



Independent Review Panel

Decision No. 14/21

In the matter of:

Proximed Ltd.

(Applicant)

v/s

Ministry of Health and Wellness

(Respondent)

(Cause No. 15/21/IRP)

Decision



A. History of the case

On 12th May 2021, the Ministry of Health and Wellness (the “**Respondent**” or the “**Ministry**”) invited for bids for Supply, Installation and Commissioning of Radiology Equipment for Radiology Department for 5 Regional Hospitals bearing procurement reference: **MHPQ/EQ/2020-2021/Q22 – CPB/08/2020**.

There were a number of clarifications sought by various potential bidders and the Ministry extended the deadline for bid submission through two addendums. The initial bid submission deadline was extended to 29th June 2021 and then to 9th July 2021

A third one (the “**3rd Addendum**”) was issued on 30th June 2021. It clarified all the requests made by potential bidders but added a number of new elements to the bid. The relevant one, here, is the fact that, through two annexes number IX and X, the Ministry is now seeking from potential bidders a binding price for X-ray films over 8 years. The Ministry’s requirements were set out in each annex and for each set of films and dimensions. There is also a note: ‘*The total cost of films will be considered for evaluation purpose.*’ (sic)

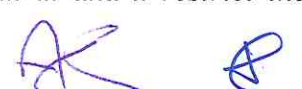
What began as a procurement for X-ray machinery plus maintenance with dry laser printers and a small set of films of each dimension has now turned into a huge tender exercise. By way of example, in the Applicant’s case, the machinery aspect (including maintenance) would amount to roughly Rs 130 million while 8 years’ worth of films would amount to Rs 974 million or so.

Eight sets of bids were received from various bidders. Proximed Ltd (the “**Applicant**”) was one of them. It is now challenging the procurement proceedings on one central issue: that the Ministry could not, by way of an addendum with such a short notice of 9 days, completely change the whole tender exercise.

B. The Challenge

On 13th July 2021, the Applicant challenged the procurement proceedings on the following grounds:

- “1. Referring to addendum no3, annex ix and x, the request for X-ray films for 8 years through an addendum 9 days before the closing date, changes the objective of this tender exercise which was initially meant for the supply of Radiology Equipment. The value of X-ray films for 8 years exceeds largely the amount of Radiology Equipment. The tender exercise therefore changes to the procurement of X-Ray film rather than Radiology equipment.
2. The fact that only 3 brands have got printer which are FDA certified, the addition of X-ray films for 8 years through addendum ix and x restrict the tender to 3 bidders only.




3. *The addition of X-Ray films for 8 years through addendum ix and x just a few days before the tender closes renders the bidding exercise unfair and casts serious doubt as to the legitimacy thereof.*
4. *MOH is committing on X-ray films for 8 years when there is no guarantee the equipment will be operational over that period.*
5. *With the rapid change in technology and the advent of e-Health & PACS systems, the use of X-ray films will become obsolete in a few years.*
6. *Dry laser printers for X-ray films are closed systems i.e., a printer from a particular brand will accept only X-ray films from that brand. By binding its purchases of X-ray films over 8 years, the MOH & Wellness is restricting other printer suppliers from entering the Market, which is against fair competition.*
7. *It is inadmissible that MOH & Wellness was allegedly unaware that it would require X-ray films for 8 years when the tender was launched on 12 May 2021. The 3rd addendum was sent on the 30th of June, only 9 days prior to the closing date, leaving no room for challenges, and gives the impression that this addendum has been deliberately drawn up and tailored to favour specific bidder/s, much to the prejudice of others”*

C. The Reply to Challenge

On 19th July 2021, the Respondent made the following reply to the challenge and stated that:

“2. *This Ministry wishes to reply to the grounds of challenge as follows:-*

<i>Ground of challenge</i>	<i>Reply</i>
<i>1.</i>	<p><i>The purpose of this bidding exercise is to procure x-ray equipment for delivery of radiology services. The requirement to provide prices for x-ray films has been added by way of Addendum dated 30 June 2021, moreso as presently the Ministry relies on x-ray films for circulation of examination results for proper diagnosis. As at date, the x-ray films are an essential component for x-ray examination and for continuity of radiology services.</i></p> <p><i>This requirement has been included taking into consideration the estimated total cost of the equipment also.</i></p> <p><i>As per the Annexes III and IV of the said Addendum, the estimated life time of the printers is 10 years.</i></p>
<i>2.</i>	<i>The assertion that only three brands are FDA certified was never</i>



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	<i>raised before and is unsubstantiated. According to the Central Procurement Board (CPB), eight bids have been received for this procurement exercise.</i>
3.	<i>This Ministry provided ample time of nine days to require bidders to provide prices of the x-ray films for eight years. No other potential bidder made representation regarding the timeframe for providing the cost of the x-ray films.</i>
4.	<i>Your assertion is speculative.</i> <i>As per the Annexes III and IV of the said Addendum, the estimated life time of the printers is 10 years.</i>
5.	<i>The implementation of a fully functional E-Health and PACS will take time. In the meantime, the Ministry will continue to rely on x-ray films for circulation of examination results for proper diagnosis.</i>
6.	<i>The assertion that the dry laser printers for x-ray films are closed is unsubstantiated. Moreover, this Ministry has carried out a competitive bidding exercise to obtain competitive prices for x-ray films. Even if we agree that dry laser printers are closed systems, it will still be a closed system after purchase of the printers irrespective of their lifetime.</i>
7.	<i>As indicated above, the purpose of this competitive bidding exercise is to procure x-ray equipment for delivery of radiology services. The requirement to quote for x-ray films has been added by way of Addendum dated 30 June 2021, more so as presently the Ministry relies on x-ray films for circulation of examination results for proper diagnosis. As at date, the x-ray films are an essential component for x-ray examination and for continuity of radiology services.</i> <i>Ample time was given to require bidders to provide prices of the x-ray films.</i> <i>According to CPB, eight bids have been received by the closing date.</i>

D. Grounds for Review

On 26th July 2021, the Applicant seized the Independent Review Panel for a review on the following grounds:

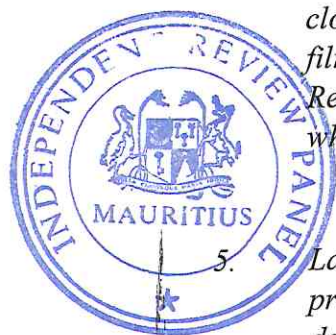
- “1. *It is the contention of the Applicant that the Respondent has deliberately failed to appreciate the specific requirements and technicalities of the tender exercise since the launch thereof, and by making a 3rd addendum on the 30 June 2021 (leaving only 7 working days until closure of the tender), this has changed the nature, ambit and objective of the tender process, and cast serious doubt as to the legitimacy thereof.*
2. *The Applicant further contends that irrespective of the number of bids received, there are only 3 brands which have printers which are FDA*




certified, and the addition of the requirement of X-ray films for 8 years (through addendum ix and x) restrict the tender to only 3 bidders which would be deemed to be technically responsive.

3. *The Applicant further avers that the Respondent is acting irresponsibly through its requirement and commitment on X-ray films for a period of 8 years when there is no guarantee that the said equipment will be operational over that period, the more so that with the rapid change in technology and the advent of the e-Health & PACS systems, the use of x-ray films will become obsolete in a few years. This will be to the prejudice of the Respondent in the long run.*

4. *Additionally, the Applicant avers that dry laser printers for X-ray films are closed systems i.e., a printer from a particular brand will accept only X-ray films from that brand. By binding its purchases of X-ray films over 8 years, the Respondent is restricting other printer suppliers from entering the market, which is against the principles of fair competition.*



5. *Lastly, the fact that 3rd addendum was sent on the 30th of June, only 9 days prior to the closing date, gives the impression that this addendum has been deliberately drawn up and tailored to favour specific bidder/s, much to the prejudice of others."*

E. The Hearing

Hearings were held on 11th August 2021 and on 18th August 2021. There is on record a Statement of Case filed by Applicant and Statement of Defence filed by the Respondent. Later, the Applicant put in a Statement of Reply. There was hardly any dispute as to the facts.

We are thankful to counsel on both sides for their thorough submissions, oral and written, on all the points that have arisen.

The Applicant was assisted by Mr H.Duval SC and Ms L.Churritter instructed by Mr Attorney N.Ramasawmy whereas Mr R.Baungally, Assistant Solicitor-General, appeared for the Respondent instructed by State Attorney.

F. Findings**Preliminary points**

At the outset, in its Statement of Defence, the Ministry raised four objections that can be summarised as follows: 1) the Applicant failed to submit to the Ministry a copy of its Application at the time it did so at the Panel, 2) the Applicant's prayers are not within the Panel's powers, 3) there is no breach of duty pursuant to section 43(1) of the Public Procurement Act 2006 (the "Act"), and 4) the grounds for review are vague and lack precision.

At the first hearing, the Ministry raised another objection to the effect that the other bidders, being interested parties, were not joined and did not appear before the Panel.

Communication of applications for review – section 45(2B)(a) of the Act

This is the major bone of contention between the parties. Section 45(2B)(a) of the Act provides, in no uncertain terms:

"(2B) (a) The unsatisfied bidder shall, at the time of his application for review, submit to the public body a copy of the application together with the documents specified in subsection (2)." (emphasis added)

There is hardly any dispute around the date of submission of the present Application. It was lodged, in good time, at the Panel on Monday 26th July 2021 but was submitted to the Respondent Ministry on 27th July 2021.

Mr Duval, in his written submissions, referred us to the case of **Toumany v Veerasamy 2010 PRV 17** the gist of which is that courts should seek to determine the justice of the case without being overly concerned with procedural considerations. Another pronouncement by the Privy Council was relied upon by Mr Duval: the judicial review case of **Peerless Limited v Gambling Regulatory Authority & Ors [2015] UKPC 29** in which the British Supreme Court Justices suggested that courts ought to delay the consideration of preliminary objections until they have assessed the legal merit of the cases before them. In oral submissions, Mr Duval drew a parallel with the practice that obtains when seeking injunctive relief: filing at the registry of the Supreme Court, obtaining a returnable date and then communicating papers to the other party or parties.

Mr Baungally, on the other hand, referred to the Panel's decision in **Agiliss Ltd v Ministry of Health and Wellness Decision No. 09/20** where the importance for applicants to adhere to time-limits was extensively discussed.

Once again, this Panel is faced with the difficult task of deciding whether to dismiss an application for failure to observe procedure. There have been innumerable pronouncements by this Panel on similar issues, the most recent being **Banker Shoes Ltd v National Transport Corporation Decision No. 13/20**, handed down a few days before to the present Decision. As lengthily expressed in the latter case and in many others before that, the Panel does not dismiss or set aside cases on procedural grounds *de gaieté de coeur* but must acknowledge the procedure is here to protect the interests of all parties. These include the 'careless' applicants, the other bidders, the

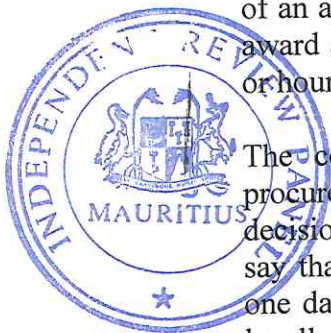
winning bidder(s), the public bodies, the Central Procurement Board, when applicable, and, ultimately, the public at large. Actors in the public procurement process are bound by a set of laws with clearly defined time-limits. Why some applicants oftentimes fail to adhere to those time-limits and formality requirements is a matter of much concern to us. Perhaps the more relaxed rules that apply before other judicial bodies leads litigants before this Panel to mistakenly believe that the same leeway can be afforded to them.

However, we find that the legislator's intent behind section 45(2B)(a) of the Act is clear and unambiguous. Not only the Panel must be made aware of an application for review but the public body as well. One reason for this is that the public body has a number of duties to perform, some of them irreversible, passing the deadlines imposed by the law. The main one being the duty to award contracts pursuant to section 40(4) if no challenge is received pursuant to section 43. It goes without saying that this must then be applied *mutatis mutandis* to section 45 of the Act. It is by no means a stretch of the imagination that in case a public body should be kept unaware of an application for review, even for a day, it would rightly and lawfully proceed to award a contract only to receive a letter of suspension from this Panel a few minutes or hours later.

The country has recently come to know of the consequences of terminating procurement-related contracts in the so-called *Affaire Betamax*, the Supreme Court decision thereof has even been cited by the Applicant before us. One can venture to say that applicants would then suggest that public bodies should wait 'for a while', one day at least, for communication of suspension letters from the Panel. Can they, legally, one may rightly ask? The answer seems to be in the negative. If there is no challenge passing 7 days of notification of award pursuant to section 40(3) of the Act, public bodies shall award the contract to the selected bidders; similarly, passing 7 days from the date the public body responded to a challenge under section 43 or 7 days from the day it ought to have responded, the public body is expected to award the contract and it can do so at the early hours of the 8th day. This is the legislator's intent. If public bodies do not do so, they may face litigation with selected bidders and may be acting in breach of their statutory duties.

It is no wonder that the legislator makes multiple references to time-limits and formality requirements and provides the sanction for non-conformity. The failure, here, much like the one in *Banker Shoes Ltd*, is in breach of at least one provision found in Regulation 56 of the Public Procurement Regulations 2008 (**the "Regulations"**) that may lead to a dismissal of the case outright. We can only hope that applicants will ensure adherence going forward.

In the present matter, one may suggest that there is a distinguishing feature. We are still at bid opening stage. Does that mean that there has been no prejudice caused or that there has been no unlawful breach? Admittedly, this is a very complex procurement that will require some time for the evaluation the bids received. However, the Act and the Regulations are designed for all degrees of procurement, and by that, we mean in terms of complexity and of the sums involved. Some procurement proceedings may need only one day for bid evaluation, others not. At the very least, in more complex tenders, a public body or the Central Procurement Board may already have set up a bid evaluation committee that would have met already, only



to receive copies of the Panel's suspension letter followed by the belated copy of the application for review.

Having given anxious considerations to the above issues and principles, this Panel is of the firm view that it cannot condone the failure to abide by section 45(2B) of the Act. A copy of the Application for Review and the accompanying documents should have been sent to the Ministry at the same time (which we understand to mean the same day) or, at the very least, before the expiry of the 7-day time-limit for seizing the Panel. The former is preferable but the latter equally avoids the conundrum about contract award that we have set out above.

Other objections

Having determined that the Application is procedurally flawed, we will now, briefly, address the other objections put forward by Mr Baungally appearing for the Ministry. On the issue of joinder, we must state that, for better or for worse, the laws provide for two parties before us: the Applicant and the public body. Even the Central Procurement Board graciously attends as an invitee of the Panel but there is no power to require the Board to attend. Similarly, our specific law makes no provision for the attendance of successful bidders but it has been the practice of the Panel to invite successful bidders to ensure that they are given an opportunity to be heard since they stand to lose an 'almost acquired' right, the right to be awarded the procurement contract. The Ministry is now suggesting that all bidders be invited – of course, in the present matter, there is no successful bidder yet – because they have a right to be heard and to make submissions as interested parties. We are confident that the Ministry and the State Law Office do not expect the *audi alteram partem* principle to be stretched this far just as no one expects all 1,000 candidates that showed up for interviews to be made a party to judicial review proceedings by one person challenging the appointment of, say, 20 public officers. A line must be drawn, somewhere. In any event, in the present case, this consideration cannot be fatal to the Application for Review.

On the issue of whether the prayers were vague and not within our power, we do not subscribe wholly to the submissions made on behalf of the Ministry. To the extent that it can be inferred from the prayers that Proximed Ltd feels aggrieved that it has had to bid with the additional element of having to indicate binding prices for 8 years' worth of supply of films on a very short notice of 9 days and is moving this Panel to order that the 3rd Addendum be discarded altogether, the case was a proper one to be heard. In fact, one may add that such possibilities are the very reason why the legislator provided for means to seize the Panel not only at award stage but at invitation to bid and bid opening stages as well.

On whether a section 43 breach has been pleaded, it is clear from the Statement of Case that the Applicant is claiming a breach by the Ministry of its duty to act fairly and to abide by the established public procurement principles.

Finally, we gather from the Statement of Defence another point that has not been formally raised as objection, the fact that by submitting a bid, the Applicant has waived its right to object. We do not feel this fact ought to be held against the Applicant. In general, any person who feels aggrieved may challenge and eventually



apply for review before this Panel. In practice, at invitation to bid stage, it may likely to be anyone, from a pool of considerable size, who is interested to respond to the invitation to bid, at bid opening stage, it would be any person who has placed a bid or has been unable to for some valid reason, and at award stage, it is often a bidder whose bid has not been retained. The Applicant may have felt compelled to submit a bid not only to avoid losing out on the chance of winning but also to pre-empt any obstacle to its challenge in the form of a lack of *locus standi*. The fact that it placed a bid cannot be held against it just as it would not have been, or would be, held against it if had waited until the award stage and raised its challenge and applied for review.

G. Conclusion

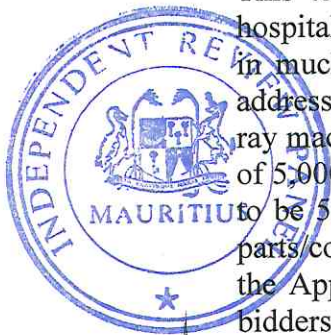
In light of the above, the main preliminary objection raised by the Ministry is well-taken and we feel bound by the Act and the Regulations to set aside the present Application. In the specific circumstances of the case, we have not deemed it appropriate to dismiss the case outright for being frivolous which would lead to the forfeiture of the whole of the security deposit paid in by Proximed Ltd. Accordingly, it shall be reimbursed half of it.

H. Observations

Even though we have had to set aside the present Application, and since the procurement proceedings are yet to enter the evaluation stage, we feel compelled to make the following observation which we direct to the Ministry.

This tender has been floated with radiology equipment in mind for our regional hospitals. In the Bidding Documents, the goods and the 'related services' are defined in much detail and in various schedules and sheets. For convenience, we will not address each type of equipment, each lot and each hospital's requirements. In brief, X-ray machines are to be bought with a DICOM 3.0 compatible printer, a 'small' supply of 5,000 films of each type is to be included in the bid in its original form (later stated to be 5,000 per hospital in the 3rd Addendum), and servicing costs and replacement parts/components over the years are to be set out and are to be taken into account. In the Applicant's case, this would amount to more or less Rs 130 million. The other bidders' bids amount to figures that are not substantially different. By adding the considerations in the 3rd Addendum, where bidders are requested to commit to 8 years' worth of film as per the vast requirements of the Ministry, there is indicated an additional figure of give or take Rs 0.9-1 billion from the bidders.

The Ministry and the Central Procurement Board have offered plausible explanations regarding this. It is even supported by the Applicant itself in its Statement of Case. A machine needs a printer, printers have their specific type of film. Many a time the Ministry has found itself unable to obtain the appropriate films for the printers it had for its previous machines because of local sourcing problems and, perhaps, exclusive distribution agreements local and regional suppliers may have for a particular printer brand. In order to avoid such shortage, the Ministry has, in effect, invited bidders to enter into a form of framework agreement sharing many traits with a *promesse unilatérale de vente*. To prevent bidders from quoting low or unachievable figures, the Ministry and the Board have astutely required bidders to commit to the prices over the



8 years – a hedging contract, of a sort. We shall not comment on whether it is appropriate to plan so far ahead and commit over 8 years but we note that the Ministry and the Applicant itself are in agreement that this makes commercial sense.

However, there seems to be a slight confusion with major repercussions at the level of the Ministry and the Board. Representatives of the Ministry seem to be under the impression that it will have an actual contract with the selected bidder and would, in case it finds the film for cheaper, be allowed to terminate the ‘contract’ with the selected bidder and buy from elsewhere. The Central Procurement Board’s representative, on the other hand, suggests that the total costs of films (based on the binding prices) will be used only for evaluation purposes and the sourcing of films will be done more dynamically, over the years.

Even though the Applicant is of the view this is workable (but challenges only the short notice of 9 days), and we can presume the other bidders are too since they have submitted bids, we do not believe it is appropriate that there should be a confusion on the very implementation of an item that has completely changed the bidding exercise—from one of Rs 100 million for supply and maintenance of machines to one of Rs 1.1 billion for supply and maintenance of machines and operational costs in the form of films, binding over 8 years.

Without prejudging the issue, we note a more concerning matter from the Bidding Documents which is the interaction of ITB 37.3 (d) with its BDS 37.3(d) and ‘Section III, Evaluation and Qualification Criteria’.

The ITB 37.3(d) allows for price adjustments:

“adjustments due to the application of the evaluation criteria specified in the BDS from amongst those set out in Section III, Evaluation and Qualification Criteria;”

ITB 37.5 is to be read together and provides:

“The Purchaser’s evaluation of a bid may require the consideration of other factors, in addition to the Bid Price quoted in accordance with ITB Clause 15. These factors may be related to the characteristics, performance, and terms and conditions of purchase of the Goods and Related Services. The effect of the factors selected, if any, shall be expressed in monetary terms to facilitate comparison of bids, unless otherwise specified in Section III, Evaluation and Qualification Criteria. The factors, methodologies and criteria to be used shall be as specified in ITB 37.3 (d).” (our emphasis)

The BDS 37.3(d) seems not to, and certainly not for ‘projected operational’ costs:

“The adjustments shall be determined using the following criteria, from amongst those set out in Section III, Evaluation and Qualification Criteria:

- (a) *deviation in Delivery schedule: No.*
- (b) *deviation in payment schedule: No.*
- (c) *the cost of major replacement components, mandatory spare parts, and service: No.*

- (d) *the availability in Mauritius of spare parts and after-sales services for the equipment offered in the bid: No.*
- (e) *the projected operating and maintenance costs during the life of the equipment: No.*
- (f) *the performance and productivity of the equipment offered: No.”*

The Evaluation criteria under ITB 37.3(d), however, mentions only service, mandatory spare parts and major replacement components:

“(c) Cost of major replacement components, mandatory spare parts, and service.

The list of items and quantities of major assemblies, components, and selected spare parts, likely to be required during the initial period of operation specified in the BDS Sub-Clause 19.3, is in the List of Goods. An adjustment equal to the total cost of these items, at the unit prices quoted in each bid, shall be added to the bid price, for evaluation purposes only.”

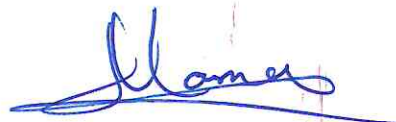
The 3rd Addendum makes a passing statement, in the annexed forms, that the binding prices of films over 8 years, which we consider to be ‘operational’ costs, will be used for evaluation purposes. How? The circular thought process behind ITB 37.3(d) and the evaluation criteria from the Bidding Documents do not offer much in terms of clarity, and this may pose a challenge for the bid evaluation committee in its evaluation exercise.

There seems to be a cloud of confusion not only in the Ministry’s intentions and its wishes as a client but in the Bidding Documents it has issued.

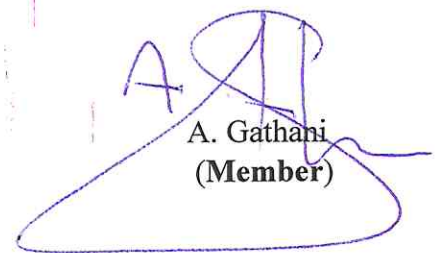
As a closing remark, this Panel is confident that the Central Procurement Board will seek all relevant advice and offer the appropriate guidance and make the necessary recommendations to the Ministry to clarify all these issues so that the whole process is seen to completion in accordance with the core principles of public procurement.



A. K. Namdarkhan
(Member)



J. Ramano (Mrs)
(Chairperson)

A. Gathani
(Member)

Dated: 24th August 2021

