. Ltd has failed to meet the minimum criteria under ITB 10(a).

Under ITB 10 (b):

Experience in two works of a similar nature over the last 5 years, each of value not less than MUR 10 Million;

Under Contract WW 381W, the value of works executed and payment certified is only MUR 6.9 M (as at bid submission date) which is below the requirement of the Bidding Document for Specific Experience which is MUR 10M. **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 10 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 10 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 was represented by Mr J Maudarboccus, whereas the Respondent was represented by Mr N Husenee.

The Successful Bidder was represented by Ms. L Padiachy.

H. Findings

- 1.- This is an Application for Review following a reply to the Challenge of applicant. The project is for Sewer Extension Works and Sewer Deviation Works at Nicolay (Port Louis) and Coromandel. As per the reply to Challenge, the applicant was informed that its bid was not retained and the reasons advanced were as follows:
- 2.- The Public Body that is the Respondent referred to the scope of works under Clause 1 which consisted, inter alia, (i) Extension works at Impasse Nicolay, Nicolay Road, Port Louis (ii) Extension works to connect the Coromandel Fire Station and (iii) Rehabilitation works within the Coromandel Industrial Estate.

- 3.- The Respondent referred to ITB 10 (a) and ITB 10(b).

ITB 10(a) provides 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:

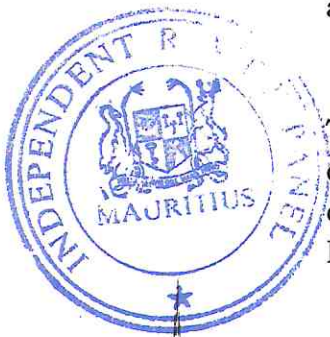
Class: Civil Engineering construction works

Specialization: Not applicable.

- (b) Experience in two works of a similar nature over the last 5 years, each of value not less than MUR 10 million.

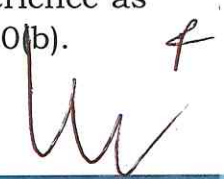

- 4.- In this regard the Applicant had listed two projects, first contract WW 380- W Design & construction of house connection in the sewerred areas of Mauritius and second contract WW 381 W- Sewer extension works and sewer maintenance works.

- 5.- The Respondent while examining the bid of Applicant called upon it for clarifications regarding the two projects submitted and those clarifications were to (a) provide exact value of works and (ii) provide details of works.



The Applicant replied (a) it carried out 201 House connections equivalent to an amount MUR 26,631,013.79 and (b) it carried out sewer extension/diversion works equivalent to an amount of MUR 8,104,511.89.

- 6.- The Respondent informed the Applicant in the reply to challenge that it failed to demonstrate that it meets specific experience as prime contractor as required under ITB 10(a) and ITB 10(b).



- 7.- The Applicant being dissatisfied with the reply to Challenge, applied before this Panel under Section 45 of the Public Procurement Act for review of the decision of the Respondent.
- 8.- In the Application for Review, the Applicant filed a Statement of Case and in the said Statement of Case, the Applicant under ITB (a) has this to say:
- (a) Under ITB 10(a) of the bidding document simply requires the Applicant to possess a valid registration certificate with the CIDB under the grade that will enable the contractor to perform the works quoted under the class of Civil Engineering Construction works
 - (b) There is not any specific Grade requirement and/or any specific specialisation requirement
 - (c) The Applicant provided a valid certificate of registration with CIDB and therefore cannot be held to have failed to meet the minimum criteria under ITB 10(a) of the bidding document
 - (d) The requirement for Applicant's experience to be of similar complexity is abusive
 - (e) There is no specialisation requirement under ITB 10(a)
 - (f) The Respondent has purposely imposed new criteria under ITB 10(a) of the bidding document and has in truth and in fact failed to understand that ITB 10(a) of the bidding document only relates to the registration to meet the minimum criteria set out thereunder.
- 9.- Under ITB 10(b): The Applicant has mentioned the following ;
- (a) By requiring Bidders to possess experience in 2 works of similar nature each of a minimum value, the Respondent has purposely provided the specific conditions in order to favour a limited group of bidders;
 - (b) The aforesaid acts and doings of the Respondent as regards the contents of ITB10(b) shall ab initio exclude the participation of some bidders in the bidding exercise
 - (c) It is tantamount to a limited bidding and selective tendering exercise rather than an open national bidding

- (d) Such practice from the Respondent is abusive and against the rules of natural justice inasmuch as it is unfair and biased and
- (e) It is not consistent with the exigencies of Directive No.30.

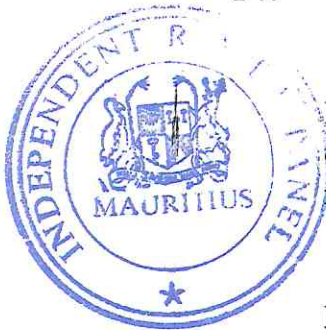
10.- This Panel had the opportunity to listen to the witness of the Applicant who deponed before us and also the witness who deponed on behalf of the Respondent. We have perused the whole record in regard to this Review Application available at the Independent Review Panel.

11.- We shall refer to the averments of the Applicant in its Statement of Case more specifically to the points raised that the Respondent requirement of Applicant's experience to be of similar complexity is abusive, the specific conditions has purposely been provided in order to favour a limited group of bidders, the contents of ITB 10(b) is to exclude the participation of some bidders in the bidding exercise (ab initio) and the Respondent has been abusive and against the rules of natural justice.

12.- As rightly pointed out by Me N Husenee Counsel for the Respondent that the Applicant should have under Regulation 48 applied for a challenge right at the beginning and which it failed to do so.

13.- Regulation 48 provides for challenge and appeal procedures.


14.- Regulation 48 (2) provides:



For the purposes of Section 43(3) (b), a challenge shall not be entertained unless it is submitted within 5 days from the invitation to bid or from the opening of bids.

Now Section 43 (2) of the Act provides:

A bidder who claims to have suffered, or is 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.

- 15.- The Applicant failed to apply these provisions for a challenge and review but in cross examination the witness Mr Zyad Maudarbaccus who deponed on behalf of the applicant has this to say:

‘Le Public body-we are an experienced contractor- Dans plusieurs cas, dans plusieurs places, donc quand nous venons de l’avant pour demander une clause qui n’est pas consistante avec la loi, mais ... (inaudible) pas changer.

The Applicant in our opinion should have applied for a challenge as provided under Regulation 48 which it failed to do so. Coming at this late stage before this Panel to ask it to intervene would be futile. The Panel may intervene and look into such issues only on its own or on good reasonable cause shown and in this present matter the Applicant has failed to show any reasons as to why this Panel should now intervene.

- 16.- On the merits of the case the Panel has to pronounce whether the Applicant complied with ITB 10(a) and 10(b).

Witness Mr Utchamah has this to say:

Mr Husenee: Nonne fini ek 380. Nous cause 381 maintenant.

Mr Utchamah: 381 li, li pane meet some minimum monetary value li 10 million.

Mr Husenee: sa outright li rejeter

Mr Utchamah: oui.

Mr Utchamah maintained in cross examination on ITB 10(b) of the Bidding documents that the Applicant failed to provide to the satisfaction of the public body experience in two works of a similar nature over the last 5 years, each of value not less than MUR 10 million. This Panel also comes to the conclusion that in

fact the Applicant failed to show before us to our satisfaction that it did have experience in two works of a similar nature over the last 5 years each of value not less than MUR 10 million. On the contrary the Applicant on this issue has submitted that the requirements under ITB 10(b) are to favour a limited group of bidders, to exclude the participation of some bidders, such practice are abusive.

- 17.- On the last point which Applicant tried to convince this Panel that ITB 10(a) and ITB 10(b) are not consistent with the exigencies of Directive No.30, the panel refers Applicant to Regulation 48 and maintains that the Applicant has right at the beginning to challenge the bid exercise and in reply to the challenge if not satisfied seized the Panel for Review. These specific provisions under Section 43 (2) of the Act and Regulation 48 have been provided by the legislator for case like the one before us.

I. Conclusion

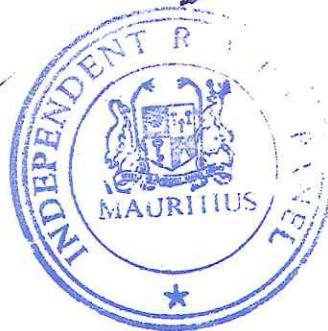
The Panel finds no merit in the Application for review and therefore set aside the Application.


H. Gunesh

(Vice-Chairperson)


V. Mulloo

(Member)




R. Mungra

(Member)

Dated: 17 May 2021

