Independent Review Panel

Decision No. 18/21

In the matter of:

Top Security Service Ltd

(Applicant)

v/s

Wastewater Management Authority

(Respondent)

(Cause No. 20/21/IRP)

Decision

INDEPENDENT REVIEW PANEL MAURITIUS

A. History of the case

On 4th January 2021, the Respondent **("WMA")** invited bids for the provision of security services bearing procurement reference **No. WMA/OAB/456S – Security Services at WMA – Sub-Offices and out stations**.

The Applicant **("Top Security")** was one of the bidders. A first evaluation exercise was carried out and RSL Security Services Ltd **("RSL"),** with a bid price of around Rs 21 million, won the day. Another bidder, Rapid Security Services Ltd **("Rapid Security")** challenged the evaluation before the Panel and the decision was given on 6th July 2021 (*vide* **Rapid Security Services Ltd v Wastewater Management Authority Decision 11/21**).

In a gist, the initial evaluation was defective for not having properly applied Directive No.52 issued by the Procurement Policy Office **("PPO")** in respect of abnormally low bids.

A re-evaluation was undertaken by a differently-constituted bid evaluation committee. This time around, Rapid Security with a bid price of around Rs 31 million was retained.

This is now being challenged by the Applicant.

With fairness at the forefront, a majorly different composition of the Panel was convened to hear the present application.

B. Second Notification of Award

On 30th September 2021, the Public Body, in response to the Invitation for Bids, informed the Applicant, that a re-evaluation of the bids received had been carried out and the particulars of the selected bidder are as mentioned below:

Name of Bidder	Address	Bid Amount
Rapid Security Services Ltd	5 Boucherville Street, Port Louis	MUR 30,972,768.00 Exclusive of VAT

C. Challenge

On 6th October 2021, the Applicant challenged the procurement proceedings on the following grounds:

"An excess in price has been observed on a lotwise basis. The bid amount for Lot No.3 is found to be overpriced and abnormally high compared to that of Lot No.1, although both Lots are almost of the same size complexity and have similar service requirement."

D. Reply to Challenge

On 8th October 2021, the Respondent in reply to the Challenge by the Applicant, stated that:

"We wish to inform you that the Authority has carried out the bid evaluation exercise for the above mentioned procurement in accordance with the specifications contained in the bidding document and also in line with the provisions of the Public Procurement Act 2006. The Evaluation Guide of the Procurement Policy Office has also been followed.

In accordance with Section 28 of the Instruction to Bidders, your bid has been found to be non-responsive, as you have not scored the minimum pass mark in the technical evaluation inter alia experience, specific training, logistics and Management Plan. Therefore, your bid was not retained for further evaluation.

Furthermore, following an analysis of the bid prices in line with Directive No. 52 of the Procurement Policy Office by the Bid Evaluation Committee, the selected bidder was found to be the lowest evaluated substantially responsive bidder."

E. Grounds for Review

On 11th October 2021, the Applicant seized the Independent Review Panel for review on the following grounds:

"1. The Applicant avers that in awarding the bids, the Respondent has failed to take into consideration the excess in the price with regards to each lot basis.

(a) The bid amount for lot No. 3 is excessive and on the high side compound to that of Lot No. 1 although both lots were almost the same with regard to the Hours of Service and 16 guards.

2. The Respondent was wrong to have retained RAPID SECURITIES SERVICES LTD, whose bid price for that was substantially higher by Rs. 3,694,848 than that submitted by Applicant.

3. Furthermore, the Applicant's bid was substantially responsive to all intents and purposes and should have been retained for the Award with regard to Lot 3."

F. Relief sought

The Applicant has prayed the Panel for an order suspending the procurement proceedings, an order prohibiting the WMA from acting and/or deciding in an unauthorized mannered *(sic)*, and to recommend that the decision of the WMA to award the said tender for Procurement of Security Services be awarded *(sic)* in whole. The

latter 'typo' is corrected in the Applicant's Statement of Case for the Applicant is, indeed, praying that the procurement proceedings be annulled in whole.

G. The Hearing

Hearings were held on 27th October 2021 and 5th November 2021. There is on record a Statement of Case filed by Applicant and Statement of Defence filed by the Respondent. A Statement of Reply was subsequently filed by the Applicant and submissions filed by the successful bidder.

The Applicant was represented by Mr N. Ramburn SC together with Mr A. Inder, whereas the Respondent was represented by Mr Noor Hussennee.

The Successful Bidder, was represented by Mrs R. Jadoo-Jaunbocus.

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.

It seems to us that Ground 3 can be addressed first.

Ground 3

Contrary to the Applicant's contention that that its bid was substantially responsive to all intents and purposes, it seems clear, based on the evidence before us, that the bid of the Applicant was found to be non-responsive almost at the outset at the level/ stage of examination of the technical criteria.

Clause 28 (Comparison of Technical Proposal) of Section I – Instruction to Bidders of the Bidding Documents reads as follows:

ITB Clause 28.1

"The Technical Proposals shall be evaluated as per a marking system as indicated in Section VI- Schedules. Only those having scored the minimum pass marks or more, shall be retained for the financial evaluation."

As per the Evaluation criteria of Section VII - Schedules of the Bidding Documents,

"Bidders shall score at least 70% of the maximum marks allocated under evaluation criteria A and B and at least 50% of the maximum marks allocated under evaluation criteria C and F to qualify for the overall technical score;

The minimum pass mark for the Technical Evaluation shall be 65 marks and only those bids having scored at least the pass mark shall be retained for further evaluation. Bids having scored less than the pass marks shall be declared not responsive."

The marks scored by each of the five bidders were computed by the BEC. Only those having scored the minimum pass mark or more, were retained for financial evaluation. Consequently, two bidders, namely RSL Security Services Ltd and Rapid Security Services Ltd, scored more than the minimum technical pass marks of 65 and were therefore retained for further evaluation.

The bid submitted by the Applicant scored 54 marks which was less than the minimum pass mark and hence was not retained for financial evaluation and computation of the composite score. That was why, according to the BEC, the bid price quoted by the Applicant for lots 1, 2 and 3 could not be considered for further evaluation.

Under this ground, it was most forcefully pressed upon by the Applicant that its bid was responsive to all intents and purposes and should have been retained for award with regard to Lot 3. The panel has queried the Respondent's witness – the Chairman of the newly-constituted BEC **(the "second BEC")** – on the markings given to the Applicant on the Detailed Technical Evaluation part of the second Bid Evaluation Report. The Panel then embarked upon a comparison of the bids of the Applicant and that of the successful bidder to assess the reasonableness of the markings. The answers and clarifications given by the Chairman of the BEC were satisfactory to the Panel, except for the item relating to logistics, namely "Details of fleet of vehicles & deployment for rapid response (Item E1, page 77 of the Bidding Documents)

This may be the result of the item itself not allowing for all possible outcomes and markings. A poor (and zero) mark was to be given to bidders with a fleet of less than 5 vehicles. 3 marks were to be given to a bidder offering "more than 10 vehicles and at least 5 Nos fitted with VHF". What about those in-between? It would seem that the Applicant, offering a fleeting of more than 5 but less than 10 vehicles, ought to have scored 2 marks instead of "0" attributed to it by the BEC. Even, if that were the case, the Applicant's bid would still be well below the pass mark of "65". We are, thus, satisfied that the Applicant's bid was rightly considered non-responsive since, accounting for that slight increase in marks, it would still have failed to make it through the technical evaluation.

We must also state that in this second evaluation, the Applicant's score has improved by a non-negligible margin when compared with the previous score it had obtained from the first BEC.

Grounds 1 and 2

These grounds can be taken together.

As is evident from the second Bid Evaluation Report, the scope of the bid was for the provision of security services on 24 sites of the WMA, sub-divided into three lots. Bids

were invited per Lot, inclusive of all sites in each lot. The contract was to be on the basis of fixed rates for a period of two years.

Ground 1, as worded in the Application for Review is that:

"in awarding the bids, the Respondent has failed to take into consideration the excess in the price with regard to each lot basis.

(a) the bid amount for lot no. 3 is excessive and on the high side compared to that of lot No. 1 although both lots were almost the same with regard to the Hours of Service and 16 guards."

We will overlook the poor formatting by the Applicant and we understand it.

Ground 2 reads:

"The Respondent was wrong to have retained RAPID SECURITIES SERVICES LTD, whose bid price for lot No. 3 was substantially higher by Rs. 3,694,848 than that submitted by Applicant."

It does seem, however, according to the Respondent's case, that Lot 1 comprises 7 sites while Lot 3 comprises 8 sites, all of which are dispersed geographically as provided in the Bidding Documents. The assessment of the complexity in providing security services for these sites and the choice for the number of guards that are to be deployed remains with the bidder.

Nevertheless, we find that the issue does not arise in the Applicant's case since it failed to obtain the minimum pass mark and the question of whether its bid was properly evaluated financially is moot. It may well have been the case that, had the Applicant and/or some other bidders obtained the pass mark, the considerably more expensive bid by Rapid Security would not have been retained for Lot 3. However, perhaps unintentionally, the Applicant has, through those two grounds, raised important issues that warrant our intervention.

Before addressing those issues, we would wish to make a few observations on the conduct of the parties' cases before us at the hearing of 5th November 2021.

First, we would like to reiterate a comment made by the Panel, in many cases since its inception, on the issue of clarifications. Bidders have this belief, wrongly held as it were, that it is for the public body to seek clarifications from them when they make mistakes in their bids or fail to provide any piece of information or document. It would be good for bidders to remember that they are salespersons pitching a sale to the public body, their client. The situation in a public procurement is not the same as that of a window-shopper who goes around asking about products he or she might be interested in. Clarifications are a discretionary tool that public bodies are allowed to use in

specific circumstances. Some, such as price adjustments are found in the law while others are provided for in the PPO's directives and circulars. It is a trait of requests for clarifications that they carry a potential for unfairness and may impact bidders differently thereby jeopardising the integrity of the whole process. Bidders who fail to be diligent enough in providing information, unlike their competitors, and then choose to wait, on a wing and a prayer, for the public body to come knocking and help them save their bids through 'clarification' ought to have rather a long wait, indeed.

Secondly, we feel we must address the issue of prayers sought before this Panel in the statements submitted by applicants and the oral testimonies in support. We need not remind litigants appearing before us that the Independent Review Panel is meant, as a default position, to hear applications on the papers, or what is now termed 'paper hearing' in other countries. It is only at the request of an applicant, and with our leave, that physical hearings are held. Of course, in spite of the legislator's intent, it has been the case that almost all applications ever to have been heard have been the subject of physical hearings. The point remains, however, that unlike more conventional tribunals or courts, we may not necessarily be bound by the oral testimony of a witness and the need for the latter to affirm or reiterate prayers before us. In the present matter, the Applicant's witness had, in examination-in-chief, reiterated the 'prayers' sought in the Application for Review but, in cross-examination, to a question well-put by Mr Hussennee, the witness accepted that the Applicant's case was of a far more limited scope. Again, in the specific context of this case and based on the Application for Review and Statement of Case, we do not find this to be fatal.

We may add, on a side note, that the legislator has also deemed it fit not to expressly limit the Panel's powers to the grounds for review settled by applicants, unlike many other specialised tribunals. We will leave to another day the construction of the statutory provisions that may or may not allow unconventional tribunals such as this Panel, entitled by law to receive confidential information known only to public bodies, to, in deserving cases, travel outside the wordings used by applicants and other bidders in their statements of cases or submissions on the basis that the latter group of persons will never be able to have knowledge of such confidential information at the time of lodging their applications or of making their submissions before us. The situation, we humbly believe, would be akin to what would have occurred, but for the existence of this Panel, if the Supreme Court had been directly seized by way of judicial review and had, by issuing an order for *certiorari*, obtained the said confidential information.

We now turn to the material irregularities, in the legal sense, which we have noted in this second evaluation exercise.

Abnormally low v Substantially high bids

We begin by reminding public bodies of the importance of the cost estimates which may be updated at any stage prior to the opening of bids. This is the very essence of procurement proceedings and from which many factors and considerations flow. Two

divisions of the Panel had the opportunity to address the issue of cost estimates in the of **Security and Property Protection Agency Co Ltd v MPA Decision 14/20** and **NEC XON (South Africa) v Mauritius Ports Authority, Decision 13/20** and we need not repeat the analysis made in those two cases.

Moreover, the PPO's Directive No.52 also clearly refers to, and defines in absolute detail, this all-important element, in bold, at the end of the Directive.

We must, with force, reiterate how crucial the matter is. The short of it is that cost estimates can only be a factor carrying certainty; not reasonable certainty or the subject of a finding on balance but an absolute certainty. A procurement exercise simply cannot exist with an undefined, or ill-defined, cost estimate.

Before the Panel in the previous challenge, brought by Rapid Security Services Ltd, the then witness for the WMA (a member of the previous bid evaluation committee) did not give a clear answer as to what the cost estimate for this procurement is. The fact that the budget for the procurement was Rs 30 million was repeated often-times but said not to be the cost estimate. Also, the bid of RSL was deemed to be low by 29% which would indicate an estimate of Rs 30 million. Moreover, it seems that the first BEC, in its Bid Evaluation Report, had used the term bid estimate and budget interchangeably, regarding the sum of Rs 30 million. This led that division of the Panel to seek an official response from the WMA with a clear set of sub-queries. In reply, the WMA in a letter dated end of June 2021, stated that the estimates were 'at Annex 1' but, in the body of the letter, again referred to a budget of Rs 30 million. The Panel was not satisfied with that response to its queries and sub-queries and held:

"The Panel later requested the Public Body to submit the details of its cost estimate. Same was submitted but after a perusal of the document the Panel could not find all needed information of how the man-month rate was arrived at.

The Panel without dwelling in all other issues, is at this stage of the view that a breakdown of the amount quoted according to the price mechanism applied in the Price Activities schedule, taking into consideration the remuneration rates, quoted, inclusive of basic wages and salaries, transport cost, day and night shift payment, overtime payment, bonus, leaves, office expenses, overhead and other related expenses such as uniforms and protective items, time off for meal and tea break etc be taken into account."

We have, cursorily, perused the proceedings and papers put before the other division of the Panel back in June 2021 and we gather that the above recommendation was in line with the grounds and issues raised by the previous applicant, Rapid Security Services Ltd, and in line with some of the matters set out in Directive No.52.

Before this division of the Panel, the Chairperson of the BEC had no hesitation, when queried about the content of the second Bid Evaluation Report from August 2021, to

state loud and clear that the cost estimate is 24 Million the lower figure contained in the Report. We do not usually set out the cost estimate but we feel it is important for us to do so here, exceptionally. The cost estimate for the procurement as indicated by the second BEC is Rs 24 million, the budget Rs 30 million. The figure of Rs 24 million matches the one in 'Annex 1' provided by the WMA to the Panel back in June 2021 after completion of hearings. The Chairperson of the BEC also stated, in his testimony, that his 'predecessor' had miscommunicated the matter to the Panel in the previous hearings and that Rs 24 million was the correct figure all along. He was supported by Mr Hussennee.

This Panel notes that if there was an updated bid estimate of Rs 24 million all along, this was never referred to during the hearings of June 2021 nor indicated in the first Bid Evaluation Report. In any event, a re-evaluation would have become necessary to correct that flaw in the previous Bid Evaluation Report.

It is of note that the WMA did not challenge, by way of judicial review or otherwise, the decision of the Panel to remit the matter for a fresh evaluation – which would necessarily involve a determination of the cost estimate, as the very first step.

So, we are now left with a report that states, in no uncertain terms, that the cost estimate is Rs 24 million. Yet, in the same report, RSL (with a bid of Rs 21.2 million) has been deemed abnormally low.

We will now set out how the second BEC arrived at such a conclusion. We must say that the second BEC has done a thorough analysis and, as we will show below, might just have been guilty of *un peu d'excès de zèle*. One may say this is a most welcome development when so many bid evaluation committees have, in the past, been found lacking when it came to the analysis of abnormally low bids.

The 'simple' arithmetical method

The second BEC began by doing a global analysis of the bid prices of RSL and Rapid Security based on a cost estimate, or the 'updated pre-bid estimate' to give it its relevant description, of Rs 24 million. None was abnormally low since both were above **Rs 20,400,000 (Rs 24 million minus 15%)**. The second BEC then did the same exercise, but lot-wise. The 24 sites, in the Bidding Documents, have been broken down into three lots. For Lot 1, RSL was 4% lower than the estimate, Rapid Security 28% above. For Lot 2, RSL was 21% below, Rapid Security was negligibly higher (by Rs 6,000). For Lot 3, RSL was 8% below, Rapid Security was 61% above.

The second BEC, applying the common benchmark of '15% below', concluded that RSL was abnormally low only for Lot 2 but added that, overall, the prices (including RSL's, we gather) were acceptable.

The 'relative' method

For some reason, the second BEC then moved on to apply a relative method supposedly because of the Panel's decision of July 2021 to apply Directive No.52. The *Procurement Guidance of the World Bank for Identifying Abnormally Bids and Proposals* was called in aid. That relative method is akin to the PPO's Directive No.52 that must be applied for goods contracts. The mean prices of all bids are calculated, their standard deviation as well, and the latter is then subtracted from the former to arrive at the notional 'Abnormally Low Bid risk zone.' The second BEC rightly points out that this relative method, based on the bid prices submitted and not cost estimates, provides an independent benchmark to assess abnormality in bids. It then proceeded to do so globally, that is, not lot-wise. The risk zone was thus defined at **Rs 22,313,750.03** and RSL was deemed to be abnormally low, on the whole.

Then, in addition to the previous calculations, the second BEC carried out the 'simple' arithmetic calculation, but this time, for each of the 24 sites. RSL was found to be below by more than 15% in nine sites, Rapid Security for only one site.

The second BEC devised a very interesting and probing 5-step method to assess the bids site-wise and sought clarification from both RSL and Rapid Security. RSL's response was then deemed insufficient and it lost out on all sites and lots.

We noted that, on many occasions in the report, the second BEC suggests that it has acted in accordance with the recommendations of the IRP from the previous Decision of July 2021. Based on the above quote from **Decision 11/21**, we respectfully disagree and hold the firm view that the second BEC has substantially expanded on what the IRP had held. Some confusion seems to have crept in.

We will, therefore, proceed to assess whether Directive No.52 has been properly applied in the second Bid Evaluation Report.

A number of issues arise in respect of the approaches used by the second BEC. First, we cannot assess the weight carried by each method of calculation that has enabled it to reach the conclusion it did. How much has the site-wise assessment influenced the final decision, or the relative method using standard deviation?

The seriousness of this flaw is made clear when one reads the wording of Paragraph 1 of Part D of Directive No.52 in respect of 'Other services' (which applies to security services):

"The first step is for the BEC to identify potential ALB by comparing the bids with the updated pre-bid cost estimates to identify items or rates that are abnormally low." (underlining is ours)

Therefore, the relative method using standard deviation should have no place in the determination of abnormality in bids for 'Other services' and, as per the PPO Directive, ought to be applied to 'goods' contracts. Also, we may ask ourselves why the second

BEC did not do a lot-wise and/or site-wise assessment using that relative method so as to ensure consistency.

Secondly, and more importantly, ITB Sub-Clause 5.2(a) which, it is safe to say, is the crucial ITB for eligibility, evaluation and award, contains a 'Note' which reads:

"Note: Evaluation of the bids and award of the contract shall be conducted per lot – each lot inclusive of all sites" (underlining is ours)

One may then ask why the second BEC chose to carry out a site-wise assessment when the evaluation was to be lot-wise as per that ITB.

Moreover, that inference is reinforced by ITB 31:

"31.1 Subject to ITB Clause 32, the Employer will award the Contract to the Bidder whose bid has been determined to be substantially responsive to the bidding documents and who has scored the highest marks per Lot provided that such Bidder has been determined to be:

(a) eligible in accordance with the provisions of ITB Clause 4; and

(b) qualified in accordance with the provisions of ITB Sub-Clause 5.2.

31.2 In allocating the lot/sites to the successful bidder(s) having scored the highest scores for those lots/sites and where bidders do not satisfy the criteria as per ITB Sub-Clause 5.2 to be awarded all those lots/sites, the Employer will award the contract by allocation the lots and sites to those bidders as per their respective capacities that result in the least cost to the Employer."

ITB Clause 32 is simply the WMA reserving its right to cancel the whole proceedings without incurring any liability towards bidders. Clause 4 relates to documents and other information about eligibility of bidders. These two ITBs are not relevant for present purposes.

ITB Sub-Clause 5.2 (a) which is part of the Sub-Clause 5.2, on the other hand, raises issues of interpretation by its interplay with ITB 31.2. That 'Sub-Sub-Clause' 5.2 (a) speaks of evaluation per Lot inclusive of all site while ITB Clause 31.2 allows for award per lot/site. This Panel finds, on balance, that the Sub-Sub-Clause' 5.2(a) should prevail over ITB Clause 31.2, especially when the former is read together with Clause 31.1 which speaks of award to the best scores 'per Lot'. Accordingly, the contract award, should be lot-wise and not site-wise. It follows that evaluation should also be lot-wise, in our view.

Major question marks, therefore, persist as to whether Directive No.52 about abnormally low bids has been properly applied, and for the reasons we will set out in our Conclusions below, we will not make any specific order as to the method of evaluation.

We now turn to the elephant in the room, so to speak. The bid of Rapid Security is exceptionally high based on the estimate of Rs 24 million.

The second BEC did address its mind to this issue and held, we will paraphrase, that based on additional information obtained from Rapid Security (presumably, information sought by way of clarification when assessing its low bid for the one site), the monthly price of Rapid Security was found to be 'fairly' reasonable. In consequence, the bid price of Rapid Security is not being considered to be substantially above the estimate for either a cancellation of the procurement or for negotiation with Rapid Security. This is a very bold statement, indeed, and shows a refreshing level of commitment from officers involved in procurement.

However, this Panel must strongly express its surprise at such a conclusion. How can a public body insist on a cost estimate of Rs 24 million and, at the same time, deem a bid of nearly Rs 31 million to be so reasonable such that not even negotiations are needed? This contradiction does not sit well with the thorough evaluation exercise the second BEC has carried out.

The Panel had the opportunity to address substantially high bids and the accompanying considerations in respect of negotiations in its decision in **Sinohydro Corporation Ltd v RDA Decision 14/20** handed down on 31st December 2020.

It can hardly be disputed that public bodies have an inherent duty to ensure they are making the best use of taxpayers' money. The laws and the PPO's guidance on the issue of negotiations are set out below, which is a quote from the decision in *Sinohydro*:

*"Negotiations in the context of the PPA and Public Procurement Regulations 2008 (the **"PPR"**)*

The PPA has a very strict default position when it comes to negotiations with bidders ('selected bidder' and 'other bidders') and allows these only in special circumstances. This position is enshrined in sections 40(2) and 40(2A) of the Act:

"(2) There shall be no negotiation between a public body and a selected bidder or other bidders except in such special circumstances as may be prescribed.

(2A) In the case of a major contract, the Board shall, where special circumstances provided in subsection (2) apply, initiate and oversee the negotiation between a public body and a selected bidder or other bidders in accordance with such instructions as may be issued by the Policy Office."

The PPR provides for those special circumstances at Regulation 8 (as amended) which reads as follows:

"8. Special circumstances for negotiation
Negotiations may be carried out with a bidder or supplier where -

(a) the lowest evaluated substantially responsive bid is substantially above the updated estimated costs and a re-bid exercise is considered not practical;

(b) direct procurement from a single source under section 25(2)(b) of the Act is resorted to; or

(c) emergency procurement under section 21 of the Act is resorted to."

*As alluded to in the Act, the Procurement Policy Office (**"PPO"**) has set down a number of detailed rules and instructions to be followed by the CPB and public bodies when carrying out negotiations. They are contained in two Circulars issued by the PPO, namely Circular 15 of 2008 and Circular 7 of 2010- the latter simply setting the threshold for negotiations at 15% above the updated estimated cost for works procurement contracts."*

Admittedly, when read in isolation, the above statutory provisions are expressed in a 'permissive' fashion through the use of the word 'may' instead of 'shall'. However, one should not lose sight of the legislative purpose behind those statutory provisions, in line with the other sections of the Public Procurement Act 2006 **("PPA")** and paragraphs of the Public Procurement Regulations 2008 **("PPR")**. We may add to this by saying that what the legislator, and the country, seems to us to expect is that if the lowest substantially responsive bid is priced substantially higher than the estimate, the public body should consider cancelling the whole exercise. No wonder a substantially high bid is a clear and express reason provided in section 39 of the PPA:

*"**39. Cancellation of bidding process***

*(1) **A public body may, at any time prior to the acceptance of a bid, reject all bids, or cancel the public procurement proceedings where -***

(a) all the bids are non-responsive;

(b) the lowest evaluated bid is substantially above the applicable updated cost estimate;

(c) the goods, works or services are no longer required;

(d) it has been established that there has been collusion among the bidders;

(e) the bidding document requires substantial modification making it more convenient to restart a new bidding process; or

(f) after the closing date and time for submission of bids and before the opening of bids, it is determined that one or more bidders were unable to submit bids due to such circumstances as may be prescribed." **(emphasis added)**

Once again, we are faced with a situation where the legislator has chosen to use the word 'may' instead of 'shall'. The definition of these two words has been the subject of much legal controversy in Mauritius. In the original enactment of section 5(4)(a) of the Interpretation and General Clauses Act 1974 ("**IGCA**", the piece of legislation meant to assist in the interpretation of all laws), 'shall' was defined as 'shall be read as imperative' and, therefore, was to be mandatory. A typographical error in the 1990 reproduction of that 1974 Act in the Revised Laws Volume 2: [The word "shall" may be read as imperative] has given rise to a fascinating chain of cases over the last 30 years. Fortunately, the word "may" *shall* always be read as *permissive or empowering* (*vide* section 5(4)(b) of the 1974 Act). Yet, the context of the whole enactment needs to be taken into account, sometimes. After all, pursuant to section 5(8) of the IGCA, *'Effect shall be given to each enactment according to its true intent, meaning and spirit.'*

An apt illustration of the above is section 39 of the PPA itself. Public bodies may cancel procurements which implies a discretionary (or permissive power) but, when read in context, it is clear that if all bids are non-responsive the public body can only cancel the procurement exercise. Similarly, when the procurement is no longer needed, the exercise should be stopped. If it is found that the bidders have colluded, the public officials involved, as per their duties under the PPA, must stop the proceedings in the public interest. The word 'may'' in section 39 of the PPA creates a discretion in law but not necessarily a discretion in fact. We find that this is the more proper approach to adopt when the lowest responsive bidder is substantially more expensive than the cost estimate.

The additional procedure for negotiation contained in section 40 of the PPA (read together with Regulation 8 of the PPR) provides an exception to this indirect duty to cancel a procurement under section 39 of the PPA in special circumstances where cancellation is not the best course to follow. The fact that the legislator went on to provide that exception lends further support to our reading of the legislative purpose of the PPA and that cancellation is the starting position.

However, if cancellation is not practical, negotiations should ensue with all bidders that are responsive. We note that the PPO circulars from 2008 and 2010 are worded in somewhat more imperative fashion. They are **annexed** to this Decision.

It is of note that, in practice, it is common in our local procurement proceedings to find that bidders quoting prices 15% or more above the estimate are disqualified outright as per the Bidding Document.

In the present case, the Bidding Documents do not provide for such disqualification and it is, consequently, left to the judgement of the public body. However, this discretion has to be reasonably exercised in line with the statutory context including, amongst many others, the duty of public officials to act in the public interest found in section 51

of the PPA. Practical considerations and more general public procurement principles should also be borne in mind.

We are prepared to accept that it was reasonable, in the *Wednesbury* sense – that is, the legal benchmark set for the actions of the executive in public administrative law – for the second BEC not to recommend a cancellation of the proceedings based on its opinion on the price of Rapid Security but we find that it was unreasonable for it not to have even attempted to get Rapid Security to lower its price by way of negotiations. Of course, should the latter have refused to lower its price, the WMA would have been able to reassess its decision not to cancel the proceedings and reached a more informed decision.

Those two last steps: the carrying out of negotiations and the assessment of any saving made, we, find, are lacking, and this Panel is of the view that this simply cannot stand, as per the law and the public procurement principles.

This is a case where the successful bidder's quote is nearly Rs 1 million above budget, where it is **29.1%** above the global estimate, **28%** above estimate for Lot 1, and **61%** for Lot 3. It is almost Rs 5 million above the second highest bidder (the present Applicant), it is slightly above Rs 5 million over the mean bid price using the 'relative' method, and, all in all, it is almost Rs 10 million above the original successful bidder, RSL.

Site-wise, the figures are even more extreme. Rapid Security is 53% below in 1 site, 4% below estimate for 8 sites, but is **21%** above for 5 sites, **25%, 31%, 35% and 39%** above for 1 site *respectively*, **102%** above in 5 sites and **166%** above in 1 site.

The threshold for negotiations set by the PPO is **15%**. Even if we were to stretch the argument to its thinnest and allow for some room to manoeuvre, though we disagree that it should be the case since the 15% benchmark is a sound one and, to put it starkly, a benchmark is a benchmark, we surely cannot allow any such consideration for that degree of excess. 29.1% is almost a third, 61% nearly two-thirds and 166% is five-thirds. These represent 'substantial' fractions and percentages by all manner of definition of the term.

In the main, we must say that the probing evaluation carried out by the second BEC is commendable and is testament of the high level of diligence shown by the second BEC members. This cannot be emphasised enough. However, as has been seen above, we express doubts as to whether all that has been done is tenable in law. Reviewing tribunals often remit matters back to decision-makers with only general guidance and seldom offer specific guidance on issues or facts that need a determination by the lower entity which is the entity empowered and expected to make decisions. We have felt compelled to intervene in much detail because of the intricate issues of law and fact that have become apparent from a reading of the papers and the hearing of oral testimony, let alone the glaring failure to negotiate.

We, therefore, propose to provide specific guidance to the WMA while refraining from taking the decision in its stead.

I. Conclusions

Our suggestions are as follows and are to be approached sequentially:

1) The WMA shall ask itself whether, in good faith, it can be absolutely certain that the updated pre-bid estimate was Rs 24 million before the opening of bids. Admittedly, the answer is clear enough from the 2020 documents placed before this division of the Panel but this is not a matter that should be the subject of a finding by the reviewing authority but one that should be the first item established by the WMA as the procuring entity. Should any uncertainty persist, however small, the whole procurement proceedings would therefore have been tainted from the start and the solution is clear, and can only be an annulment.

2) If Rs 24 million is indeed the cost estimate for this procurement, the WMA is to seek the guidance of the PPO under section 7 of the PPA on whether, in line with the Bidding Documents and the Directive No.52, the erstwhile successful bidder was properly disqualified by a 'site-wise' assessment of abnormality. If the assessment ought to have been 'global', the irresistible conclusion is that the then successful bidder was never abnormally low in any way whatsoever. If the assessment could or should have been 'lot-wise', ITB 31 might eventually operate so as to break the procurement contract into three Lots allocated to the responsive bidders to ensure the lowest cost to the WMA.

3) If the 'site-wise' assessment of abnormality is deemed proper after seeking guidance from the PPO, the WMA and the public officials in its employ would have a duty, under the law and as per the principles of administration, to carry out negotiations with Rapid Security in respect of the relevant Lots/sites where it is priced more than 15% above the applicable estimate and, only then, choose between cancellation (presumably, if insufficient 'discounts' are offered) or paying the higher, original price.

We have called upon our sister-entity, the PPO, in order that any necessary methodology is devised and that consistency prevails in similar procurement proceedings.

In the same vein, we urge the WMA to promptly inform us, pursuant to Regulation 59, of decisions or actions they have taken following this judgment so as to help us ensure consistency of approach.

We are aware that the PPO, with the input of the CPB, has formulated a policy that re-evaluation when ordered by the Panel shall always be carried out by a differently-

constituted bid evaluation committee. We feel this may not be necessary in the present matter since the steps we have set out above, other than annulment, do not require a new evaluation but rather, one is a question of policy and the other is the carrying out of negotiation. The only lingering issue would be the clarifications by RSL. After all, the first BEC had no qualms about RSL's bid even though it was deemed 29% below budget while the second BEC felt that RSL may not be strictly abnormally low but was not convinced by its replies when subjected to the 5-step test. For that reason, we leave it to the judgement of the WMA on whether to set up a new, third committee.

In a way, the Applicant has been partly successful in that we have directed the public body not to act in an unauthorised manner and there may be an annulment going forward. Its Application for Review is, thus, deemed not to be devoid of merit and the Panel shall reimburse its security deposit in full.

Surprisingly, the Applicant, by bringing this case, while RSL (*in fine*, the more aggrieved bidder) chose not to, has enabled this Panel, and we are sure the WMA as well, to better scrutinise this particular procurement exercise and further the public interest.

J. Ramano (Mrs)

(Chairperson)

R.Mungra

(Member)

A. K. Namdarkhan

(Member)

Dated: 9th November 2021

Annex 1

MINISTRY OF FINANCE & ECONOMIC DEVELOPMENT
PROCUREMENT POLICY OFFICE

Circular No 15 of 2008

Ref : F/PPO/4/1

From: Director, Procurement Policy Office

To : Heads of Public Bodies

Special Circumstances for Negotiation

Public bodies are hereby informed that the Regulation 8 of the Public Procurement Regulations 2008 has been revoked and replaced by the following regulation:

"8. Special circumstances for negotiation

Negotiations may be carried out with a bidder or supplier where –

(a) the lowest evaluated substantially responsive bid is substantially above the updated estimated costs and a re-bid exercise is considered not practical;

(b) direct procurement from a single source under section 25(2)(b) of the Act is resorted to; or

(c) emergency procurement under section 21 of the Act is resorted to".

The procedures to be followed for negotiation are herewith annexed.

Procurement Policy Office
01 September 2008

Procedures for negotiations under Regulation 8 of the Public Procurement Regulations 2008

1. Negotiations with a bidder shall be resorted to only in the following circumstances:

   a. the lowest evaluated substantially responsive bid is substantially above the updated estimated costs and a re-bid exercise is considered not practical;

   b. direct procurement from a single source under section 25(2)(b) of the Act is resorted to; or

   c. emergency procurement under section 21 of the Act is resorted to.

2. For non-major contracts, the Chief Executive Officer of the Public Body shall appoint a Negotiator or a Negotiating Team, depending on the value and complexity of the procurement contract, from among officers who are knowledgeable in all aspects of the procurement.

3. For major contracts related to para 1 (a) and 1(b), the appointment of the negotiator or negotiating team shall be made by the Central Procurement Board in the following manner:

   (i) where negotiation is required following an evaluation of bids the Negotiating Team shall consist of members of the Bid Evaluation Team and employees of the Public Body concerned who are well conversant with the requirements in the bid document and are specialized in the specific procurement.

   (ii) Where negotiations are to be carried out with respect to para 1(b), independent negotiators shall be appointed to form a team with the employees of the Public Body.

4. The Chief Executive Officer or the Central Procurement Board, as the case may be, shall oversee the negotiations process in the following manner:

   a. Carrying out a pre-negotiation review and approving the agenda

   b. Requiring the team to seek approval at a given stage before finalizing the terms of the agreement.

5. The review is conducted so that the Chief Executive or the Central Procurement Board can be assured that the Team leader is well prepared and that the other members of the team are agreeable with the strategy of negotiations in order to achieve the expectations of Management or the Central Procurement Board.

6. From the Negotiator(s)'s point of view, the advantage of the review is the opportunity to understand the expectation of management and to obtain the authority to handle particular problems.

   The review can be a quick run-down of the facts and the objective in five minutes or less if it is a small deal. It can be a formal presentation by the negotiating team to an assemblage of top procurement management. It can be a written justification and request for clearance to proceed.

7. The Public Body concerned shall provide a member of its staff as secretary to attend the negotiation sessions and to maintain record of the proceedings. Such record shall be part of the procurement records.

8. The outcome of a negotiation shall only be executed after approval of the Central Procurement Board/Chief Executive of the Public Body depending on whether the procurement is for a major or minor contract.

9. Exceptionally, in case of emergency referred to in para 1(c) for major contract, when the situation warrants for immediate start of negotiation, the Public Body shall initiate procurement procedures for immediate action after negotiation with Contractors/Service Providers based on its own past experience of costs and resources, ascertaining due diligence to obtain value for money.

   The decision of having recourse to emergency procurement and defining the scope of the emergency shall rest upon the Public Body.

   The Public Body shall as far as possible arrange with the Contractor/ Service Provider that the scope of the works are subject to variations and approval of Central Procurement Board.

10. For procurement under emergency as mentioned in para 9, the Public Body shall, as soon as possible, report the situation of emergency to the Central Procurement Board giving details of actions initiated. The Central Procurement Board may thereafter discuss with the Public Body for any fine tuning in respect of the scope of works and any other relevant detail to render the procurement more effective.

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Annex 2

MINISTRY OF FINANCE & ECONOMIC DEVELOPMENT
PROCUREMENT POLICY OFFICE

Circular No. 7 of 2010

Ref : F/PPO/4/1 Vol 2

From: Director, Procurement Policy Office

To : Heads of Public Bodies

Special Circumstances for Negotiation

The Procedures for Negotiation, issued through Circular No. 15 of 2008 pursuant to Regulation 8, have been reviewed to provide for the application of the government policy announced in the last Budget Speech with regard to negotiations, when the value of the works contract exceeds the updated estimate cost by more than 15 %.

2. Paragraph 1(a) of the annex to the said Circular should now read:

"the lowest evaluated substantially responsive bid exceeds the updated estimated cost of the works by more than 15 % or when it is substantially above the estimated cost for any contract other than works, and a re-bid exercise is considered not practical;".

Procurement Policy Office
22 June 2010

__Note__: When undertaking a procurement exercise, please make sure you are using the latest version of the appropriate Standard Bidding Document available on the website of the Procurement Policy Office (http://ppo.gov.mu). You may also consult on the site the updated version of the Public Procurement Act and the Regulations made thereunder, as well as circulars issued by the Office.