Independent Review Panel

Decision No. 13/21

In the matter of:

Banker Shoes Ltd.

(Applicant)

v/s

National Transport Corporation

(Respondent)

(Cause No. 14/21/IRP)

Decision

INDEPENDENT REVIEW PANEL MAURITIUS

A. History of the case

On 4th February 2021, the National Transport Corporation (the **"Respondent"** or the **"NTC")** issued bidding documents for the procurement of black leather shoes for Ladies and for Gents. The project bore Procurement Reference No. OAB/NT/21/01.

The Applicant, Banker Shoes Ltd, along with three other bidders submitted their respective bids on 5th March 2021. The bids were opened on the same day.

B. Evaluation

The Bid Evaluation Committee **("BEC")** issued its report, the Bid Evaluation Report (**"BER"**), on 26 May 2021.

C. Notification of Award

By letter dated 21st June 2021, the Respondent informed Q-Trust Hardware Supplier Ltd that it was awarding the latter the contract for the "Procurement of Black Leather shoes Gents and Ladies to it for a contract value of MUR 2,950,580, incl. VAT.

On 2nd July 2021 the Applicant was verbally informed by the Respondent that another bidder was awarded the contract. However, the name of the bidder was not disclosed to it.

By letter dated 6th July 2021 addressed to the Respondent, the Applicant inquired for information as to whether the Margin of Preference of 40% had been applied and on which ground the contract was allocated to another bidder.

D. The Challenge

On 10th July 2021 (but a document dated 7th July 2021), the Applicant challenged the procurement proceedings on the following grounds:

*"(a) **The Public Body failed to take into consideration, at evaluation, of the fact that Banker Shoes Ltd benefits from a Margin of Preference of 40%.***

*(b) **The Public body failed to take into consideration of the fact that Banker Shoes Ltd was the lowest evaluated bidder taking into consideration the applicable Margin of Preference;***

*(c) **The Public body failed to appreciate that Banker Shoes Ltd was substantially responsive to the bidding documents;***

(d) The Public body failed to take into consideration the fact that Banker Shoes Ltd complied with the financial and technical requirements of the bidding documents."

E. The Reply to Challenge

On 12th July 2021, the Respondent made the following reply to the challenge in section D above and stated that:

"We wish to inform you that following technical evaluation your bid was not retained for further evaluation as some part of the sample provided was found non-compliant.

We also took note of your challenge and hereby convene you for a meeting at our office at Bonne Terre, Vacoas."

This reply to the challenge is the subject of one of the grounds of review before this Panel.

F. Grounds for Review

On 21st July 2021, the Applicant seized the Independent Review Panel for review on the following grounds:

"A. The Public Body failed and neglected to comply with Regulation 48(4) of the Regulations.

B. The Public Body was wrong not to have retained the Applicant's bid for further evaluation after the technical evaluation of its bid.

C. The Public Body failed to take into consideration of the fact that Applicant was the lowest evaluated substantially responsive bid which meets the qualification criteria specified in the bidding documents.

D. The Public Body failed to appreciate that the Applicant was substantially responsive to the bidding documents."

G. The Hearing

The Hearing was held on 3rd and 11th August 2021.

Mr H. Sookhoo, appeared for the Applicant instructed by Mrs Attorney D. Ghose. Mr N. Vencadasamy appeared for the Respondent together with Mr Hansraj Sunnassee, both of Counsel.

The Applicant was represented by Mr Permal Sinnappan, its director. The Respondent was represented by Mr Ritesh R. Hurchund, Human Resource Manager and chairperson of the BEC.

H. Findings

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

The law – avenues for challenge and review

Our procurement laws provide for various mutually exclusive methods for an aggrieved bidder to challenge on particular issues and eventually apply to the Panel for a review. The relevant provisions are scattered in both the Public Procurement Act 2006 ("Act") and the Public Procurement Regulations ("Regulations"). We set out below, for convenience, what we find to be the statutory framework that ought to be applied in the present matter.

From the Act, the following is of relevance:

"40. Award of procurement contracts

(1) A procurement contract shall, subject to subsection (1A), be awarded by a public body to the bidder having submitted the lowest evaluated substantially responsive bid which meets the qualification criteria specified in the prequalification or bidding documents, following the steps outlined in subsections (3) and (4).

(1A) The chief executive officer of a public body shall, before awarding a contract under subsection (1), certify and keep on record that all the procurement rules have been complied with in accordance with this Act.

[...]

(3) A public body in relation to a procurement contract, the value of which is above the prescribed threshold shall notify the successful bidder in writing of the selection of its bid for award and a notice in writing shall be given to the other bidders, specifying the name and address of the proposed successful bidder and the price of the contract.

(4) In the absence of a challenge by any other bidder within 7 days of the date of the notice referred to in subsection (3), the contract shall be awarded to the successful bidder.

(5) A successful bidder may be asked to submit a performance security and sign a contract within the period specified in the bidding documents.

(6) Where the bidder whose bid has been accepted fails to sign a contract, if required to do so, or fails to provide any required security for the performance

of the contract within the prescribed time limit, the public body shall select another bidder from among the remaining valid bids, and subsections (3) to (5) shall apply to the new selection.

(7) A public body shall promptly publish, in such manner as may be prescribed, notice of every procurement award.

43. Challenge

(1) 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.

(2) A challenge shall be in writing to the Chief Executive Officer of the public body concerned and identify the specific act or omission alleged to contravene this Act.

(3) A challenge shall not be entertained unless it is submitted –

(a) in the case of a challenge under section 24(12) or 40(4), within the time specified in the relevant subsection; or

(b) in any other case within such time as may be prescribed.

(4) Unless the challenge is resolved, the Chief Executive Officer of the public body shall suspend the public procurement proceedings and shall, within such time period as may be prescribed, issue a written decision, stating his reasons, and, if the challenge is upheld, indicating the corrective measures to be taken.

45. Right of review

(1) An unsatisfied bidder shall, subject to section 39(5), be entitled to ask the Review Panel to review the procurement proceedings where -

(a) the Chief Executive Officer of the public body does not issue a decision within the time specified in section 43(4);

(b) he is not satisfied with the decision; or

(c) after the entry into force of the procurement contract, the value of which is above the threshold prescribed by regulations but does not exceed the prescribed threshold referred to in section 40(3), he is not satisfied with the procurement proceedings on a ground specified in section 43(1)." (underlining is ours)

Regulation 48 of the Regulations then complements the Act and reads as follows:

"48. Challenge and appeal procedures

(1) A challenge under section 43 of the Act shall be made in the form set out in the Second Schedule.

(2) 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.

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

(4) Unless the challenge is resolved by mutual agreement, the Chief Executive Officer of the public body shall issue a written decision stating his reasons within 7 days of the filing of the application.

(5) Where the Chief Executive Officer of the public body fails to issue a decision within 7 days or if the bidder is not satisfied with his decision, the bidder may submit an application for review to the Review Panel, provided that the application is filed within 7 days of receipt of the decision of the public body or the time when that decision should have been received.

(6) For the purposes of section 45(1)(c) of the Act the threshold shall be 1 million rupees.

(7) An application for review under section 45(1)(c) of the Act, from an unsatisfied bidder after the entry into force of a procurement contract the value of which is above the prescribed threshold, as specified in paragraph (6), stating that he is not satisfied with the procurement proceedings on a ground specified in section 43(1), shall be made within 5 days of the date the applicant becomes aware of alleged breach." (underlining is ours)

The long and short of it is that the law creates two distinct regimes. One is where the contract value is expected (prior to the invitation to bid) to be above Rs 15 million and requires that the public bodies must notify both the successful bidder and the unsuccessful bidders of the proposed award. The other, for smaller contracts, necessitates that only the successful bidder is to be notified of him having won the bid through a letter of acceptance or award.

Admittedly, a reasonable reading of the legislator's words, especially Regulation 48(7) is that for such smaller contracts, the public body shall proceed with the award of the contract. Then, an unsatisfied bidder coming to know of an alleged breach after he becomes aware of his bid having not been retained, whether by way publication of the award or debriefing of unsuccessful bidders, or otherwise, may then challenge the public body's decision directly to the Panel and seek to obtain reparation in the form of reasonable costs he has incurred (*vide* sections 45(1)(c) and 45(10)(d)). This

applies to contracts worth between Rs 1 million and Rs 15 million. For even smaller sums, the recourse is, presumably, in the form of a judicial review of the public body's decision before the Supreme Court.

For contracts above Rs 15 million, the two-stage challenge kicks in with a first challenge with the public body's chief executive followed by a challenge through an application for review before this Panel. The former stage is sufficient explanation as to why a public body must notify the successful bidder of his win as well as informing all other bidders that they lost so that a challenge can be triggered at the level of the public body itself.

Crucially, those two regimes create an important distinction that can be gathered, though scattered, from the Act and the Regulations. For the bigger contracts, the deadlines for challenge run from the date of notification of award (to successful and unsuccessful bidders); for the smaller ones, the time limit runs from the date a challenger becomes aware of a relevant breach.

At some point during the proceedings, after the Panel had indicated to the Applicant's Counsel that we had been informed that the contract had been already awarded, it was suggested by Applicant's Counsel that the contract was not awarded yet, despite the letter of award ("Letter of Acceptance") having been sent on 21st June 2021, since there had not been the signing of the documents forming part of the agreement. Respondent's Counsel undertook to provide the Panel and the Applicant with all relevant correspondence in respect of the award to Q-Trust and he did so promptly.

We do not propose to embark on a discussion of what constitutes acceptance of a procurement contract. Suffice it to say that it is clear from Regulation 39 of the Regulations that the default position is that an award need not be signed unless the bidding documents require such signature by the parties. This necessarily stems from the fact that the floating of a bid is, first and foremost, an invitation by a client for bidders to make offers and it is taken to be understood that the choice of one bidder will entail the forming of a contract; the selection of a bidder by the client who then proceeds to notify the bidder of his offer having been retained already forms a contract between that bidder and the client. The latter point is, in fact, expressly made in the Bidding Documents issued by the NTC, ITBs 43 and 44.

Indeed, the Letter of Acceptance issued by the NTC is meant to be a binding contract until the formal contract is prepared and executed (ITB 43.2). Pursuant to ITB 44.1, the NTC is to 'promptly' issue the Agreement and the Special Conditions of Contract to be signed within 28 days of receipt by the successful bidder (ITBs 44.1 and 44.2). It goes without saying that a refusal to sign by the successful bidder would terminate the 'binding contract' that came about upon issue of the Letter of Acceptance and the NTC would then move to the next substantially responsive bidder, if any. It is the Panel's understanding that the successful bidder responded, positively, to the Letter of Acceptance by way of a letter dated 28th June 2021 while the Agreement and accompanying documents are yet to be sent/executed since the present Application for Review having meanwhile intervened, the procurement proceedings stand suspended. However, we find that there is, still, a binding contract as per ITBs 43 and 44.

With the above issues and observations in mind, we shall now address the procedural points raised.

In its Statement of Defence, the Respondent raised a Preliminary Objection to the following effect:

"1. The Applicant failed to comply with Section 45(2B)(a) – (b) of the Public Procurement Act inasmuch as the Applicant failed to submit to the Respondent on 21st July 2021, at the time of its Application for review, a copy of its Application together with the supporting documents.

2. The Applicant has failed to comply with Regulation 48(5) of the Public Procurement Regulations 2008 inasmuch as it has failed to lodge its Application within 7 days of the receipt of the decision of the Respondent in reply to the Applicant's Challenge dated 10th July 2021.

3. The Application cannot be entertained without putting Q-Trust Hardware Suppliers Ltd ("the successful bidder") into cause, which is a party having an interest in the present matter."

On the other hand, the core of the Applicant's points is that the present application is to be dealt with according to the more common type of challenge, the two-tiered one. To boot, the NTC did entertain the challenge it submitted under section 43. The Applicant then submits that the reply to its challenge under section 43 was not 'sufficient', in its content and structure; we are not taking into account the fact that the Applicant's challenge is dated 7th July 2021 but has been submitted on the 10th. Applicant's Counsel has, ingeniously, submitted that since the challenge communicated 10th July 2021 (but dated 7th July) was not properly replied to by the NTC, the 7 days should run from the last date the NTC's chief executive ought to have replied, that is, the 16th July 2021. For the sake of argument, were we to apply to two-tiered challenge procedure to this case, this proposition is hindered by one crucial fact: as per the Statement of Case of the Applicant itself (and this is undisputed in evidence), it became aware of the selection of Q-Trust on Friday 2nd July 2021 which means that the challenge submitted on Saturday 10th July 2021 was itself well outside delay. Were we to deem the challenge as having been submitted on 7th July 2021, within delay, the deadline for the NTC to respond would have been 13th July 2021, anyway. The Application for Review would still have been outside delay.

We do not subscribe to the submissions of Applicant on the procedure to be adopted. Our law does not provide for a hybrid avenue of challenge. As we have seen above, the laws provide for a mechanism in respect of contracts above Rs 15 million, with a notification of award to unsuccessful bidders triggering the deadline of 7 days, the two-tiered challenge with the chief executive of the NTC under section 43 and then, later on, the Panel under section 45. For smaller contracts, the avenue for challenge is a direct one to this Panel under section 45 five days after a challenger becomes aware of a breach by the public body.

In the present matter, the NTC informed the Applicant (and other unsuccessful bidders) not through a notification of award but through a phone conversation on 2nd July 2021. One may venture to say that even this was not necessary, in law, since the Letter of Acceptance had been issued already and the next step would have been a simple publication of the Award as per the Act and the Regulations but the Bidding Documents provided otherwise, for some reason. We find that the 7-day time limit that obtains in the case of contracts above Rs 15 million did not apply to this case; yet, both the NTC and the Applicant proceeded on that basis. As such, both acted in a way not provided for by the legislator and it is now for the Panel to make sense and to reorient the present Application.

It is a fact that by 2nd July 2021, the date on which the Applicant was verbally informed of the selection of its competitor, the Letter of Acceptance had already been issued to Q-Trust. By 7th July (or 10th July), the Applicant was, understandably, not yet aware of any breach. When the NTC replied to the 'challenge' on 12th July 2021 (received, and presumably sent, by fax on 13th July), the Applicant became aware of a breach: that its bid was not retained because it was deemed not to be technically compliant. We note, again, the fact that a document dated on a given date is not communicated on that day which, we feel, defeats the purpose of indicating dates on documents.

Nevertheless, there was no further communication of any fact by the NTC to the Applicant – the Panel specifically put a question to that effect to the Applicant's representative and the NTC's. We take it that the present Application for Review is, thus, based on the letter dated 12th July 2021 issued by the NTC and it is clear from a reading of the Statements of Case and the submissions of Counsel that the gist of the case is that the Applicant's bid was technically compliant. That has been the 'alleged breach' all along.

We are prepared, exceptionally, to consider the 13th July 2021, that is, when that letter was faxed as the starting point. Having found that there was, at the time, a binding contract between the NTC and Q-Trust, the present matter falls under the provisions of Regulation 48(7) and this, dare we say, as intended by the legislator. The 5 days run from the 13th July 2021 thus ending on the 17th. That day being a Saturday, the time-limit is extended to Monday 19th July 2021, accordingly. The Application for Review having been filed on 21st July 2021, it is out of time.

This Panel has repeatedly held, on countless occasions, that failure to adhere to time-limits under sections 43 to 45 of the Act and the accompanying relevant provisions in the Regulations is fatal to an application for review and we see no reason to depart from this constant caselaw.

We, therefore, do not propose to address the other procedural objections raised by the Respondent, that is, joinder of parties and communication of the Application for Review to be made at the Panel's registry and the public body 'at the same time.'

However, we feel bound to address the merits of the current application which, we must regretfully observe, might have been successful but for that crucial procedural breach.

Grounds B to D.

The following is our analysis.

It came out in evidence that evaluation by the Bid Evaluation Committee ("BEC") was based on certificates provided, visual inspection and the touch of samples provided. As confirmed by the Respondent's witness, Mr Hurchund, Chairperson of the BEC: "*Technical specifications of each shoe offered by the bidders have been checked visually.*"

Regarding the Applicant's bid, it was the contention of the BEC "*that the sample provided did not have a purview of good quality of leather material from visual inspection*"

Firstly, as rightly submitted by the Applicant, the BEC, whilst carrying out its evaluation, did not confine and restrict itself to the evaluation criteria and items set out in the Summary of Technical Specifications Table set out at page 60 of the Bidding Documents.

Section 37(9) of the Public Procurement Act provides that a bid shall be evaluated according to the criteria and methodology set out in the Bidding Documents. In the present case, all bids had to pass the test of technical responsiveness set out at ITB 31 and 34 of the Bidding Documents.

Moreover, ITB 37.2 of the Bidding Documents states the following:

"To evaluate a bid, the Purchaser shall use only the factors, methodologies and criteria defined in ITB Clause 37. No other criteria or methodology shall be permitted. (underlining is ours)"

ITB Section V, Part 3 (Page 60) of the Bidding Documents provides a "Summary of Technical Specifications the procurement goods have to comply with. It contains a list of eleven technical specifications and standards (items (a) to (i) for Black Leather Shoes (Gents) and items (a) and (b) Black Leather Shoes (Ladies). It also provides that the bidder shall prepare a similar table to justify compliance with the requirements.

Instead, the BEC departed substantially from the criteria and processes set out in the Bidding Documents and took into consideration extraneous factors to arrive at a conclusion on the technical compliance of the Applicant's bid. Hence the BEC carried a technical evaluation in breach of Clauses ITB 37, specifically ITB 37.3 (as amended) at page 30 of the Bidding Documents which expressly read:

"Evaluation will be done for items [....] 'Bids will be evaluated for each item and the contract will comprise the item(s) awarded for the successful bidder."

On another note, it was the contention of the Respondent that there have been several complaints previously from the model of shoes provided by the Applicant, from bus crews. The shoes were found to be flexible and thus gave a tendency for easy tearing

off the side of the edge where it is easy to bend. This was clearly stated, in the Bid Evaluation Report ("BER") to be a reason why the Applicant's bid was rejected.

What was discovered was that the padded collar was very rough. When the employees were wearing these shoes, *"it was giving them some bruise and mark in their ankle, back of their ankle. This is very rough. It is for sure that if he delivers these shoes to our employees, they would have received several complaints, many complaints"*.

Although Mr Hurchund insisted that the complaints arose before and during the evaluation of the present procurement exercise, it seemed clear from the whole of the evidence adduced, that the complaints related to previous tenders where the Applicant had been successful. The Applicant pressed the fact that it had been supplying the same model of shoes to the Respondent for the last 27 years and there had never been any complaint whatsoever. The shoes were of the same model and material. The Applicant had never been served with any notice for breach of contract pertaining to the quality of the shoes.

The Applicant also stressed the fact that its last contract with the Respondent was in 2019 and, more importantly, it felt that the technical specifications for that tender were exactly the same as the current 2021 one. It had provided exactly the same model of shoes in 2019.

Mr Azagan Sinnappan, the Applicant's Manager and witness for the Applicant, produced the contract dated 27th September 2019 and the Compliance Sheet and the technical specifications part of the bidding documents for the last 2019 tender exercise when the shoes the Applicant offered were selected. He states that he had produced the same type of shoes with the same material as provided in the current tender.

The NTC might perhaps have considered making use of section 35(1A) of the Act to disqualify the Applicant, after following the proper and fair procedure. However, while in receipt of complaints from its staff about shoes, it decided to 'lightly' modify the technical specifications.

The Applicant rightly submitted that the BEC's evaluation smacked of unfairness when the above extraneous factors, which were adverse to its interests were used behind the Applicant's back to disqualify it. The Applicant was never given an opportunity to give its version as regards the extraneous factors.

From the BER, it seems clear that the Applicant's bid was technically responsive. It had ticked all the boxes in the Technical Evaluation Table, except the controversial item (i) namely, "Genuine" Quality Leather. [It seems the Respondent's statement regarding the plastic coating pertaining to the upper layer of the shoes was never reflected in the BEC Report. It was raised for the first time before the Panel by Mr Hurchund. We also note that in the BER, the final assessment of the technical responsiveness of the Applicant's bid is indicated as "R" meaning technically responsive.

Further, as came out clearly from the evidence if there was any need for it, leather can only be either natural or synthetic. Genuine, as in authentic, leather as opposed to non-

leather made to mimic leather. It is obvious that the Respondent should have been more precise in its technical requirements specified in the Bidding Documents. Had it really meant to distinguish between genuine leather and 'leather', it should have included as part of its evaluation a grading or other marking system to clearly distinguish / designate the successful bidder about the quality or grade of leather, which has been an established practice since ancient times. A bidder simply had to bid for leather ('genuine') shoes. If there had been a marking, bidders would, perhaps, have understood that they should strive to provide the finest products they could.

The BEC was most certainly not allowed to judge the quality of leather when the technical requirement was simply for leather. We will ignore the fact that no person involved in the evaluation was an expert in leather yet they sought to define or opine on genuineness. This adds to the unfairness of the methods the BEC followed. As matters stand, it seems obvious that the Applicant was as qualified as the successful bidder.

ITB 19. 1 provides that to establish conformity of the goods to the Bidding Documents, the bidder shall furnish the documentary evidence that the goods conform to the technical specifications and standards specified in Section V, Schedule of Requirements

ITN Section 5. 3 Technical Specifications provides:

"the TS constitute the benchmarks against which the Purchaser will verify the technical responsiveness of bids and subsequently evaluate the bids. Therefore, well-defined TS will facilitate preparation of responsive bids by bidders, as well as examination, evaluation, and comparison of the bids by the Purchase; ....

Technical Specifications shall be fully descriptive of the requirements."

The Applicant did provide such documentary evidence. It relied on a Mauritius Standard Bureau, (MSB) Certificate/ test report of which it informed the Respondent on 5th March 2021, to establish that its sample qualifies as all genuine leather material.

Mr Hurchund himself admitted that genuine quality can be deduced through the MSB Certificate. He finally admitted too that the MSB Report makes no adverse inference regarding the genuine quality of the leather. It just mentions leather. It does not give an expert opinion to the effect that the leather is not a genuine one – and we are, here, stretching the line of argument to assume that leather from the hide of an animal may not be 'genuine'.

At some point, Mr Hurchund suggested that the MSB certificate for the Applicant's shoes should have indicated the word 'genuine' and not only 'leather'. Importantly, and to our disbelief, it came out that the Q-Trust submitted certificates from the MSB which also referred to the upper material of the shoes as being made of "leather"; yet the very same finding of the MSB as regards the shoes of the Applicant were deemed to be insufficiently precise as regards the genuineness of the leather proposed by the Applicant. This is improper.

The BEC has also, and it was admitted in evidence after queries from the Panel, completely and utterly disregarded the binding Directive No.52 issued by the Procurement Policy Office ("PPO") late last year. It did not address its mind, at all, to

the possibility that the bidders' bids were abnormally low and to be dealt with in accordance with section 37(10A) of the Act. We note that the bid of Q-Trust for Ladies' shoes might just have been below the 'ALB Zone' as coined by the PPO.

It seems evident that ITB 36 regarding Margin of Preference was applicable to this case. It was not considered in the Applicant's case as its bid was not retained for Financial Evaluation. Mr Hurchund conceded that, had the Applicant passed the technical evaluation, the Margin of Preference would have operated to make Banker Shoes the winner and not Q-Trust. This would have empowered us to order that reasonable costs be reimbursed by the NTC.

This brings us to another unfortunate issue in the present case. Since the Applicant laboured under the impression, no doubt influenced by the mistaken approach by the NTC itself in responding to a challenge under section 43 in a contract it had already awarded and worth less than Rs 15 million, that the said contract had not yet been awarded to Q-Trust, it did not define the sum of reasonable costs it was to claim. Its prayers sought the more common annulment and/or re-evaluation.

I. Conclusion

In light of the above, we set aside the present Application for Review.

J. Observations

This Panel has often had to face the difficult situation where it must find against applicants because they failed to lodge their applications in time. We certainly have heard the pleas of such litigants and their reliance on the pivotal Privy Council decision in **Toumany v Veerasamy 2010 PRV 17**. Many other cases since have supported the courts, tribunals and panels in their task to render justice without being overly shackled with procedural considerations. Mr Sookhoo, in submissions, also referred us to the Supreme Court case of **Dr Ng Kuet v Medical Council of Mauritius 2019 SCJ 1**. This Panel most certainly wishes it had the ability to look beyond the time-limits in very deserving cases much like the Supreme Court can, in effect, override its own rules when it comes to prerogative orders, *inter alia* and condone shortcomings as to form or procedure. However, our time-limits and formality requirements are set in stone by the legislator, let alone being emphasised and re-emphasised many times by him throughout the Act and the Regulations. One such example is the fact that such a belated application as this one may be dismissed outright pursuant to no less than two sub-paragraphs of Regulation 56 of the Regulations, and the security deposit paid by the Applicant forfeited.

There is, we feel, a sound reasoning behind this state of affairs. Commitment, seriousness, diligence must be shown by litigants since their action necessarily brings to a halt, for a time, the sourcing of goods or services by a governmental body. From black leather shoes to vital commodities such as critical medical supplies, and this, in the context of public procurement where institutions strive to ensure fairness to all, a level playing field and proper use of public funds. A consistent application of the law

is crucial to ensure fairness to all, even moreso in this context. The time-limits no matter how restrictive are known to all and laches cannot be overlooked much like the public bodies are entitled to swiftly award procurements contracts should the Panel be guilty of any delay. Similarly, section 40(4) of the Act provides that, passing 7 days from the notification of an award issued under section 40(3), public bodies shall award the contract to the selected bidder. The same applies, presumably, 7 days after a public body has replied to a challenge under section 43 and no application for review has been lodged. The legislator creates a more than legitimate expectation towards the often unspoken interested party we know as successful or selected bidders that they will have certainty of their award and 'shall' have a contract *en vigueur* passing set deadlines. Is it for challengers or even this Panel to thwart such expectations by failing to act with the time-limits?
We again enjoin litigants, applicants above all, to ensure strict compliance with sections 43 and 45 of the Act as well as the relevant, matching Regulations.

Enforcing strict adherence in a deserving case is all the more unfortunate. Absent changes to the laws or specific guidance pertaining to procurement proceedings and the accompanying time constraints from a higher jurisdiction, we feel bound to apply the law as it stands.

On a final note, we have deemed it more appropriate, in the circumstances, to set aside the present application instead of dismissing it outright and we decline to exercise any discretion we have to order a forfeiture of the whole of the security deposit. We find that in such a deserving case, this Applicant should be refunded half of its deposit.

J. Ramano (Mrs)

(Chairperson)

A. K Namdarkhan

(Member)

R. Mungra

(Member)

INDEPENDENT REVIEW PANEL MAURITIUS

Dated: 19th August 2021