



Independent Review Panel

Decision No. 12/21

In the matter of:

Serveng Ltd.

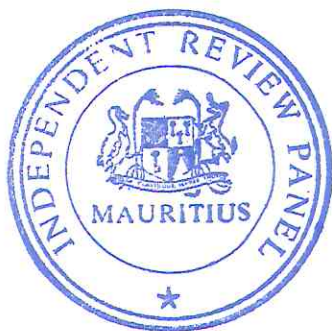
(Applicant)

v/s

Central Water Authority

(Respondent)

(Cause No. 13/21/IRP)



Decision

A. History of the case

On the 14th June 2021, the Central Water Authority (The Respondent) issued bidding documents through the e-Procurement System for the Renewal of Pumping Main From New Plaine Lauzun to Upper Monneron Reservoir - Procurement Reference CPB/17/2021 - Contract CWA/IFB/2021/579.

B. The Challenge

On 16th June 2021, the Applicant challenged the procurement proceedings on the following grounds:

“1.0 Alternative BID(ITB14)”

We trust the contract should have allowed alternative bid, (ITB 14) since, over the last few months/years a new normal have been defined all over the world, to cope with the persistent pandemic, the end of which can hardly be anticipated, so that serious financial adversities are being observed all around the world. Being an experienced contractor, we trust the contract value should be above MUR 150 Million, on the basis of the actual scope of works.

However, we trust there should be alternatives to the present bid (value engineering) which can bring the contract price drastically down to the benefit of the Tax Payers at large. This would help in alleviate the financial burden levied over the country and trust these are in line to the Government philosophy.

Conditions of Contract

*The condition of contracts is defined in section VI as follows: The Conditions of Contract Part1 – General Conditions of Contract (GCC) shall be those forming Part 1 of the “Conditions of Contract for Construction for Building and Engineering Works **Designed by the Employer**” first edition, 1999 prepared by the Federation Internationale des Ingenieur – Conseils (FIDIC). Additionally, under section VII, the Particular Conditions of Contract (PCC), it states that the PCC shall complement the General Conditions of Contract to specify data and contractual requirements linked to special circumstances, the Employer, the Engineer, the sector, the overall project, and the Works.*

The contractor feels aggrieved since we trust the PCC have been modified in such a way that that it is unfair to the Contractor and they are as follows:

Sub Clause 3.3 Instruction

We trust the additional add-on to the paragraph is unfair, since the instruction given to the contractor cannot be an arbitrary one, that is the Engineer or his representative should know beforehand that his or her instruction/s entails a contractual claim or not. Therefore, we do not foresee the responsibility of the contractor to give notice to the Engineer within Seven days following the issue of the written instructions.

Sub Clause 3.5 Determination

The PCC under this subclause deleted the fact that “Each party shall give effect to each agreement or determination, unless and until revised under Clause 20 (Claims, Disputes and Arbitration). In the contrary, unilaterally states the following “if agreement is not achieved, the Engineer shall make a determination, taking due regard of all relevant circumstances and shall obtain the approval of the Employer on the determination.” It is to be pointed out the Engineer and the Employer over this contract is the CWA, and this sub-Clause 3.5 is biased and detrimental to the contractor.

Sub Clause 4.2 Performance Security

Given the prevailing pandemic, with very difficult financial conditions, we trust the lead time for delivering the Performance Security should have been maintained to 28 days, Banking activities nowadays, take longer Leadtime with the addition of Mauritius in the FAFT grey list and trust a lead time of 14 days is very tight.

Sub Clause 4.8 Safety Procedures

It seems to be a deliberate act for this addition since we trust the employer have added all the possible safety instruments that can be imposed on the contract. Having designed by the engineer we trust that a provisional sum should have been added to cater for all these additional costs that can be imposed by the RDA, TMRSU, Municipal Councils and District Council. Additionally, if spraying water at least 4 times a day to keep dust and nuisance to a minimum should have to be allowed as well in the provisional sum rather than loading it on the contractor.



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Sub Clause 4.10 Site Data

Since the contract is designed by the Engineer, we trust that the employer should have enough information about the site data that should have been according to the original Clause of GCC4.10, make available to the contractor instead of deleting this subclause in its entirety and put in an exhaustive list of site Data which the contractor should be well acquainted to prior to bid submission. Additionally, we also observe that this list also make reference to be acquainted to restrictions in working hours as imposed by Police, TMRSU, Municipal Council, District Council, restrictions and authorizations required for road closure etc. It seems that the employer is biased over here, since it is very difficult/for the contractor to know the implication of these bodies additionally, it is a known fact that these public bodies do not entertain any request from contractors and as such loading these conditions to the bidder is unfair.

Sub Clause 4.12 Unforeseeable Physical Conditions

The first paragraph of Clause 4.12 of the GCC, defines “physical conditions” as natural physical conditions and man-made and other physical obstructions and pollutants, which the contractor encounters at the site when executing the Works, **including sub surface and hydrological conditions** but excluding climatic conditions.

So, we find it weird, biased, unfair and unreasonable as to why the addition in Sub Clause 4.12 requires that “the Contractor shall be responsible for dealing with water, whether from existing drainage systems, watercourses, underground spring or any other source or cause”. We trust this is in total contradiction to the definition of physical conditions and should be valued as unforeseeable conditions.

Sub Clause 4.13 Rights of Way and Facilities

Since the contract is designed by the Engineer, we trust the detailed stage programme showing all the arrangements to be taken to ensure smooth and safe traffic flows on the roads to be diverted should emancipate from the Engineer rather than lading same on the shoulders of the contractor.

Sub Clause 4.17 Contractor’s Equipment

Can the Employer explain how can the Contractor’s Equipment, acquired through lease or own fund be the property of the Employer

with effect from its arrival on site? Can the methodology of same be defined?

Sub Clause 4.18 Protection of the Environment

The contract being a designed by the Employer contract, we trust the EMP should emancipate from the employer and implemented by the contractor. On the basis of this EMP, the contractor would be able to price this element.

Sub Clause 4.23 Contractor's Operations on Site

"... The employer reserves the right to employ others to do the necessary work of reinstatement and to deduct the cost thereof from any money due from the Employer to the Contractor." We are not agreeable to this statement and trust that this decision should cannot be a unilateral one.

Sub Clause 4.25 Protection of Existing Works and Services.

We cannot understand how the contractor is to be held responsible for any injury resulting from existing works or services, and why the employer shall be indemnified, since the works have been designed by the employer.

Sub Clause 6.2 Rates of Wages and Conditions of Labour.

We trust the rates and wages and conditions of labour have the competent authority in Mauritius to look after an enforce consequently, we trust that the additional criteria required to be entitled to payment is unjust and unfair to the contractor.

Sub Clause 6.5 Working Hours

Since the contract is designed by the Employer, we trust they should be able to advise on the stretches of the road where restricted hours would be imposed, so that we are not agreeable to the fact that the contractor should foresee same and include this cost to his BID.

Additionally, the 3rd paragraph requires that during the night works, the Contractor shall do so in such a way so as not to cause disturbance to inhabitants and establishments adjoining the site. We trust that the contractor in his best endeavour can mitigate disturbances but we cannot foresee how no disturbance at all can be achieved. Since the contract is designed by the Employer we would be



glad to have the methodology of work from the employer whereby no disturbance would be caused to the inhabitants.

We are not agreeable to paragraph 5th, where it mentions that it is deemed that the contractor has taken into consideration all restricted working hours and night works that shall be imposed. We trust that this statement is not fair to the contractor, since it is pre-empted from such statements that the Employer anticipate restricted working hours and deliberately making the contractor carry the can. Whereby they further stressed that the contractor shall not be entitled for extension of time and additional payments.

Sub Clause 6.17 Festivals, Religious Customs and Municipal or Government Elections

This is an addition to the GCC, and trust it is biased to the fact that the Employer is not taking into consideration the idle cost of equipment due to the unplanned holidays/festivities. It requires only extension of time without cost to be attributed to these events. Additionally, to our surprise the delay due to Mahashivratri has also been highlighted whereby it is observed that extension of time for this delay will not be allowed. We trust these new criteria are to the detriment to the contractor and the document is biased in favour of the employer.

Clause 7 Plant and Materials and Workmanship

*“...he shall ensure that during all phases of the performance of the contract he has adequate materials on site and **ensure that adequate supplies of materials will be available to him in all phases of the Contract Performance...** The Employer shall be under no liability whatsoever by way of indemnity or otherwise in respect of any shortage of materials.”*

In this world of Today, whereby the whole world is experiencing adverse financial adversities, whereby it is a known fact that freight either by air or sea have been seriously impacted, we trust this condition should be waived since no body can predict how the importations would be like in the near future.

Sub-Clause 7.10 Water Cut

*“**The CWA does not guarantee that the existing pipelines will be completely dry and the Contractor shall provide necessary arrangements to deal with the water...**” We trust it is the duty of the employer to provide the proper water cut and based on experience*




very often we found that due to improper connection high flow of water keeps on oozing out of the connection point. Consequently, this responsibility cannot be laden on the Contractor, since any rational mind understands that for the proper connection to take place the connection point should be dry. Additionally, we trust delays and disruptions accrued due to water cuts should entail extension of time with cost.

Sub Clause 20.1 Contractor's Claim.

*We are not agreeable to the following **"Furthermore, the Contractor is not entitled to the following claims:***

- **Loss of interest due to late release of Retention Money.**
- **Financial Charges.**
- **Costs associated with preparation of extension of time and claims.**
- **Loss of commercial opportunities**
- **Overhead cost/Offices Charges**
- **Opportunity Cost even if the Contract is extended as a result of Extension of Time."**

We trust this summarise the biased nature of the PCC, the contractor should be allowed to claim the above if there are any deviations in the contract requirements and therefore same should be allowed."

C. The Reply to Challenge

On 23rd June 2021, the Respondent made the following reply to the challenge and stated that:

"We wish to inform you that the Challenge of the Conditions of Contract is not entertainable. Moreover, the CWA maintains that all conditions of the Contract remain the same."

D. Grounds for Review

On 29th June 2021, the Applicant seized the Independent Review Panel for review on the following grounds:



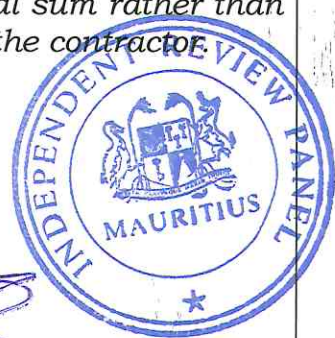
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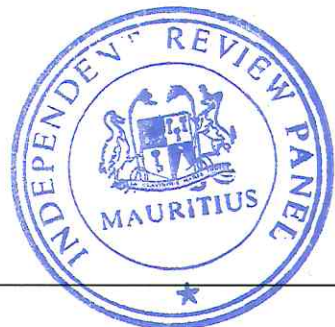
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ANNEX 1		
Sub-Clause	Modification(s) to Particular Conditions of Contract (PCC)	Applicant's Submissions
3.3.	<p>Instruction of the Engineer</p> <p>Add the following to paragraph 2, sub-paragraph (a): "or an instruction via electronic mail,"</p> <p>Add the following paragraphs: "The Engineer' written instructions shall to be dated, numbered and registered. Before the start of works, the Contractor shall check all documents submitted and notify the Engineer of any errors, omissions or contradictions therein. If in the opinion of the Contractor an Engineer's instruction goes beyond his contractual obligations which may give rise to claims, he shall give notice to the Engineer within a period of seven days, following the date of issue of such instruction. Beyond the period of seven days, no claim shall be accepted by the Engineer. Such claims shall not suspend the execution of the written instructions unless the Engineer instruct otherwise."</p>	<p>We trust the additional add-on to the paragraph is unfair, since the instruction given to the contractor cannot be an arbitrary one, that is the Engineer or his representative should know beforehand that his or her instruction/s entails a contractual claim or not. Therefore, we do not foresee the responsibility of the contractor to give notice to the Engineer within Seven days following the issue of the written instructions.</p>
3.5.	<p>Determinations</p> <p>Delete the 2nd sentence "If agreement relevant circumstances" at the end of the 1st paragraph and replace by the following: "If agreement is not achieved, the Engineer shall make a determination, taking due regard of all relevant circumstances, and shall obtain the approval of the Employer on the determination."</p>	<p>The PCC under this Sub-clause deleted the fact that "Each party shall give effect to each agreement or determination, unless and until revised under Clause 20 (Claims, Disputes and Arbitration). In the contrary, unilaterally states the following "If agreement is not achieved, the Engineer shall make a determination, taking due regard of all relevant circumstances and shall obtain the approval of the Employer on the determination." It is to be pointed out the Engineer and the Employer over this contract is the CWA, and this sub-Clause 3.5 is biased and detrimental to the contractor."</p>
4.2.	Performance Security	



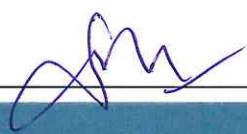
	<p>In line 1 of the 2nd paragraph delete the words “28 days” and replace by “14 days”</p> <p>In line 4 and 5 of the 2nd paragraph delete the words “annexed to the Particular Conditions” and substitute “included in the Bid documents”</p> <p>Insert at the end of the second paragraph of Sub-Clause 4.2 the following: <i>“The Performance Security shall be in the form of a bank guarantee, issued by a local commercial bank registered and licensed to do business in Mauritius and acceptable to the Employer.”</i></p> <p><i>Performance Securities offered by insurance companies or other institutions will not be accepted.”</i></p>	<p><i>Given the prevailing pandemic, with very difficult financial conditions, we trust the lead time for delivering the Performance Security should have been maintained to 28 days, Banking activities nowadays, take longer Leadtime with the addition of Mauritius in the FAFT grey list and trust a lead time of 14 days is very tight.</i></p>
<p>4.8.</p>	<p>Safety Procedures</p> <p><i>Insert the following paragraphs at the end of Sub-Clause 4.8(e):</i></p> <p><i>f) provide beacons, flashing lamps, diversion signs, warning signs, lamps of sufficient luminance on roads within the site limits to ensure the safety of all road users and pedestrians, as per the requirements of the Road Development Authority (RDA), Traffic Management and Road Safety Unit (TMRSU) and the Municipal Councils and District Councils concerned. The entire cost of installing and maintaining warning signs, beacons, flashing lights and all other safety requirements including the deployment of traffic policemen during and after normal working hours or on public holidays on the Site shall be borne by the Contractor during the execution of the works, be responsible for any accidents or damage done to a third party resulting from his equipment or mistakes or from the omissions of warning signs, beacons, barricades or flashing lights and the like.</i></p> <p><i>g) take all necessary measures regarding spraying water, at least four (4) times a day to keep dust nuisance to a minimum, all at his own cost.</i></p> <p><i>h) ensure that all roads are kept clean during working hours and after every</i></p>	<p><i>It seems to be a deliberate act for this addition since we trust the employer have added all the possible safety instruments that can be imposed on the contract. Having designed by the engineer we trust that a provisional sum should have been added to cater for all these additional costs that can be imposed by the RDA, TMRSU, Municipal Councils and District Council. Additionally, if spraying water at least 4 times a day to keep dust and nuisance to a minimum should have to be allowed as well in the provisional sum rather than loading it on the contractor.</i></p> <div style="text-align: right;">  <p><i>AS</i></p> <p><i>Jue</i></p> </div>

	<p><i>working day to ensure safety of the public and deemed to have allowed for this in his rates.”</i></p>	
<p>4.10</p>	<p>Site Data</p> <p>Delete clause 4.10 and replace by the following: <i>“The Contractor shall be deemed to have inspected and examined the site and obtained all necessary information as to risks, contingencies and other circumstances which may influence or affect the Bid or Works satisfied himself of the following:</i></p> <ul style="list-style-type: none"> <i>(a) the extent, nature and location of the Works</i> <i>(b) the general conditions and potential difficulties for carrying out the Works and remedying of any defects and in particular, the equipment necessary for the proper execution of the Works</i> <i>(c) access for construction equipment and materials to the pipeline alignment at all necessary locations at the top of the cliffs, bottom of valleys and along rivers for the construction of the Works</i> <i>(d) the physical conditions of the site, including the road surface material, asphalt thickness, soils, rock types, the hydrological and geotechnical characteristics of the site and its surroundings, existing structures, and aboveground and underground services</i> <i>(e) local traffic conditions and traffic diversions where necessary,</i> <i>(f) conditions inhibiting works to be carried out during peak traffic hours,</i> <i>(g) conditions requiring works to be limited to be carried out at night</i> <i>(h) meteorological and climatic conditions, the possibility of flooding by rivers, depths of water table, the possibility of high water table causing seepage of water in trenches, wind velocity etc.</i> <i>(i) conditions governing the import of plant and equipment</i> <i>(j) local conditions especially those concerning the supply materials, such as aggregates, cement, reinforcement etc.</i> <i>(k) supply of imported materials such as pipes and fittings to Mauritius</i> 	<p><i>Since the contract is designed by the Engineer, we trust that the employer should have enough information about the site data that should have been according to the original Clause of GCC4.10, make available to the contractor instead of deleting this sub clause in its entirety and put in an exhaustive list of site Data which the contractor should be well acquainted to prior to bid submission. Additionally, we also observe that this list also make reference to be acquainted to restrictions in workings hours as imposed by Police, TMRSU, Municipal Council, District Council, restrictions and authorizations required for road closure etc. It seems that the employer is biased over here, since it is very difficult/ for the contractor to know the implication of these bodies additionally, it is a known fact that these public bodies do not entertain any request from contractors and as such loading these conditions to the bidder is unfair</i></p>

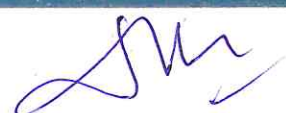
	<p>(l) means of communication and transportation</p> <p>(m) supply of electricity, potable water and fuel etc.</p> <p>(n) availability of manpower</p> <p>(o) laws and regulations governing the employment of foreign labour, all the constraints imposed by the social, monetary and customs legislation in force in Mauritius</p> <p>(p) all circumstances likely to have a bearing on the execution of Works or on its costs</p> <p>(q) Restriction in working hours as imposed by the Police, TMRSU, Municipal Council, District Council, RDA, Forestry Services, Health Centres, Religious Institutions, Educational Institutions and any other local authority and stakeholder.</p> <p>(r) Restrictions and authorisation required for road closures</p> <p>(s) The requirement to provide access or alternative access to residents to their premises.</p> <p>The Contractor shall be fully responsible for obtaining the necessary information and its proper interpretation. The Contractor must not assume that exhaustive investigations have been done on the nature of the site. He is at liberty to carry out his own investigation work for the proper execution of the Works all at his own cost at any time he considers it necessary and is deemed to have been satisfied before submitting the Bid as to all relevant matters.”</p>	
<p>4.12.</p> <p><i>U</i></p>	<p>Unforeseeable Physical Conditions</p> <p>Add the following paragraph: Except as otherwise specified, the Contractor shall be responsible for dealing with water, whether from existing drainage systems, watercourses, underground springs or any other source or cause. In discharging and diverting water, he shall avoid flooding or damaging other works or services, causing erosion and/or pollution of watercourses. In addition, the Contractor shall take appropriate steps to prevent soil erosion and keep the site and borrow areas free from flooding.</p>	<p>The first paragraph of Clause 4.12 of the GCC, defines “physical conditions” as natural physical conditions and man-made and other physical obstructions and pollutants, which the contractor encounters at the site when executing the Works, including sub surface and hydrological conditions but excluding climatic conditions.</p> <p>So, we find it weird, biased, unfair and unreasonable as to</p>




		<p><i>why the addition in Sub Clause 4.12 requires that “the Contractor shall be responsible for dealing with water, whether from existing drainage systems, watercourses, underground spring or any other source or cause”. We trust this is in total contradiction to the definition of physical conditions and should be valued as unforeseeable conditions.</i></p>
<p>4.13.</p>	<p>Rights of Way and Facilities</p> <p><i>Add the following paragraph: The Contractor shall provide and maintain all detours, temporary roads including any temporary drainage measures, barriers, warning and guide signs, temporary traffic lights, and any other road equipment at all hours during day and night. The Contractor shall, within 14 days following the order to proceed with the works on a specific work-front, submit a detailed stage programme showing all arrangements to be taken to ensure smooth and safe traffic flows on roads to be diverted. The Contractor shall liaise with the appropriate Authorities in the application of this Clause. No claim for any damage to the Works caused by the traffic will be entertained by the Employer, and any damage caused by diverted traffic will have to be made good at the Contractor’s expense. The Contractor shall be responsible for ensuring the safety of all persons and property on the site. When existing fences, walls, hedges, gates and the like have to be removed or altered for the proper execution of the Works, the Contractor shall erect temporary fencing and gates and, if required, provide watchmen, provided always that the fences or gates referred to have not been the subject of a negotiated agreement for compensation whereby the owner or tenant has been made responsible for such removal or alteration. The cost of such temporary removals and reinstatement and the repair of any damage will be deemed to have been</i></p>	<p><i>Since the contract is designed by the Engineer, we trust the detailed stage programme showing all the arrangements to be taken to ensure smooth and safe traffic flows on the roads to be diverted should emancipate from the Engineer rather than lading same on the shoulders of the contractor.</i></p>


	<p><i>included in the Contractor's rates. The Contractor shall ensure that no fence or gate, except where these are required to be removed or altered for the proper execution of the Works, is damaged and that no gates are left open which may constitute a potential hazard.</i></p>	
<p>4.17</p>	<p>Contractor's Equipment</p> <p><i>Insert the following paragraphs to Sub-Clause 4.17 as follows: "Contractor's Equipment which is owned by the Contractor (either directly or indirectly) shall be deemed to be the property of the Employer with effect from its arrival on the Site. This vesting of property shall not:</i></p> <ol style="list-style-type: none"> <i>1. Affect the responsibility or liability of the Employer</i> <i>2. Prejudice the right of the Contractor to the sole use of the vested Contractor's Equipment for the purpose of the Works, or</i> <i>3. Affect the Contractor's responsibility to operate and maintain Contractor's Equipment.</i> <p><i>The plant shall be deemed to revert back to the Contractor when he is entitled either to remove it from the site or upon issue of the Taking-Over Certificate for the Works, whichever occurs first. The Contractor shall not remove any plant from site without the express permission of the Engineer"</i></p>	<p><i>The addition of this clause is a violation of the constitutional rights of the Applicant in relation to property.</i></p>
<p>4.18.</p>	<p>Protection of the Environment</p> <p><i>Add the following paragraph to Sub-Clause 4.18: "The Contractor will be required to adhere to the Environmental Monitoring Plan (EMP) (including environmental mitigation and environmental management plans) and shall submit the EMP to the Engineer for approval within 14 days after Contract Award. The entire cost for meeting the provisions of the EMP and this Sub-Clause is to be borne by the Contractor. During the execution of the Works he shall be responsible for any accident or damage done to a third party resulting from non-compliance of this Sub-Clause."</i></p>	<p><i>The contract being a designed by the Employer contract, we trust the EMP (Environmental Monitoring Plan) should emancipate from the employer and implemented by the contractor. On the basis of this EMP, the contractor would be able to price this element.</i></p>

<p>4.23.</p>	<p>Contractor’s Operations on Site</p> <p>Add the following paragraphs after the 2nd paragraph of Sub-Clause 4.23: <i>“The Contractor shall reinstate all roads with an asphaltic temporary reinstatement within 2 calendar days after excavation and backfilling of trenches have been completed as per the provisions of the Contract.</i> <i>The Contractor shall also reinstate all properties whether public or private, which are damaged in consequence of the construction and maintenance of the Works to a condition as specified and at least equal to that existing before his first entry on them. The cost of such reinstatement shall be borne by the Contractor. If, in the opinion of the Engineer, the Contractor has failed to take reasonable and prompt action to discharge his obligations regarding reinstatement, the Engineer will inform the Contractor in writing. The Employer reserves the right to employ other to do the necessary work of reinstatement and to deduct the cost thereof from any money due or which shall become due from the Employer to the Contractor.”</i></p>	<p><i>“... The employer reserves the right to employ other to do the necessary work of reinstatement and to deduct the cost thereof from any money due from the Employer to the Contractor.”</i></p> <p><i>We are not agreeable to this statement and trust that this decision should cannot be a unilateral one.</i></p>
<p>4.25.</p>	<p>Protection of Existing Works and Services</p> <p><i>“The Contractor shall acquaint himself with the position of all existing aboveground and underground services, such as surface water drains, electrical cables, telephone ducts, telephone and lighting poles, water mains, sewers, manhole and chambers and the like before commencing any excavation or other work likely to affect these services.</i> <i>Where work is to be carried out in the vicinity of overhead power lines, the Contractor shall ensure that all persons working in such areas are aware of the relatively large distance that high voltage electricity can “short” to earth when cranes, other large equipment is in the vicinity of power lines. The Contractor’s attention is drawn to BS 162 which gives safe clearance for the various voltages.</i> <i>The Contractor shall be held responsible for</i></p>	<p><i>We cannot understand how the contractor is to be held responsible for any injury resulting from existing works or services, and why the employer shall be indemnified, since the works have been designed by the employer.</i></p>




any injury resulting from existing works or services, and shall indemnify the Employer against any claims in this respect. The Contractor shall be responsible for the reinstatement of the services so affected.

In all cases where such works or services are exposed, they shall be properly marked, shored, hung up or otherwise protected. Special care must be exercised in filling and compacting the ground under mains, cables, etc, and to leave uncovered exposed water meters, water house connection pipes, stopcock boxes and similar items.

Installation adjacent to the works shall be kept securely in place until the work is completed and shall then be made as safe and permanent as before.

Notwithstanding the foregoing requirements, and without reducing the Contractor's responsibility, the Contractor shall inform the Engineer immediately if any existing works or services are located, exposed or damaged.

6.2. Rates of Wages and Conditions of Labour...

The Contractor shall not be entitled to payment of any money which would otherwise be payable under the terms of Contract in respect of the work and labour performed in the execution of the Contract unless and until he shall have filed together with his application for payment a certificate:

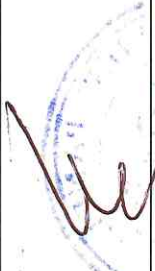
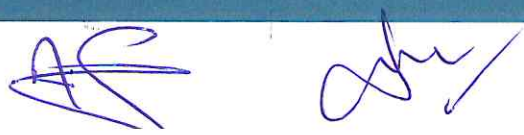
- (a) showing the rates of wages and hours of labour of the various classes of workmen employed in the execution of the Contract;
- (b) whether any wages in respect of the said work and labour remain in arrears; and
- (c) that all the labour conditions of the Contract have been duly complied with.

In the event of default being made in payment of any money in respect of wages of any worker employed on the Contract and if a claim thereafter is filed with the Permanent Secretary of the Ministry of Labour, Industrial Relations and Employment of the Government of Mauritius and proof thereof satisfactory to him is furnished he may, failing payment by the Contractor, arrange for the payment of such claim out of the

We trust the rates and wages and conditions of labour have the competent authority in Mauritius to look after and enforce consequently, we trust that the additional criteria required to be entitled to payment is unjust and unfair to the contractor.



	<p>monies at any time payable under the Contract and the amount so paid shall be deemed payments to the Contractor.</p> <p>The Contractor or any subcontractor employed by him shall be responsible for the direct supervision and payment of all labour employed on the Contract.</p> <p>The Contractor shall be responsible for the observance of the provisions of this Clause by Subcontractors employed by him in the execution of the Contract.”</p>	
<p>6.5.</p>	<p>Working Hours</p> <p>Add the following paragraphs: Normal working hours under this Contract shall be as follows:-</p> <ul style="list-style-type: none"> • 21.00 hours to 05.00 hours from Mondays to Fridays i.e works shall be carried out at night. <p>However, on Sundays and Public holidays the Contractor shall not be allowed to undertake any excavation works whatsoever except for any emergency works.</p> <p>However, as an experienced Contractor, the latter must foresee prior to Bid submission, stretches of roads where restricted hours would be imposed during the execution of the Works by Police, TMRSU, Municipal Council, RDA, Forestry Services, Health Centres, Religious Institutions, Educational Institutions and any other local authority and stakeholder.</p> <p>However, if a particular work such as survey works, trial pits, excavation works/pipelaying works, testing of pipeline, any other works associated with the commissioning of the pipeline, etc.. has to be completed during the day, the Contractor shall not be entitled to extra costs. Sundays and Public holidays the Contractor shall not be allowed to undertake any excavation works whatsoever except for any emergency works. The rate must include all health & safety precautions required, appropriate lighting, police assistance, all overtime payable and any day off or resting time of personnel involved in night works, etc.</p> <p>During night works, the Contractor shall do</p>	<p>Since the contract is designed by the Employer, we trust they should be able to advise on the stretches of the road where restricted hours would be imposed, so that we are not agreeable to the fact that the contractor should foresee same and include this cost to his BID.</p> <p>Additionally, the 3rd paragraph requires that during the night works, the Contractor shall do so in such a way so as not to cause disturbances to inhabitants and establishments adjoining the site. We trust that the contractor in his best endeavour can mitigate disturbances but we cannot foresee how no disturbance at all can be achieved. Since the contract is designed by the Employer we would be glad to have the methodology of work from the employer whereby no disturbance would be caused to the inhabitants.</p> <p>We are not agreeable to paragraph 5th, where it mentions that it is deemed that the contractor has taken into consideration all restricted working hours and night works</p>

so in such a way so as not to cause disturbance to inhabitants or establishments adjoining the site and shall not be entitled to any additional payment. Any steps, taken by the Contractor in meeting his obligations under this Sub-Clause including night work, working on Saturdays, Sundays, Public Holidays, Specified Non-Working days, etc, or after normal working hours on Weekdays which requires additional surveys, design, supervision, contract administration and contract management costs by the Engineer and his staff, such costs shall, after due consultation with the Engineer and the Contractor, be determined by the Engineer and shall be deducted by the Employer from any monies due or to become due to the Contractor and the Engineer shall notify the Contractor accordingly, with a copy to the Employer.

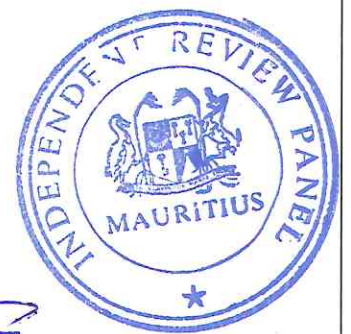

It shall be deemed that the Contractor has taken into consideration in his bid submission all restricted hours and night works which shall be imposed.

It shall be the sole responsibility of the Contractor to liaise with all relevant authorities (Police, TMRSU, Municipal Council, RDA, etc.) prior to bid submission, prior to commencement of Works and also during execution of Works.

The Contractor shall not be entitled for extension of time and any additional payment whatsoever, including idleness of labour, plant & equipment, and any reduced hours due to restricted hours that may be imposed by Police, TMRSU, Municipal Council, RDA, Forestry Services, Health Centres, Religious Institutions, Educational Institutions and any other local authority and stakeholder.

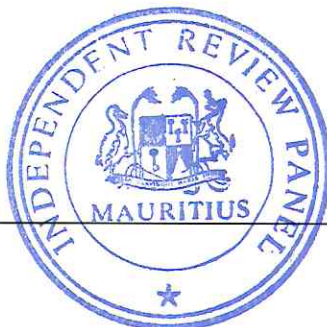
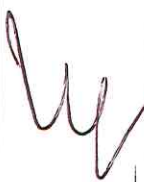
It shall also be deemed that, prior to bid submission, the Contractor has taken cognizance of all establishments (educational, religious, health, etc.) within the project area and has therefore taken into consideration in his programme of works all the hours whereby he shall not proceed with any Works, if applicable, so as not to cause

that shall be imposed. We trust that this statement is not fair to the contractor, since it is pre-empted from such statements that the Employer anticipate restricted working hours and deliberately making the contractor carry the can. Whereby they further stressed that the contractor shall not be entitled for extension of time and additional payments.



	<p>any inconveniences and nuisance to those establishments.</p> <p>Notwithstanding the above, if the Contractor wishes to execute permanent work requiring approval outside normal working hours, defined above, he shall obtain the written permission of the Engineer at least one full working day in advance to enable the Engineer to make provision for supervision of such work.</p>	
6.17.	<p>Festivals, Religious Customs and Municipal or Government</p> <p><i>Elections</i></p> <p>“The Contractor shall in all dealings with labour in his employment have due regard to all recognised festivals, days of rest as published yearly under the Public Holidays Act No. 22 of 1968 as amended, and religious or other customs.</p> <p>In the event that either festivals, weddings, religious customs, funerals, police interventions, school activities (including examinations), municipal or government elections etc. prevent, delay, or disrupt the activities of the Contractor in carrying out the Works, the Contractor shall, after due consideration of the circumstances by the Engineer, be entitled only to an extension of time without cost for such delays or disruptions as a result of these events.</p> <p>Delays or disruptions occurring over recognised and gazetted public holidays or during specified non-working days, shall not entitle the Contractor to any extension of time.</p> <p>For the purposes of this Contract, the following days are defined as (Specified Non-Working days):</p> <ul style="list-style-type: none"> • All Sundays, and Public Holidays, • 14 calendar days for end of year festivities (23 December (inclusive) to 05 January (inclusive)), <p>The Contractor shall deploy a standby team to be available after normal working hours, at night, on Saturdays, Sundays, Public Holidays, and during Specified Non-Working Days to intervene in emergency situations such as road cleaning works, H&S</p>	<p>This is an addition to the GCC, and trust it is biased to the fact that the Employer is not taking into consideration the idle cost of equipment due to the unplanned holidays/festivities. It requires only extension of time without cost to be attributed to these events. Additionally, to our surprise the delay due to Maha Shivratri has also been highlighted whereby it is observed that extension of time for this delay will not be allowed. We trust these new criteria are to the detriment to the contractor and the document is biased in favour of the employer.</p>

	<p>compliance, environmental compliance, etc. Mahashivratri festival The contractor must take into consideration in his program of work the period of Mahashivratri festival which is a listed Public Holiday. No activities will be allowed during this festive period (One week before the festival and one day after the festival) due to pilgrimage to Grand Bassin. No extension of time will be granted for this period. One week before the Mahashivratri public holiday, the Contractor shall: (1) Reinstate all trenches with an asphaltic temporary reinstatement (2) Remove all plant and equipment on site (3) Ensure that all roads are clean without any obstruction (4) Reinstate the wearing and base courses of the existing roads to the original state within the site area that have been damaged by the Contractor's Construction traffic.</p>	
<p>7.9</p>	<p>Quality of Materials, Plant and Workmanship</p> <p>"The Contractor is to be solely responsible for the supply of the materials required for the execution of the Works and shall ascertain himself of the availability of such materials. He shall ensure that during all phases of the performance of the Contract he has adequate materials on site and ensure that adequate supplies of materials will be available to him in all phases of the Contract performance. The Employer shall be under no liability whatsoever by way of indemnity or otherwise in respect of any shortage of materials."</p>	<p>In this world of Today, whereby the whole world is experiencing adverse financial adversities, whereby it is a known fact that freight either by air or sea have been seriously impacted, we trust this condition should be waived since no body can predict how the importations would be like in the near future.</p>
<p>7.10.</p> 	<p>Water Cuts</p> <p>"Water cuts shall be provided by the CWA only on Tuesdays, Wednesdays and Thursdays during normal working hours as defined under Clause 6.5- Working hours. Water cuts shall not be provided by the CWA on Mondays, Fridays, Saturdays, Sundays, Public Holidays and Specified Non-Working Days. Requests for water cuts should be</p>	<p>We trust it is the duty of the employer to provide the proper water cut and based on experience very often we found that due to improper connection high flow of water keeps on oozing out of the connection point. Consequently, this</p>




	<p><i>submitted to the CWA at least 48 hours prior to the planned date for water cuts”.</i></p> <p>The CWA does not guarantee that the existing pipelines will be completely dry and the Contractor shall provide for necessary arrangements to deal with the water during the installation of pipes, fittings and accessories for connection and repair works.</p> <p><i>Contractor shall be entitled to an extension of time without cost for delays or disruptions due to postponement of water cuts by the Operations Section of the CWA.</i></p>	<p><i>responsibility cannot be laid upon the Contractor, since any rational mind understands that for the proper connection to take place the connection point should be dry. Additionally, we trust delays and disruptions accrued due to water cuts should entail extension of time with cost.</i></p>
<p>20.1</p>	<p>Contractor’s Claims</p> <p><i>Insert at the end of Sub Clause 20.1 the following paragraph:</i></p> <p><i>“Claims for additional costs (if any) associated with extensions of time shall be evaluated and calculated solely from the Contractor’s relevant time-related items and relevant fixed cost items as inserted in Bill No. 1 of the Bill of Quantities, provided that the Contractor has to incur or had incurred additional expenses during the period of extension of time. This Sub-clause to pay any additional costs arising due to any Extension of Time shall overrule any other related Clauses in the Fidic Conditions of Contract 1999.”</i></p> <p><i>Furthermore, the Contractor is not entitled to the following claims;</i></p> <ul style="list-style-type: none"> <i>• loss of interest due to late release of Retention Money</i> <i>• financial charges</i> <i>• costs associated with preparation of extension of time and claims</i> <i>• loss of commercial opportunities</i> <i>• overhead costs/office charges</i> <i>• opportunity cost even if the Contract is extended as a result of Extension of Time</i> 	<p><i>This Sub-clause to pay any additional costs arising due to any Extension of Time shall overrule any other related Clauses in the Fidic Conditions of Contract 1999.</i></p> <p><i>We are not agreeable to the following “Furthermore, the Contractor is not entitled to the following claims;</i></p> <ul style="list-style-type: none"> <i>• Loss of interest due to late release of Retention Money.</i> <i>• Financial Charges.</i> <p><i>Costs associated with preparation of extension of time and claims.</i></p> <ul style="list-style-type: none"> <i>• Loss of commercial opportunities</i> <i>• Overhead costs/Office Charges</i> <i>• Opportunity Cost even if the Contract is extended as a result of Extension of Time”</i>




E. The Hearing

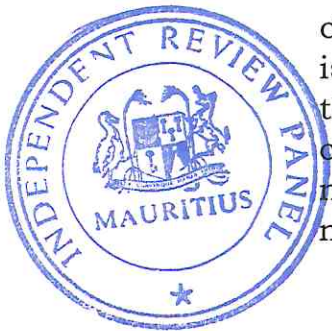
The Hearing was held on 13th July 2021. There was on record a Statement of Case filed by Applicant and Statement of Defence filed by the Respondent.

The Applicant was represented by Me P. Moonosawmy, Barrister whereas the Respondent was represented by Me Y. Roopun, Barrister.

F. Findings

This is an Application for Review in the following circumstances, viz:

1. The Respondent has invited bidders to bid for the tender of renewal of pumping main from new Plaine Lauzun pumping station to upper Monneron reservoir;
2. The Applicant has '*ab-initio*' applied as a prospective bidder for a challenge under Section 43(1) of the Public Procurement Act.
3. The Respondent, in reply to the challenge, through a letter dated 23/06/2021 informed the Applicant that the challenge of the conditions of contract was not entertainable and therefore it maintained all the conditions of the contract;
4. The Applicant has now applied for review mainly on the grounds that the Respondent failed to give a reason as to why the challenge was not entertainable and in conclusion the Applicant is praying the Panel to revoke and/or quash and/or set aside the decision of the Respondent whereby it stated that the challenge of the conditions of contract dated 16/06/2021 was not entertainable and to make an order for the Respondent to modify the Terms of the contract which are in dispute.



The Respondent filed a Statement of Defence which contained preliminary objections. The preliminary objections were mainly based on the ground that the challenge falls short of the ambit or provisions or purview of Section 43(i) of the Public Procurement Act and was not maintainable in Law.

On the merits, the Respondent has averred that (a) the procurement contract was not allowed or maintainable or entertainable in law and (b) given its explanations under each particular conditions of the




contract raised as an issue by the Applicant, namely Under Section VII, particular conditions of contract sub clause 3.3, 3.5, 4.2, 4.8, 4.10, 4.12, 4.13, 4.17, 4.18, 4.23, 4.25, 6.2, 6.5, 6.17, 7.9, 7.10 and 20.1.

There is another point which arose whether the Applicant is a bidder as he confirmed that he has not yet bid for the said project.

This Panel has, first to determine whether the Applicant has the locus to apply for challenge and review. For this purpose we have referred to the definition of a bidder which is found at Section 2 of the Act.

A bidder means a participant or potential participant in procurement proceedings.

It is clear from this definition that the Applicant can challenge and apply for review though it has not yet participated in the bidding process. The Panel further considers it as a potential participant because the Respondent has replied to its challenge without any further formalities.


The second issue "*in limine litis*" is whether under Section 43(i) of the Public Procurement Act, the Applicant can apply for challenge and review.

Section 43(i) of the Act reads as follows:

A bidder who claims to have suffered, or to be likely to suffer, loss or injury due to the 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.

While reading this Section of the Law and upon which Counsel appearing for the Respondent laid much stress, that a bidder who claims to have suffered or likely to suffer loss or injury due to the breach of a duty imposed on the Public Body or Board may apply for challenge and review. It is averred that the Applicant has failed to show how the Public Body has failed in a duty imposed upon it and how the Applicant has suffered prejudice or loss.

No doubt this project is a major contract as confirmed by the propose of the Respondent.

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One should not lose sight of Regulation 48 of the Public Procurement Act, which provides for steps that have to be followed for challenge and appeal procedures.

Regulation 48(2) reads:

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 openings of bids.

Regulation 48(3) reads:

Where the challenge concerns any aspect of the procurement process prior to the award of contract, the Chief Executive Officer of the Public body concerned shall in case of a major contract obtain all relevant information from the Board. (the underlining is ours).

From the above reading it is clear to the Panel that the challenge may relate to any aspect of the procurement process.

We therefore conclude that the Public Body was duty bound to consider the Application for Challenge and give a plausible reply as it did in the Statement of Defence. On this score only, the Panel notes that the Applicant has rightly moved in order to revoke and/or quash the decision of the Respondent whereby it stated that the challenge of the conditions of contract dated 16/06/2021 is not entertainable without giving any plausible explanations.

We shall illustrate through one example which came out from examination and cross examination to show that the Public Body has to look after and/or has to have the conditions reviewed and/or well vetted before launching the invitation to bid.

★ Under Clause 4.17 Particular Conditions of Contract- Contractor's Equipment, it is provided:

'Contractor's Equipment which is owned by the Contractor (either directly or indirectly) shall be deemed to be the property of the Employer with effect from its arrival on the site. This vesting of property shall not:

1. Affect the responsibility or liability of the Employer
 2. Prejudice the right of the Contractor to the sole use of the vested Contractor's Equipment for the purpose of the Works,
- Or






3. Affect the Contractor's responsibility to operate and maintain Contractor's Equipment.

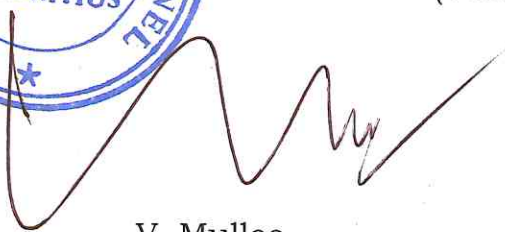
From the above, the understanding of the Panel is that the equipment brought on site cannot be removed without the express permission of the Engineer but the use of the term "shall be deemed to be the property of the Employer with effect from its arrival on the site" is not proper. (the underlining is ours).

The Panel has observed that the conditions of the Contract are not unfavourable as the Applicant claims but it is recommended that some Sub clauses should be revisited and of course after consultation with the Central Procurement Board.

During submission, Counsel for the Respondent, after the Panel made certain observations, agreed that some Sub clauses of the Particular Conditions of Contract (PCC) have to be modified but cannot take a stand right now as the decision rests with the Respondent Board.

G. Conclusion

The Panel, under Section 45 (10)(a) of the PPA therefore recommends the Public Body to review some of the Sub clauses which in our view should be more clear and fair.

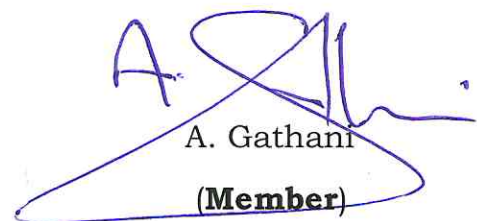


V. Mulloo

(Member)



H. Gunesh
(Vice-Chairperson)



A. Gathani
(Member)

Dated: 23 July 2021