Independent Review Panel

Decision No. 17/21

In the matter of:

Royal HaskoningDHV (Pty) Ltd

(Applicant)

v/s

Airport of Rodrigues Ltd

(Respondent)

(Cause No. 18/21/IRP)

INDEPENDENT REVIEW PANEL MAURITIUS

Decision

A. History of the case

On 1st September 2020, the Respondent, Airport of Rodrigues Ltd **("ARL"),** issued a Request for Proposal (RFP) for the procurement of Consultancy Services for the Detailed Design and Supervision for the Construction of a New Runway at Plaine Corail, Rodrigues, bearing Procurement Reference No.: **ARL/RFP/15 of 2020**.

The Applicant was one of the bidders.

B. Notification of Award

On 27th August 2021, Airport of Rodrigues Ltd, in response to the Invitation for Bids, informed the Applicant, that an evaluation of the bids received had been carried out and the particulars of the selected bidder are as mentioned below:

Name of Consultant	Address	Contract Price
GIBB (Mauritius) Ltd in association with Pell Frischman	GIBB House 71, Sayed Hossen Road Solferino Mauritius	MUR 57,066,500 GBP 625,025.00 Exclusive of VAT

C. The Challenge

On 2nd September 2021, the Applicant challenged the procurement proceedings on the following grounds:

"1. The Public Body failed to disqualify the selected consultant on the ground of conflict of interest and/or unfair advantage in as much as GIBB (Mauritius) Ltd, together with TPS Consult Ltd, were awarded the contract for related services, i.e. "Design, Cost Estimation and preparation of Tender Documents for the extension of runway at Plaine Corail Airport" in April 2016, and inter-alia performed an official estimate of the overall costs of the extension of the said runway at Plaine Corail Airport, Rodrigues.

2. The Public Body failed to readily acknowledge the abnormally low price of the offer of the selected consultant and the necessary related concerns as to its ability to perform the contract, and further failed to request for and/or properly assess information from the selected consultant, and to consequently acknowledge the subsistence of such concerns warranting the rejection of the offer of the selected consultant.

3. Failure to reject the offer of the selected consultant for non-responsiveness in as much as it did not satisfy the requirements of the Request For Proposal, including but not limited to the minimum qualifications, experience and availability of Key Personnel, as well as the need for specific experience relevant to the assignment.

The selected consultant should have been disqualified outright and/or should not have been selected for award as it is not the lowest evaluated substantially responsive bidder in view of all the arguments propounded above."

D. The Reply to Challenge

On 9th September 2021, the Respondent made the following reply to the challenge and stated that:

S/No.	*Grounds for challenge from Royal Haskoning dhv (Pty) Ltd (NACO)*	*Reply from Airport of Rodrigues Ltd (ARL)*
(i)	*The Public Body failed to disqualify the selected consultant on the ground of conflict of interest and/or unfair advantage in as much as GIBB (Mauritius) Ltd, together with TPS Consult Ltd, were awarded the contract for related services, i.e. "Design, Cost Estimation and preparation of Tender Documents for the extension of runway at Plaine Corail Airport" in April 2016, and inter-alia performed an official estimate of the overall costs of the extension of the said runway at Plaine Corail Airport, Rodrigues.*	*Please refer to Clause 1.6.4, Section 2 (Instruction to Consultants) regarding Unfair Advantage which read as follows: "If a shortlisted Consultant could derive a competitive advantage for having provided consulting services related to the assignment in question, the Client shall make available to all shortlisted Consultants together with this RFP all information that would in that respect give such Consultant any competitive advantage over competing Consultants."* *Royal Haskoningdhv (Pty) Ltd (NACO) has on two occasions during the first RFP exercise launched in February 2019 brought up the issue of conflict of interest and/or unfair advantage of GIBB (Mauritius) Ltd, as follows:* *Following a request for clarification from Royal Haskoningdhv (Pty) Ltd (NACO), Addendum no. 1 of 01 March 2019 was issued and all raw data of works done by the consultant GIBB (Mauritius) Ltd in association with Pell Frischmann, which were handed over by the Rodrigues Regional Assembly (RRA) for the new runway, was issued to all shortlisted consultants. To note that the preliminary design consultancy services was led by the RRA, as client.* ***Annex I*** *– request for clarification dated 20 February 2019 and Addendum No. 1.*

		A second request for clarification was submitted by Royal Haskoningdhv (Pty) Ltd (NACO) and the issue was addressed in the Addendum no. 5 dated 11 April 2019 Whereby additional information was provided to all shortlisted consultants. ***Annex II*** *– request for clarification no.2 dated 12 March 2019 and Addendum No. 5.* *List of documents shared with RFP include the following:* *1. Plaine Corail Airport, Airport Master Plan Review Report dated 14 December 2018 by Groupe ADP* *2. New Land Based Runway Final Preliminary Design Report November 2018 from GIBB (Mauritius)* *3. Geotechnical Interpretative Report for Preliminary Design Phase from GIBB (Mauritius) Limited dated September 2018* *List of documents shared with Addendums No. 1 and No. 5 as mentioned above including the following:* *1. Report on Finding and Recommendations for MEP Services for the Existing Terminal at Sir Gaetan Duval Airport-Rodrigues* *2. Notes of Meeting for the 7th Technical Committee Meeting* *3. New Runway Options Report* *4. Assessment of Communications, Navigation and Surveillance Equipment* *5. Topographical Survey Report* *6. Updated Topographical Survey Report* *During the second RFP launched in September 2020, this issue was not raised, but the documents and data above mentioned were shared with the same list of shortlisted consultants following the EOI of 2018.* *As such, any concern regarding any conflict of interest or unfair advantage was adequately addressed by providing all bidders with the relevant information so that no unfair advantage could accrue to any one*

		bidder.
(ii)	*The Public Body failed to readily acknowledge the abnormally low price of the offer of the selected consultant and the necessary related concerns as to its ability to perform the contract, and further failed to request for and/or properly assess information from the selected consultant, and to consequently acknowledge the subsistence of such concerns warranting the rejection of the offer of the selected consultant.*	*Pursuant to Directive 52 of the Public Procurement Office, an in-depth analysis of the proposed rates and resources deployed were carried out and the bid price of the selected consultant was found to be acceptable, especially having regard to prices for which contracts have been allocated in the past for similar projects.*
(iii)	*Failure to reject the offer of the selected consultant for non-responsiveness in as much as it did not satisfy the requirements of the Request For Proposal, including but not limited to the minimum qualifications, experience and availability of Key Personnel, as well as the need for specific experience relevant to the assignment.*	*The selected consultant's bid was, after careful evaluation, found to be technically responsive.* *We wish to draw your attention to Clause 8.1 of the RFP document on Confidentiality which read as follows: "Information relating to evaluation of Proposals and recommendations concerning awards shall not be disclosed to the Consultants who submitted the Proposals or to other persons not officially concerned with the process until the publication of the award. The undue use by any Consultant of confidential information related to the process may result in the rejection of its Proposal and may be subject to the provisions of the Government's antifraud and corruption policy."*

E. Grounds for Review

On 12th September 2021, the Applicant seized the Independent Review Panel for review on the following grounds:

"1. The Public Body failed to disqualify the selected consultant on the ground of conflict of interest and/or unfair advantage in as much as GIBB (Mauritius) Ltd, together with TPS Consult Ltd, were awarded the contract for related services, i.e. "Design, Cost Estimation and preparation of Tender Documents for the extension of runway at Plaine Corail Airport" in April 2016, and inter-alia performed an official estimate of the overall costs of the extension of the said runway at Plaine Corail Airport, Rodrigues.

In response to the reply of the Public Body dated 9th September 2021 to the challenge, the Applicant maintains that the selected consultant ought to have

been disqualified on the ground of conflict of interest and/or unfair advantage. Whilst the Public Body's reference to any documents or data that may have been shared with the shortlisted consultants under the Request For Proposal (RFP) exercise launched in February 2019 constitutes an admission of the existence of a clear need to cure a position of unfair advantage in that particular RFP, the present Application for Review relates to a distinct RFP of 2020 wherein appropriate disclosures ought to have been made to address the otherwise still unresolved situation of unfair advantage. In any case, the aggregate of documents shared in 2019 and/or in 2020 did not effectively address or resolve the unfair advantage in that the selected consultant was privy to a wealth of other information which was never shared with other bidders, or could not be effectively shared due to their intangible nature, thus failing to create a level playing field for all bidders. In its reply to the challenge, the Public Body is silent on the issue of conflict of interest raised in the challenge, and the Applicant shall insist thereon in the present application, the more so that as per the Respondent's own requirements, new preliminary and other designs were required, implying previous unsatisfactory performance and thus excluding "continuity" as one of the potential exceptions to the situation of conflict of interest.

The Applicant states that in selecting the selected consultant for the contract, the Public Body acted in breach of Clause 1.6, 1.6.1(i), 1.6.2 and 1.6.4, Section 2 – Instruction to Consultants of the Request For Proposal and Regulations 73(2) and (3)(b) of the Public Procurement Regulations 2008.

2. The Public Body failed to readily acknowledge the abnormally low price of the offer of the selected consultant and the necessary related concerns as to its ability to perform the contract, and further failed to request for and/or properly assess information from the selected consultant, and to consequently acknowledge the subsistence of such concerns warranting the rejection of the offer of the selected consultant.

In response to the reply to the challenge of the Public Body dated 9th September 2021, the Applicant maintains that the contract price of the selected consultant is abnormally low. The Applicant states that had the Bid Evaluation Committee carried out a proper evaluation and assessment of the offer of the selected consultant in line with Directive No. 52 issued by the Procurement Policy Office, it would have necessarily requested for more information from the selected consultant and thereafter come to the inescapable conclusion that the selected consultant would not be able to perform the contract. The Applicant invites the Independent Review Panel to look into the alleged in-depth analysis of the offer of the selected consultant, including any investigation carried out.

The Applicant states that based on its experience of over 70 years in airport planning and design, in over 600 airports worldwide, the normal cost of design services on a project total budget is between 4-8%. Here, on an estimated project budget of Euros 100 million, the selected bidder would have quoted

1.9% far below the normal cost. Since the number of months staff input for supervision were set by the Respondent in the bidding documents, variations between different bidders would be on rates. After subtracting supervision costs using average/reasonable rates from the offer of the successful consultant, it is clear that the balance falls short of that required for completion of the design.

3. Failure to reject the offer of the selected consultant for non-responsiveness in as much as it did not satisfy the requirements of the Request For Proposal, including but not limited to the minimum qualifications, experience and availability of Key Personnel, as well as the need for specific experience relevant to the assignment.

In response to the reply to the challenge of the Public Body dated 9th September 2021, the Applicant states that in view of the abnormally low price of the selected consultant, the selected consultant cannot possibly satisfy all the requirements of the RFP, which come at a price. For instance, the first 3 key positions of Project Manager, Airfield Pavement Engineer and Site Engineer (Civil) require experience in at least 4 international Runway/Taxiway/Apron projects. As this requirement is a stringent one and need to be filled from international experts within a niche field. Rates for such international specialists are significantly higher than for more generic and locally experienced engineering staff.

The Applicant invites the Independent Review Panel to examine the proposal of the selected consultant in order to ascertain whether the selected consultant had indeed satisfied the requirement of the RFP, including but not limited to the minimum qualifications, experience and availability of Key Personnel, as well as the need for specific experience relevant to the assignment.

The selected consultant should have been disqualified outright and/or should not have been selected for award as it is not the lowest evaluated substantially responsive bidder in view of the all the arrangements propounded above."

F. The Hearing

When the case was called pro forma on 17th September 2021, the Respondent raised the issue of jurisdiction. In its Statement of Defence, the Respondent avers, as preliminary objection, that the procurement exercise does not fall within the scope of the Public Procurement Act 2006 and, therefore, the Independent Review Panel does not have jurisdiction to consider the present Application. A Hearing on the preliminary issue of jurisdiction was, accordingly, held on 21st September 2021.

Mr N. Hurnaum appeared together with Ms S.Chuong for the Applicant instructed by Senior Attorney J.Gujadhur. Ms N.Behary Paray appeared together with Mr M.Sauzier SC for the Respondent.

G. Findings

At this stage, the Panel is called upon to answer a preliminary question: is ARL a public body for the purposes of this country's procurement laws and, consequently, does the Panel have jurisdiction to hear the Applicant's Application for Review. This may seem a very simple question but, as will be seen below, it raises an important issue of law.

The legal provisions sourced directly from the procurement enactments are hardly disputed. The Public Procurement Act 2006 **(the "PPA")** and the Public Procurement Regulations 2008 **(the "PPR")** apply to procurement proceedings undertaken by public bodies except exempt procurement contracts such as rental of office space or the procuring of training services. The two pieces of legislation do not apply to exempt organisations either (*vide* section 3(2) of the PPA). Regulation 2 defines in no uncertain terms what are exempt organisations, which is the nomenclature used to describe public bodies that become exempt in respect of very specific types of procurement contracts. Of recent notoriety, the *Affaire Betamax* showed that State Trading Corporation was made exempt in respect of procurement contracts entered into for the purchase of goods for resale including the procurement of services incidental to such purchases; more mundanely, the National Assembly is exempt from the procurement laws when it comes to catering services.

We need not embark on a detailed analysis of the interplay between the PPA and PPR and their schedules and we shall restrict ourselves to the extracts of the procurement laws relevant to the present issue before us.

From the PPA, at section 2 (Interpretation), we can read:

'"public body" -

(a) means any Ministry or other agency of the Government;

(b) includes -

(i) a local authority;
(ii) a parastatal body; and
(iii) such other bodies specified in the Schedule;'

From the PPR, again Regulation 2, we can source the definition of a 'parastatal body' in the field of public procurement which is defined as:

'"parastatal body" means an organisation established under an enactment whether body corporate or not and which depends wholly or partly on government funding;'

Therefore, to fall within this Panel's jurisdiction, an organisation must either be an arm of Government such as a ministry or agency (the more common and the laypeople's notion of 'public bodies') or a local authority, or a parastatal body. Conventional wisdom and tradition would lead us to expect characteristic names: Council, Board, Panel, Authority, Commission, and Corporation, for instance.

However, a final species is added for the purposes of procurement laws, those bodies that are not public *per se* but which Parliament has deemed fit to specify in the Schedule to the PPA – no doubt because it felt that these organisations should be subject to the enhanced scrutiny of the public procurement process. Through this, some limited companies, bearing the usually private sector 'Ltd', are roped into the public procurement process. These entities can be both private or public companies, they are legally no different from companies that people would describe as *'le privé'* and have constitutions, shareholders, directors, chief executive officers and chairpersons but we can surmise that Parliament has chosen to bring them within such enhanced scrutiny because of the level of influence the government has in their operations. These organisations would not fall under the purview of public, or administrative law, except for their inclusion in the Schedule to the PPA. There would be no judicial review by the Supreme Court entertained in respect of their decisions and any remedy against them would be under purely private law.

It may be proper, here, to address a common confusion that the legal and finance worlds have caused for now more than two centuries, the 'public company'. Much like how a transaction termed 'cash' can in fact be a transaction undertaken through bank cheques or transfers but are called 'cash' for tax purposes (in the sense that it was 'not on credit'), a public company can be purely private. At the core, a private company is one where people come together and form a company in which they usually own shares. Those shares can be sold but the other shareholders have a pre-emptive right to buy the shares before they are sold to a 'stranger'. A public company is one whose shares can be freely bought by anyone who can get his or her hands on them, usually at the time of a new issue of shares or through a stock exchange, afterwards.

A 'public' company may have little to do with the government or the State, or nothing at all. Locally, both SBM Holdings Ltd and the MCB Group are public companies but the State has markedly different levels of share ownership in each; IBL, one of the biggest local conglomerates, is also a public company whose shares are traded daily but has little to do with the State. Many foreign countries have ways of describing such public companies with acronyms added to their names; examples include BMW AG (from Germany), Barclays plc (from the UK), Nestlé S.A. (from Switzerland). In other countries, public companies usually have the 'Ltd' acronym and it is private companies that have a distinctive name: South Africa, in which the Applicant was established, uses 'Pty' to designate private entities, as is apparent from the Applicant's name.

Having gone through the history of ARL, we note that it was a small public company set up in February 2000. Through the Civil Aviation (Transfer of Undertaking) (Rodrigues) Act 2001, it was later transferred the controlling rights to the aerodrome on Rodrigues Island as a payment for almost all its shares. That transfer was, in effect, the

government buying shares in ARL and paying for them by the said transfer of the rights to the aerodrome. Some years later, Government sold the shares to another company (owned by Government) known as Airports of Mauritius Ltd.

Airports of Mauritius Ltd (AML for short) is one of the entities having the unusual position, described above, of being companies run as a private entity, but having been roped into the procurement laws by being included in the Schedule to the PPA. Does that mean that this should apply to its now subsidiary, ARL? This is what the Applicant argues, amongst other things.

The Applicant's case is that ARL should be deemed a public body by reason of its 'factual/legal nature' and by its own admissions.

ARL's case is simply that it is not a public body for the purposes of procurement laws since it is not a government department or agency, not a parastatal body, not a local authority, nor is it listed in the Schedule to the PPA. Miss Behary Paray also relies on the Supreme Court's judgment in **Maitaram v Financial Services Commission 2011 SCJ 143** where the Court held that the dismissal of an employee by the FSC had no sufficient public element for it to be justiciable through a judicial review application. She also relies on the House of Lords case of **Aston Cantlow PCC v Wallbank [2003] UKHL 37** where the Law Lords held that a parochial church council (or PCC) was not a 'core' public authority for the purposes of section 6 (right to a fair trial) of the British Human Rights Act 1998.

In the Applicant's submissions on the legal nature of ARL, it argues firstly that ARL carries out a public function of sorts and was transferred the undertaking of Government in respect of the aerodrome in Rodrigues. Secondly, it has been added to the schedule to the Statutory Bodies Pensions Funds Act 1978.

In support for the first proposition, Mr Hurnaum draws a parallel with the European Court of Justice's judgment in the case of **Case C-567/15 - LitSpecMet UAB v Vilniaus lokomotyvu remonto depas UAB**. He produced, however, the Opinion of the Advocate-General, Campos Sanchez-Bordona who stated, at paragraph 79: *"In other words, the contracting authority can make use of proxy entities, within the limits already mentioned, by entrusting them with particular tasks which should, in principle, be subject to public procurement procedures but which are exempted. This exception is not, of itself, open to question, legally speaking, in the light of the case-law of the Court of Justice (and, now, Article 12(1) of Directive 2014/24). However, where such proxy entities do not have the resources needed to themselves carry out the tasks assigned by the contracting authority and are obliged to have recourse to third parties in order to do so, the reasons for relying on the in-house exemption disappear and what emerges is actually a hidden public (sub-)procurement where the contracting authority, through an intermediary (the proxy entity) obtains goods and services from third parties without being subject to the directives which should govern the award. "*

The thrust of Mr Hurnaum's argument is that should the Panel were to uphold the objection to jurisdiction, it would allow public bodies to escape the procurement laws through the setting up of wholly-owned subsidiaries.

He adds that the transfer of Government's undertaking in the Rodrigues aerodrome to ARL further demonstrates the legal nature of that company and he lays emphasis on the fact that the transfer was for a consideration of 99.99% shares of ARL being owned by Government (those shares having later been sold to AML). The inclusion of ARL in the Statutory Bodies Pension Fund scheme further reveals the public nature of ARL.

He also relied on the speech of the Prime Minister before the National Assembly on 16th April 2019 who explained the sale of Government's shares in ARL to AML, back in 2018, was partly due to the fact that ARL could not raise the necessary funds to build a new runway and, in addition, ARL did not have the adequate experience for the development and management of a large airport, unlike AML.

We have gone through the cases produced and the pieces of legislation, as well as the extracts of Request for Proposal **(the "RFP")** placed before us by the Applicant. We must say that we do not subscribe to the arguments and to the interpretation put forward by the Applicant.

ARL was set up in early 2000. Soon after, in 2001, the National Assembly passed the Civil Aviation (Transfer of Undertaking) (Rodrigues) Act 2001 where Government's undertaking in respect of the Rodrigues aerodrome would pass on to ARL on an appointed day. That was done by regulation in 2007 **(GN 37 of 2007)** and set to the 31st March 2007. The consideration, or payment, for this transfer was 99.99% shares in ARL becoming the property of Government. The Government, therefore, acted within its well-established right to act as a private citizen and purchase shares and paying for those; it was selling a public element (the rights to operate an aerodrome which its Civil Aviation department held) and purchasing a private asset, shares in ARL. Incidentally, though not produced before the Panel, a read through the **CIVIL AVIATION (TRANSFER OF UNDERTAKING) ACT 1993** reveals that a similar approach was undertaken for the transfer of rights to Plaisance SSR airport to a company to be known as Airport Development Corporation Ltd **("ADCO")**. However, unlike in ARL's case, there would be no exchange or payment or transfer of shares. The appointed day for that transfer was also undertaken through regulations in 1999 by which time Government had changed its mind and had dropped ADCO in favour of AML.

In 2012, by regulation **(GN 16 of 2012)**, Parliament added ARL to the schedule to the Statutory Bodies Pension Funds Act 1978.

In 2018, Government sold its shares in ARL to AML when the smaller company became a wholly-owned subsidiary of AML and part of its group of companies.

The above sequence of events leads to a very clear conclusion. At the time of the passing of the PPA, ARL and AML were both up and running but were not directly substantially related, if legally related at all. One was already handling Plaisance Airport, the other was about to start operating Rodrigues Airport. The legislator in 2006 chose to include AML as one of the exceptional entities in the procurement laws but not ARL. Many a time Parliament has amended the PPA, starting in 2008. Crucially, the Schedule to the PPA which lists *eligible* entities was also regularly amended since then. The year 2008 also saw the passing of the PPR and was followed by the increase in exempt organisations. The legislator was very active as regards the PPA and PPR to say the least. Meanwhile, the legislator was also enacting specific laws in respect of ARL's

staff and their pensions, around the same time entities such as the Université des Mascareignes was added to the Schedule to the PPA. It is abundantly clear that at no point has the legislator shown any intent to bring ARL under the enhanced scrutiny of the procurement laws.

More specifically, with regard to the pension scheme, we were only provided a copy of the regulation adding ARL to the list **(GN 16 of 2012)** but we feel bound to point out that the definition of 'statutory body' in the primary legislation from 1978 seems to be a very specific and practical one: *'"statutory body" means a body specified in the First Schedule and includes, for the purposes of the Scheme, a secondary school as defined in the Private Secondary Schools Authority Act.'* If, as suggested by the Applicant, we were to import, and apply some form of equivalence, the concept of statutory body in the definition of public body within the contours of procurement law, does that mean that procurement tasks undertaken by any 'secondary school not owned and managed by the Government' should be actionable before this Panel? Laws are interpreted first and foremost, by the celebrated principle of the literal rule (plain, ordinary meaning). True it is that there are, sometimes, very exceptional cases where we may call in aid another piece of legislation (unconnected on the face of it to the legislation being interpreted) to guide us in defining a word or concept, but the use of this exceedingly rare ace card should not operate so as to change the legal nature of a person or company. Therefore, ARL may not be made into a public body for the purposes of the procurement laws by analogy with a law enabling ARL to be eligible in pension schemes for its employees.

On whether ARL is a parastatal body as defined in the PPR, that is, whether it is set up under an enactment and depends wholly or partly on government funding, we find that the legislative purpose behind this definition is that it must be a company set up by a specific enactment or law. Otherwise, all companies would be captured by this definition since they are all *'incorporated under the laws of Mauritius'* – usually, the Companies Act 2001. In any event, ARL submits that its funding for this project is from foreign organisations (the Agence Française de Développement and the European Union) and there is no evidence to suggest any reliance on government funding, generally or otherwise. We note that the Applicant itself relates the foreign funding in its Statement of Case.

In short, this Panel is not convinced that ARL is a public body for the purposes of the PPA, whether on its own as an alleged parastatal body or as the subsidiary of AML.

We now turn to the RFP even though we are of the firm view that it is not whether a body believes and acts like a public body that it should be held to be one under the PPA and PPR. Similarly, we are of the view that ARL's argument that it is not on the list of public entities published by Government is of little weight to our determination. Whether a body is a public one for the purposes of procurement laws is a question of law and it will be for the statutes to guide us to the proper answer.

Nevertheless, one may say that the conduct of ARL and its choice of words in its RFP is shocking. There are numerous instances in the RFP, too many to recount in this judgment, where ARL portrayed itself as being bound by the PPA and PPR. It even referred to itself as 'Public Body' when defining itself as 'Client' in the RFP. Mention is made of the 'policies of the Republic of Mauritius', of the Central Procurement

Board, of the Procurement Policy Office. It even uses the phrase 'AML/ARL' on occasion as if it is one and the same with AML. When queried by the Panel, the answer was simply that it is ARL's 'format'. We very much doubt this unnecessary and self-inflicted conundrum is what the Prime Minister had in mind when he stated, in 2019, that AML would be offering its expertise to ARL in the management and development of a large airport. Subsidiary companies are often encouraged to make savings by benefiting from synergies and using their parent companies' templates and resources but a subsidiary should do better when adapting the document to its own requirements. Nothing prevented ARL from imposing on itself or partly mimic the stricter rules of public procurement, including a challenge mechanism at its level and the duty to hold a debriefing session with unsuccessful bidders, but it has to apply or enforce these on its own and cannot surely bring the Procurement Policy Office, the Central Procurement Board or other branches of Government into its private dealings – unless these entities are willing to act as some sort of consultants. However, this Panel is not empowered to act as some form of arbitral tribunal in private matters.

The abnormality carried on, even after the selection of the other consultant. When the Applicant challenged the selection of its competitor, it did so under section 43 of the PPA and ARL was content to respond to the challenge with its letter bearing the heading 'Challenge under Section 43 of the Public Procurement Act 2006'. We can only presume that it is only after receiving legal advice when ARL was notified of the case before this Panel that ARL was properly made aware that it is not a public body.

We must say that we fully understand the Applicant and its choice to follow the procedure under the PPA because of the above mistakes by ARL. Be that as it may, the use of that 'format' by ARL does not make ARL subject to the PPA and PPR.

On a final note, we feel it necessary to respond, separately, to Mr Hurnaum's conceivable suggestion that some public bodies would seek to escape from the procurement laws by incorporating subsidiaries to undertake specific procurement contracts. Ultimately, this situation did not arise in this case since ARL was an entity operating the Plaine Corail Airport long before AML's takeover, nor was it an amalgamation where rights and liabilities, and perhaps duties, would be merged between companies. ARL, which remains a separate legal entity, only happens to have been bought by a company falling under the special type of 'public bodies' under the PPA and interpreting this as ARL now being also a public body would be one step too far. However, it is not impossible to imagine more conventional public bodies setting up subsidiaries with some form of ulterior motives. We will refrain from passing comments on such a possibility but we are confident that both the Supreme Court empowered to review executive decisions and Parliament will, as the case may be, ensure that such subsidiaries are lawfully set up and, if necessary, added to the Schedule to the PPA.

H. Conclusion

In light of the above, we find that this Panel has no jurisdiction to entertain this Application for Review and we set it aside. Whatever remedy the Applicant may have against ARL, it ought to lie within the realm of private law.

In the exceptional circumstances of the case, and given the Respondent's ill-advised drafting of the RFP and its confusing conduct until the Application for Review was lodged, we do not find the said Application to be a frivolous one and we, thus, order the reimbursement of half of the security deposit pursuant to section 45(3)(d) of the PPA.

J. Ramano (Mrs)

(Chairperson)

R. Mungra

(Member)

A. K. Namdarkhan

(Member)

INDEPENDENT REVIEW PANEL MAURITIUS

Dated: 30th September 2021