



Independent Review Panel

Decision No. 19/21

In the matter of:

JV Kalis Technologies Ltd and Keep Clean Ltd

(Applicant)

v/s

Open University of Mauritius

(Respondent)

(Cause No. 21/21/IRP)

Decision



A. History of the case

On 28 May 2021, the Respondent, through Open Advertised Bidding proceeded with procurement exercise for Tablet Pc bearing procurement reference No. **OU/OAB/5/20-21**.

The Applicant was one of the bidders.

B. Evaluation

A Bid Evaluation Committee was set up by the Respondent to evaluate the bids received and to identify the lowest evaluated substantially responsive bid.

C. Notification of Award

On 04 October 2021, the Public Body, 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 were as mentioned below:

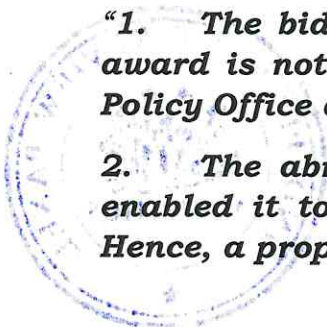
Sr No.	Name of Bidder	Address	Contract Price (MUR)
1	HM Rawat Communications Ltd	Hassam Moussa Rawat Business Centre, 149-151 Royal Road Beau Bassin	MUR 21,483,440.00 plus VAT MUR 3,222,516.00

D. Challenge

On 07 October 2021, the Applicant challenged the procurement proceedings on the following grounds:

“1. The bid of the successful bidder is abnormally low and the award is not in compliance with Directive 52 of the Procurement Policy Office dated 02 December 2020.

2. The abnormally low price of the successful bidder has not enabled it to fully comply with the requirements of ITB 12.1(h). Hence, a proper evaluation of the bids has not been possible.






3. The successful bidder is a renowned supplier of mobile phones. It may not have 5 years' experience in the supply and/or sale of PC tablets, and the corresponding turnover, as required by the contract, specifically for PC tablets."

E. Reply to Challenge

On 11 October 2021, the Respondent replied to the Challenge by the Applicant, as mentioned hereunder:

"

S/n	Ground of Challenge	Our Reply
8.1	The bid of the successful bidder is abnormally low and the award is not in compliance with Directive 52 of the Procurement Policy Office dated 02 December 2020.	Paragraph 2 and 3 of Directive No 52 spell out the following: 2. Section 37(10A) of the Public Procurement Act 2006 provides for the following:
8.2	The abnormally low price of the successful bidder has not enabled it to fully comply with the requirements of ITB 12.1(h). Hence, a proper evaluation of the bids has not been possible.	<p>"(a) Where a public body or the Board-</p> <p>(i) is of the view that the price, in combination with other constituent elements of the bid is abnormally low in relation to the subject matter of the procurement; and</p> <p>(ii) has concerns as to the ability of the supplier to perform the procurement contract, it may request in writing from the supplier such information as it considers necessary.</p> <p>(b) Where, after having taken into account any information furnished by the supplier under paragraph (a) and the information included in the bid, the public body or the Board still has concerns as to the ability of the supplier to perform the procurement contract, it may reject the bid."</p>



3. Public bodies must ensure that all requirements in Section 37(10A) are followed before initiating action to retain or reject a bid.

- In line with paragraph 2 and 3 above, Open University of Mauritius (OU) has ensured due diligence in ascertaining that the above have been followed.
- We wish to inform you that as per Directive No 52, **the public body should not only assess the price quoted by a bidder but also constituent elements of the bids and as well as assessing the ability of the supplier to execute the eventual award.**
- Based on the information submitted in the bid and clarification obtained thereafter, OU has no concern whatsoever at this stage for awarding the contract to the successful bidder “HM Rawat Communications Ltd”.

This procedure has always been followed in previous exercises. In one previous case namely, OU/OAB/4/19-20: Procurement of Table PCs on 07 July 2020, award of contract for procurement of Tablet Pc was made to your company Kalis Technologies Ltd in joint venture with Zener Onenet LLC for a unit price of Rs1,583.77 (Incl. of Vat). Even in this case, it would have appeared that it was an abnormally low price. Still, the joint venture was unable to execute the contract even with extension provided and consequently the performance guarantee was forfeited.





8.3	<p>The successful bidder is a renowned supplier of mobile phones. It may not have 5 years' experience in the supply and/or sale of PC tablets, and the corresponding turnover, as required by the contract, specifically for PC tablets.</p>	<ul style="list-style-type: none"> • HM Rawat Communications Ltd has been incorporated on 10 August 2009 and satisfies all requirements of the bid.
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F. Grounds for Review

On 15 October 2021, the Applicant seized the Independent Review Panel for review on the following grounds:

- “(a) **The bid of the successful bidder is abnormally low and as such, it was incumbent on the Public Body to comply with Section 37 (10A) of the Public Procurement Act 2006 and with Directive No. 52 (issued pursuant to Section 7 (b) of the Public Procurement Act 2006), the moreso that the abnormally low quote casts serious doubt on the ability of the successful bidder in performing the procurement contract. In evaluating the bids, the Public Body has failed to identify that the bid submitted by the successful bidder is an abnormally low one and has consequently failed to follow the procedures required when dealing with an abnormally low bid;**
- (b) **The abnormally low bid of the successful bidder could not have/has not enabled it to fully comply with the requirements of ITB 12.1 (h) and as such, upon a proper examination of the bids and the documents submitted under ITB 12.1 (h), the Public Body ought to have rejected the bid of the successful bidder;**
- (c) **The Public Body has failed to carry out a proper evaluation and assessment of the bids when it wrongly selected HM Rawat Communications Ltd as the successful bidder, since the latter does not have / could not have the required specific experience provided in Section III: Evaluation and Qualification Criteria, and as amended by Corrigendum No. 1, issued on 16 June 2021, which states that:**

(I) Page 32 at 3.1 (iii) (a):

“The bidder must have at least 5 years of experience in supply and/or sale of PC Tablets to Public Bodies including



Ministries, Parastatal Organisations and State-owned Enterprises”, and

(II) Page 33 in grid for Reference sites (Reference sites where the Bidder has completed projects of similar nature):

“At least one verifiable site/customer during the last five years supported by explicit evidence for the supply of at least 200 tablet PCs in one or multiple consignments to Private/Public Bodies including Ministries, Parastatal Organisations and State-owned Enterprises during the period. The bidder must submit evidence for the Supply of table PCs including letter of award and proof of payment.”
(Underlining is ours)

Under paragraph 3.1 (iv) Experience and Technical Capacity, which are mandatory requirements of the bidding documents, it is noted that:

“The Bidder shall furnish signed documentary evidence, with relevant certifications in the products being proposed, to demonstrate that the Bidder meets required 5 years’ experience in the supply and/or sale of PC tablets..”
(Underlining is ours)

The Public Body has failed to take into account the fact that the successful bidder is a renowned supplier of mobile phones and that it may not have 5 years’ experience in the supply and/or sale of PC tablets and could not have the corresponding turnover specifically for PC Tablets.”

G. The Hearing

Hearing was held on 05 November 2021. There is on record a Statement of Case filed by Applicant and Statement of Defence filed by the Respondent.

The Applicant was represented by Me. A. Peeroo of Counsel, whereas the Respondent was represented by Me. N. Parsuramen, Principal State Counsel.

The representative of the Successful Bidder, was also in presence.



H. Findings

This Application for Review came before this Panel following an invitation for bids for the procurement of 11,000 Units of Tablet PC. The estimated cost for the project was Rs 50 Million.

Through a notification letter the Applicant was informed that it has not been retained for award and the Successful Bidder, for the amount of Rs.21,483,440 plus VAT MUR 3,222.516, was HM Rawat Communications Ltd.

The Applicant applied for a Challenge under Section 43 of the Public Procurement Act 2006 on two grounds, viz: (a) The bid of the Successful Bidder was abnormally low and (b) The Successful Bidder may not have 5 years' experience in the supply and/or sale of PC Tablets.

After a reply to the Challenge, where the Respondent ensured due diligence in ascertaining that Directive 52 has been followed and that the Successful Bidder incorporated on 10 August 2009 has satisfied the 5 years' experience issue.

The Panel has gone through the Statement of Case and the Statement of Defence filed respectively by the Applicant and the Respondent.

On the day of hearing one Mr Rajeev Peddadu, the Manager of the Applicant Company deponed and was cross examined.

As for the Respondent Mr Balkrishna Ramseebaluck, the Technical Executive of the Respondent deponed and was also cross examined.

Mr R Peddadu explained that that the quote of the Successful Bidder was for Rs.21,945,000 exclusive of VAT and according to the Applicant this quote was abnormally low and Directive 52 was not followed.

On the issue of 5 years' experience, Mr R Peddadu referred this Panel to ITB 12.1 and stated that the Successful Bidder should have at least five



years' experience in supply of sale of PC tablets to Public Bodies including Ministries, Parastatal and State Bodies.

Mr B. Ramseebaluck, the Technical Executive of the Respondent agreed that the quote of the Successful Bidder was abnormally low but that Directive 52 was followed. In fact he stated before the Panel that coming to the conclusion that the price quoted was abnormally low but the Respondent considered the bid because it was in line with the equipment that was being proposed and indeed those equipment satisfied all the requirements and even exceeded the basic requirements.

On the issue of 5 years' experience Mr B Ramseebaluck explained to the Panel that based on the documentation provided by the Successful Bidder they have indeed enough experience.

The Law

Section 37(10A) of the Public Procurement Act 2006 provides:

'(a) Where a Public body or the Board-

- (i) Is of the view that the price, in combination with other constituent elements of the bid, is abnormally low in relation to the subject matter of the procurement; and*
- (ii) has concerns as to the ability of supplier to perform the procurement contract,*

it may request in writing from the supplier such information as it considers necessary.

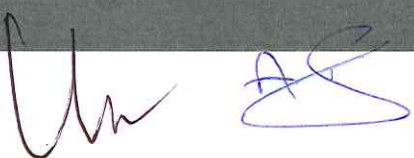
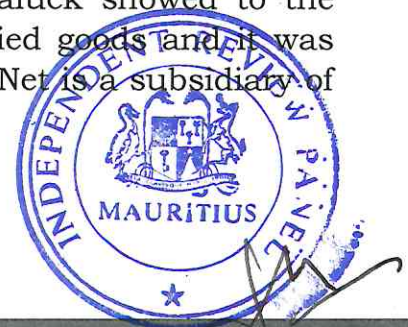
(b) Where, after having taken into account any information furnished by the supplier under paragraph (a) and the information included in the bid, the Public body or the Board still has concerns as to the ability of the supplier to perform the procurement contract, it may reject the bid.

Directive 52 issued by the Procurement Policy Office provides:

1. *The purpose of this Directive is to set instructions about how to identify and deal with abnormally low bids.*
2. *Section 37(10A) of the Public Procurement Act 2006 provides for the following:*
 - (a) Where a public body or the Board-*
 - (i) is of the view that the price, in combination with other constituent elements of the bid, is normally low in relation to the subject matter of the procurement; and*
 - (ii) has concerns as to the ability of the supplier to perform the procurement contract, it may request in writing from the supplier such information as it considers necessary.*
3. *Public bodies must ensure that all requirements in Section 37(10A) are followed before initiating action to retain or reject a bid.*
4. *The procedures to be followed to deal with abnormally low bids are hereby annexed.*
5. *This Directive supersedes Directive 46.'*

Mr B. Ramseebaluck explained that most of the information was already requested earlier in the tender document itself and the documents were sufficient enough for the purpose. Later when the Respondent found that the bid was abnormally low requested for clarification on the memory of device that was being proposed.

Upon a question from the Panel, Mr B. Ramseebaluck showed to the Panel a document from Mobile Net that has supplied goods and it was given to understand to the Respondent that Mobile Net is a subsidiary of HM Rawat Communications Ltd.



The Panel observes that there is nothing concrete on record to show that Mobile Net is a subsidiary of HM Rawat Communications Ltd.

Legal Entity of the Successful Bidder

We pause here to look at the legal entity of the Successful Bidder. It came out during cross examination that HM Rawat Communications Ltd had taken part in the bidding exercise and this is confirmed by the representative of the Successful Bidder who was present at the hearing.

It also came out during the hearing that the real name of the company is Hassam-Moussa Rawat Communications Ltd incorporated in 1987 and not incorporated in the year 2009 and that HM Rawat Communications Ltd is the abbreviation of Hassam-Moussa Rawat Communications Ltd and that both names refer to the same company.

Should this Panel consider that Hassam-Moussa Rawat Communications Ltd and HM Rawat Communications Ltd is the same company then is the participation in this bid exercise legally in order?

The answer to the above, in view of the Panel is 'NO' for the following reasons:

- (a) This is a Public tender and Public interest and funds are involved;
- (b) This Panel cannot condone that for Public Procurement anybody can tender under a trade name or under such a name that may bring confusion to the Public in general and
- (c) The Public Bodies cannot deal with bodies or persons whose legal entity are not in order.

The matter of a legal entity or rather a non existing person was dealt with the Supreme Court in the case of **[Jhundoo vs Jhuree 198/MR111]**. The Supreme Court in the case of Jhundoo vs Jhuree pointed out that a non existing person cannot be substituted by an existing one.



A similar question arose in the case of [***Air Mauritius vs Gerard Tyack 2003 SCJ 256***]

In the case of Air Mauritius the point that was raised was that Air Mauritius was a non-existing party as its legal entity was Air Mauritius Limited. The Court in this case pronounced that this was not of much consequence and the mistaken appellation of the applicant did not cause prejudice to the Respondent who had no doubt in his mind as to the identity of the party.

In this present Application the issue of the identity of the Successful Bidder came out only during the hearing.

In another case of the Supreme Court [***R.Sayfoo v/s The State 2014SCJ198***] again the issue of non-existent body arose. In this case 'Mayfield Pharmacy' was prosecuted and this was a trade name and it was concluded by the Court "*it is not to be confounded with the legal personality of the owner of the business nor does it not have any 'personalité juridique' of its own or any standing and legal capacity 'd'agir en justice' on its own. It cannot sue nor can it be sued or be prosecuted.*


Having said so, the Panel is of opinion that a body corporate cannot participate in a Public Procurement under its trade name or using abbreviation of its legal entity.

Finally, the Panel has also observed that the Successful Bidder had failed to prove that it had 5 years' experience.

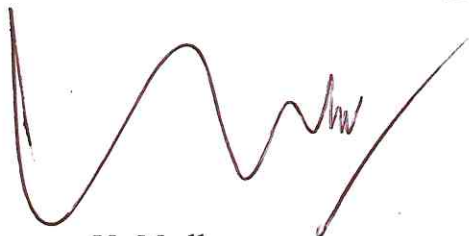


I. Conclusion

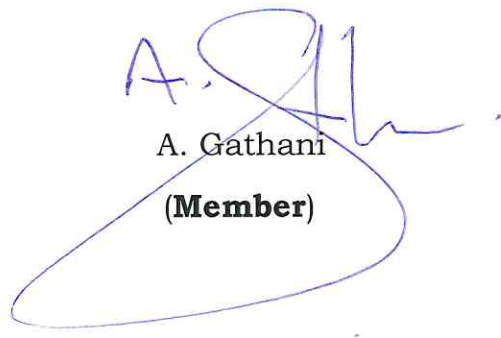
The Panel therefore comes to the conclusion that the legal entity of the Successful Bidder itself is in issue and cannot recommend for a re-evaluation of the tender exercise but instead recommends the annulment in whole of the decision of the Public Body.



H. Gunesh
(Vice-Chairperson)



V. Mulloo
(Member)



A. Gathani
(Member)

Dated: 12th November 2021