



# Independent Review Panel

**Decision No. 24/21**

**In the matter of:**

**Mechanization Company Ltd**

**(Applicant)**

**v/s**

**Mauritius Cane Industry Authority**

**(Respondent)**

**(Cause No. 25/21/IRP)**

**Decision**



*[Handwritten signatures]*

**A. History of the case**

On 19 May 2021, the Mauritius Cane Industry Authority (“the Respondent”, the Public Body) issued bidding documents for the procurement exercise bearing Procurement Reference No.: **OAB MCIA/New Equipment/2021/004 – Procurement of New Equipment (Crawler Tractor with Accessories)**.

The Applicant was one of the three 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 29 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:

	<b>Item</b>	<b>Name of Bidder</b>	<b>Address</b>	<b>Contract Price (Incl. VAT)</b>
1.	<i>Crawler Tractor with accessories</i>	<i>Scomat Ltée</i>	<i>Grewals lane Pailles</i>	<i>Rs. 17,713,450.00</i>

**D. Challenge**

On 10 November 2021, the Applicant challenged the procurement proceedings on the following grounds:

- a. The Public Body has failed to award the bid to the Bidder which was the lowest bidder, with a Bid Price of MUR 14,705,000.00, excluding VAT and was substantially responsive as there was no major deviation in the Bidder’s proposal;**
- b. The Public Body wrongfully awarded the bid to the successful bidder whose bid price Rs. 15,403,000, excluding VAT, i.e, MUR 698,000 higher than that of the Bidder.**
- c. The Public body failed to consider that the Bidder was the lowest bidder and substantially responsive to all requirements set out in the bidding documents, including**



***the applicable qualification and evaluation criteria and the Technical Requirements”.***

**E. Reply to Challenge**

On 18 November 2021, the Respondent in reply to the Challenge by the Applicant, stated that:

*“MCIA took note of MECOM Ltd’s grounds for challenge and submit its reply to each query as follows:*

**(i) Paragraph 8(a)**

*For this online e-procurement system, MECOM Ltd has failed to upload page 63 pertaining to the Technical Specifications, which is considered to be a major deviation.*

**(ii) Paragraphs 8(b) and 8(c)**

*MCIA has undertaken a detailed evaluation of the bids in accordance with the evaluation guide established under the Public Procurement Act 2006 and maintained its stand on this procurement process”*

**F. Grounds for Review**

On 23 November 2021, the Applicant seized the Independent Review Panel for review on the following grounds:

- a. The Public Body failed and neglected to comply with Regulation 48(4) of the Regulations.***
- b. The Public Body has failed to award the bid to the Bidder which was the lowest bidder, with a Bid Price of MUR 14,705,000.00, excluding VAT and was substantially responsive as there was no major deviation in the Bidder’s proposal;***
- c. The Public Body wrongfully awarded the bid to the successful bidder whose bid price Rs. 15,403,000, excluding VAT, i.e. MUR 698,000 higher than that of the Bidder.***
- d. The Public body failed to consider that the Bidder was the lowest bidder and substantially responsive to all requirements set out in the bidding documents, including the***



*R* *AS*

***applicable qualification and evaluation criteria and the Technical Requirements.”***

**G. The Hearing**

A Hearing was held on 10 December 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.

The Applicant was represented by Mr I. Mamoojee, Counsel, instructed by Ms Dya Ghose, Attorney whereas the Respondent was represented by Ms D. Beesoondoyal, Principal State Counsel appearing together with Mr. Coolen, instructed by Ms S. Angad, Principal State Attorney.

The Successful Bidder, was represented by Mr. I Rajahbalee.

The Panel heard Mr Quevauvilliers, the Applicant's representative - Head of Sales and Marketing, who deposed on behalf of the Applicant and Mr L. Jhurry, Chairperson of the Departmental Bid Committee of the MCIA who deposed on behalf of the Respondent.

The Panel has had access to the Bidding Documents, the bids of the Applicant and the successful bidder, and the Bid Evaluation Report (the BER).

**H. Decision**

**The time-limit for challenge under section 43 of the Public Procurement Act 2006 (“PPA”)**

Through the Statement of Defence, in its body at paragraph 6 where one would expect to see averments on the merits, the Public Body has raised, what effectively amounts to a preliminary objection: that the Applicant has not lodged its Challenge under section 43 of the PPA, read together with section 40(4), in good time. The Public Body reckons the 7-day deadline from the date it has indicated in its letter of notification, that is 26<sup>th</sup> October 2021. By operation of law, the 7 days would lapse on the 5<sup>th</sup> November 2021.

This having all the characteristics of a preliminary point, we shall address it first.

This Panel has had to very often enforce time-limits at the expense of applicants. The time-limits expressed and implied in sections 43 and 45 of the PPA are strongly emphasised by the legislator and are designed to punish

*[Handwritten signatures]*



applicants failing to abide by them. It is also clear that no such sanction has been provided by Parliament when it is the public bodies that blatantly disregard time-limits and we must say that, unfortunately, this occurs far too many times. The position of the law, if we were to attempt to reconcile the various provisions, is that the applicants, being the ones having carriage of proceedings and applying for review, are to be sanctioned by the extinguishing of their right of action should they falter and fail to observe deadlines. This is achieved through an interplay of sections 44(4) and 45 of the PPA and the prescriptions contained in the Public Procurement Regulations 2008, "PPR" for short, (*vide* Regulation 56).

On the contrary, public bodies have nothing much to be worried about except, perhaps in a very extreme case, having their statements of defence disregarded by the Panel – but even then, applicants would still have to prove their case before a Panel.

The Panel has stood guided by the established caselaw of our superior courts on how to approach time-limits. One may refer to the speech of Chief Justice Rivalland in the case of **Perrine v Foogooa 1967 MR 134**, a pre-Independence electoral case, with which speech Mr Justice Ramphul agreed. The then Chief Justice held:

*"A perusal of the above cases shows that there exist side by side two clear trends of reasoning and that the dividing line is to be found in the nature of the enactment which has laid down the time limit for the doing of a specified act. Where the enactment is an Ordinance, the Court has invariably held that the provisions were mandatory, and that except in cases where compliance was impossible or where the non-compliance was due to the laches of an officer of the Court, the default necessarily entailed the dismissal of the action or appeal. On the other hand where the provisions are contained in Rules of Court, the Court has, equally invariably, held that the provisions were directory, and that, on satisfactory cause being shown, it would ensure that the Rules of Court which are the channels through which justice is to be dispensed to litigants should not become the channels through which justice is denied to them."*

It is not a task to be taken lightly for a judicial body, in good conscience, to deny applicants the very chance of bringing their case in their search of justice and reparation. The courts have, on countless occasions, too many to recount here, 'forgiven' litigants guilty of lateness. In the present matter, the Panel shall limit itself to the approach suggested in *Perrine*: a discretionary accommodation so long as there is no statutory bar.

The relevant provisions from the PPA are as follows:

**"40. Award of procurement contracts**

[...]



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

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

### **“43. Challenge**

[...]

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

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

(b) in any other case within such time as may be prescribed.” (underlining is ours)

From the PPR, we read:

### **“56. Dismissal of Application for Review**

An application for review may be dismissed for -

(a) failure to comply with any of the requirements of sections 43 to 45 of the Act, and these Regulations;

(b) setting forth allegations that do not state a valid basis for an application for review, or that do not set forth a detailed legal and factual statement;

(c) having been filed in an untimely manner, either at the initial level of review by the public body, or with respect to deadlines for filing an application for review by the Review Panel; or

(d) contract implementation or administration instead of contract award.” (underlining is ours)





It is clear to us that the above provisions are mandatory in nature and not directory and they call for a stringent application. The question, however, is the starting point in the computation of time.

Under section 40(3), public bodies must 'notify in writing' the successful bidder of the intended award and 'give' a 'notice in writing' to the unsuccessful bidders informing them that their bids were not retained and whose bid was retained. We find that the legislator's intent could not have been that there are two different approaches possible despite the different wording; after all, 'notify' is the verb and 'notice' is the noun. For someone to be on notice or to be notified implies being at the receiving end of an action by another person. This is further supported by the use of the verb 'give' in section 40(3).

In this case, we were surprised to note the 'Notification' document was issued on 29<sup>th</sup> October 2021, a Friday. Then came Saturday and Sunday, there were public holidays on Monday 1<sup>st</sup> November and Tuesday 2<sup>nd</sup> November. Another public holiday was observed on Thursday 4<sup>th</sup> November 2021. We do not doubt that the Applicant only received the 'Notification' on Friday 5<sup>th</sup> November 2021, the last day to challenge if 29<sup>th</sup> October 2021 was to be deemed the starting point.

Our legislator certainly did not pass laws so that public bodies could issue notification documents, take all their time to deliver/fax/despatch them to unsuccessful bidders, send it on the last day for challenge based on the date they put on their own notification document and expect aggrieved bidders to mount an adequate challenge within hours of receipt.

That suggested reading of the law, which is that the notification date is the one indicated by the public body in a letter/document it has the sole power to issue would open the door to all manner of abuse by public bodies, unless, of course, the latter are particularly expedient in communicating or despatching. We have seen gaps of a day or two before but this one has gone above and beyond.

To have suggested the reckoning of the 7 days as from the 29<sup>th</sup> October 2021 is, we find, somewhat improper and we hold that the 7 days ran from the date of receipt by MECOM of the notification of award to SCOMAT, which is, 5<sup>th</sup> November 2021 and the last day to submit a challenge under section 43 was 11<sup>th</sup> November 2021, accordingly.

We now consider the grounds of review proper.

**Ground A: The public body failed and neglected to comply with Regulation 48(4) of the Regulations.**





True it is that under regulation 48(4), the Respondent had to respond to the Challenge lodged by the Applicant within the statutory delay of 7 days and this, it had failed to do. The Applicant files its challenge on 10 November. It was by letter dated 18 November 2021 that the Respondent responded to the challenge. It seems this letter did not reach the Applicant until the 22 November. The Reply was therefore late by five days. As rightly submitted by Counsel for the Applicant, the Respondent should have exercised diligence in following the Regulations as, it is public money involved and public money is sacred. Although the lapsus is not to be encouraged, we must say that it was not fatal in the circumstances as the unsuccessful/ aggrieved bidder is still entitled to submit an application for review to the IRP pursuant to **Section 45(a) of the PPA and Reg 48(5) of the PPR**.

Reg 48(5) provides as follows:

*“where the Chief Executive officer of the public body **fails to issue a decision within 7 days** or if the bidder is not satisfied with the decision, **the bidder may submit an application for review to the Review Panel**, provided that the application is filed within 7 days of receipt of the decision of the public body or the time when that decision should have been received.”*

Thus the Applicant’s suggestion that a dis-satisfied bidder can only come to the IRP after a challenge is not accepted, is not altogether correct. An unsuccessful bidder can still come directly to the IRP if the Public Body does not respond to a challenge within the prescribed period under Reg 48(5). Failure by a Public Body to comply with Reg 48(4) does not debar the unsuccessful bidder from having recourse to the IRP as per S. 45(1a) of the PPA. And here the Applicant did do so.

Further, no prejudice was caused to any party in the process.

### **Grounds B and C**

Under both these grounds, the Applicant’s complaint was that its bid was the lowest bid. Its price of MUR 14,705,000.00 excluding VAT was MUR 698,000 lower than that of the successful bidder. Its bid was also substantially responsive as there was no major deviation in its proposal.

The evidence before us shows that the Applicant’s bid had not even reached the financial evaluation stage for being defective at the very initial or preliminary stage of evaluation by the Bid Evaluation Committee (the BEC). According to both the BEC and the Departmental Bid Committee of the Respondent, the Applicant had failed to submit in its bid the duly filled Page 63 of the bidding documents pertaining to the requisite technical specifications.

Although the Applicant maintained throughout its case before this Panel that it had submitted a complete bid document duly filled in and which contained



all the required documents, including the Technical Specifications, the evidence before us suggests otherwise.

Firstly, a careful perusal of the documents attached to the Statement of Case, specifically the Applicant's own Annexure B purporting to be the "complete" bid document submitted by it, shows clearly that the Applicant had failed to submit Page 63 pertaining to Technical Specifications. This, in the teeth of its averment in its Statement of Case that *"it had duly submitted Page 63 Pertaining to Technical Specifications when submitting its bid,"* Surprisingly, even in its Statement of Reply, the Applicant maintained that Page 63 is *"well found in Annexure B to the SOC"*, when it is not. The Applicant did fill in the Technical Specifications Schedule which should consist of 5 pages. However, one page (Page 63) is clearly missing.

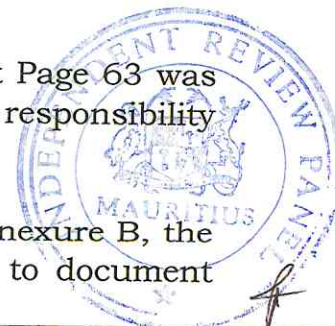
The Applicant also argued before this Panel that its bid was submitted on the eProcurement System and if Page 63 was missing, it could be a technical error beyond its control. It maintained that the Public Body could still and ought to have exercised its discretion under ITB 30.1 to seek clarifications *"the moreso that it was at all times fully aware that it was dealing with a bid document which was submitted online and therefore technical issues beyond its control could crop at any time in the process;"*

With regard to the Technical or human error suggestion above, as rightly submitted by Counsel for the Respondent, this cannot rest on a mere speculation. At the Hearing, the onus was still on the Applicant to prove that the whole of his bidding documents was uploaded on the system or that if technical error there was, it was not attributable to the Applicant. It came out through Mr Quevauvilliers that it was one Marie Josée Pellegrin, the Applicant's former préposé who uploaded the bid documents. However, it also transpired that this Applicant's préposé who was physically responsible for uploading the bid on the eProcurement system was no longer available to confirm same. Witness Quevauvilliers admitted he was not personally present when that was done. He did not personally verify the documents just before they were about to be uploaded. So, it is highly likely that the document in question was not in the bundle of documents at the time of uploading.

It should be the Applicant's responsibility to ensure that all pages of its document are properly uploaded on the system.

Mr Quevauvilliers eventually admitted that it was possible that Page 63 was not uploaded, that this was an important specification and that responsibility rests with the Applicant.

Importantly, he also had to admit that, according to its own Annexure B, the document allegedly submitted by the Applicant - as opposed to document





received on the E-Procurement system - Page 63 is missing. It goes without saying that the responsibility lies with the bidder to ensure that all documents are uploaded/ submitted.. The witness admits “*il faut tout soumettre*”.

ITB 31 states very clearly in its various provisions as follows:

31.1 *“The purchaser’s determination of a bid’s responsiveness is to be based on **the contents of the bid itself.**”*

31.2 *A substantially responsive bid is one that conforms to all the terms, conditions, and specifications of the Bidding Documents **without material deviation, reservation, or omission.***

31.3 *If a bid is not **substantially responsive to the Bidding Documents,** it shall be rejected by the Purchaser and may not subsequently be made responsive by the Bidder by correction of the material deviation, reservation or omission.”*

ITB 33.1 provides:

*“**The purchaser shall examine the bids to confirm that all documents and technical documentation requested in ITB Clause 12 (Documents comprising the Bid) have been provided, and to determine the completeness of each document submitted.**” (Emphasis ours)*

ITB 34.1 provides:

*“If, after the examination of the terms and conditions and the technical evaluation, the purchaser determines that the bid is not substantially responsive in accordance with ITB Clause 31, it shall reject the bid.”*

In the light of the above clauses, it goes without saying that incomplete submission of the bidding document is a major deviation and the bid itself cannot be a substantially responsive bid. This is determined at the preliminary examination of the bids - ITB 33.1. The purchaser is entitled to reject such a bid and cannot ask for explanations or clarifications.

We note that despite the instructions in ITB 31.3, instead of outright rejection, the BEC sought advice in writing from the Procurement Policy Office (the PPO) as to whether the Applicant’s bid should be retained for further evaluation in view of the omission, namely incomplete submission of Technical requirements. By way of letter dated 19 October 2021, the PPO informed the Respondent that incomplete submission of the bidding document is a major deviation. (Annex R2 to the Statement of Defence). In



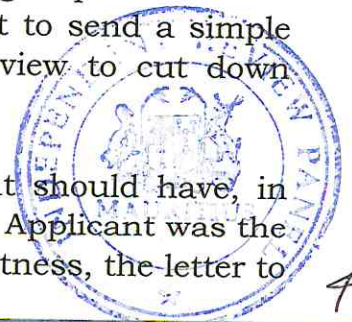
line with the advice/ recommendation of the PPO, the Respondent took the decision to reject the Applicant's bid outright and, it seems, rightly so..

Further the Technical Specifications in a bidding exercise constitute the benchmark against which the Purchaser will verify the technical responsiveness of bids and subsequently evaluate the bids.

In support of its above argument that the Public Body ought to have exercised its discretion to seek clarifications, the Applicant's witness stressed the fact that in the very recent past in another bidding exercise to which the Applicant company participated, the Respondent had sought clarifications on its bid with regard to technical specifications. He produced a Clarification request from the Respondent dated 1 December 2021 in relation to a Procurement of Agricultural Tractors and Associated Implements (Bid Reference MCIA/IFB/2021/25). The Respondent should have done the same here. The alleged error does not stop the Respondent from asking for clarification. However, it became clear from the Respondent's witness, Mr Jhurry that the two situations were different. In the bidding exercise referred by the Applicant in support of its contention for an 'obligation' for clarification, all required documents were submitted and that was why clarification could be sought and were indeed requested on certain unclear aspects of certain specifications. It was not a case of submission of incomplete documents. Clarification is requested where the bidder has not clearly specified certain 'things' - as Mr Jhurry put it - or where more details are required than those provided on the requested specifications. Here, there was an 'important' omission, a major deviation and documents were missing. Clarification cannot be requested on the submission of incomplete documents. The Public Body cannot request for clarifications in respect of "omissions" under ITB 31.2 and ITB 31.3 or in the case of a bid which was not substantially responsive. Here a document has not been uploaded and submitted by the bidder. The Respondent acted on the advice of the PPO and on the basis of the Clauses in the Bidding Documents.

Counsel for the Applicant forcefully argued that, considering the amount at stake, the fact of his client being the lowest bidder and in the light of a possible technical error at play and, importantly, the fact that it was public money – which is sacred – involved here, the Respondent should have asked for clarifications, should have queried the alleged missing requirements. It would have been in the public interest for the Respondent to send a simple request for clarification about the missing page with a view to cut down expenses and save taxpayers' money.

The Applicant also laid stress on the fact the Respondent should have, in their query to the PPO, made it known to the latter that the Applicant was the lowest bidder. As rightly pointed out by the Respondent's witness, the letter to





the PPO which was submitted with respect to responsiveness had nothing to do with “pricing”.

We disagree with both of these submissions for many reasons; one such reason is that the goal should be the integrity of procurement process and a level playing field for every stakeholder of which the best guardian should be a dispassionate and neutral system, not one that seeks to rescue purportedly low bids that are irremediably flawed. Just as a responsive bid may not be the lowest, a low bid may not be responsive. There are two elements in the evaluation of bid, responsiveness and price.

The onus is on the bidder to make sure that all documents are uploaded as per requirements of the Client/ Public Body. As also confirmed by Mr Jhurry, in the present bidding exercise, the documents to be filled in and provided *“were very necessary documents where it was for the bidder to indicate whether they will comply...”*

We are of the view that the BEC rightly concluded that the Applicant’s bid was lacking. The Applicant did not supply a technical specification of the Bidding Document. A whole page detailing part of the Technical Requirements was missing from the Applicant’s bid. The onus was on it to submit all duly filled in forms as per the requirements of the bidding documents.

It was clear, in the light of our above findings that clarifications could not be requested.

### **Ground D**

Indeed under all its last three grounds B, C and D, the Applicant’s main bone of contention was that its bid was the lowest bid. Its bid price was MUR 14,705,000.00 excluding VAT and MUR 698,000 lower than that of the successful bidder. It pressed home the fact that because sacred public money was involved and the Applicant’s bid, being the lowest bid, it was incumbent upon the respondent to request for clarification, were the bid really incomplete with the alleged missing Page 63. Further, in any event, it had also submitted, as part of its bid, ‘Technical Details’ dated 22 June 2021 (Annexure F) which contained all the required Technical Specifications as per the bidding documents. Hence the Respondent acted in a biased, unfair manner and in bad faith by not exercising its discretion to request clarifications from the Applicant as to its bid in accordance with ITB 31.1. An evaluation ought to have been carried out as per ITB 37 and 38. According to the Applicant, it did comply with all the technical specifications as can be evidenced by the annexed ‘Technical Details’- Annexure F which was duly submitted along with the bidding documents.





We have perused Annexure F. As rightly pointed out by the Respondent, the technical details in Annexure F to the Applicant's Statement of Case indeed do not seem to contain all the required technical specifications set out at Page 63 of the bidding documents. (The technical details provided in Annexure F either do not fully respond or do not respond to all the specifications requested at Page 63. In other words, they do not complete the missing information not provided at Page 63 and, in some respects were deviations from the specifications). A comparison of Annexure F and Page 63 of the Technical Specifications Schedule - an exercise carried out by the Respondent after receipt of/ after taking cognizance of the Applicant's Statement of Case - shows that certain technical specifications were not submitted in Annexure F. Among these, was the most important specification (item (P) of the Section V Schedule of Requirements of the Bid Form), namely the 5 Year Warranty requirement "*on whole tractor including parts (Labour and Transport costs to be borne by bidder.*" No such warranty was submitted in Annexure F, precisely at Page 4 of Annexure F. The wording of the Warranty term at Page 4 of Annexure F titled "Terms and Conditions" is as follows:

*"Warranty on dozer : Five (5) Years excluding wear & tear items*  
*Warranty on Rake : Two (2) years or 4000 hrs whichever comes first"*

This omission, according to the Respondent's witness, would have amounted to a major deviation. It was for the bidder to indicate whether they will comply with the requisite warranty requirement.

Incidentally, with regard to the technical specifications on Page 63 under items marked as M, N, O and P, Mr Quevauvilliers himself conceded that these were very important for the purposes of the bid. To mention another Schedule specification, apart from the warranty one, which was not addressed by the Applicant is the following item:

*(N): spare parts, Workshop and Operators Manuals were to be provided with soft and hard copy.*

This does not figure in Annexure F.

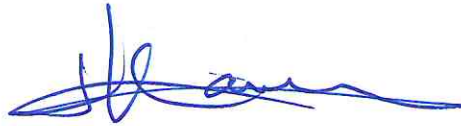
It would seem that the Applicant's bid, apart from not being generally compliant with the Respondent's requirements, would, at any rate, not have been specifically substantially responsive to all technical requirements set out in the bidding documents even if Annexure F had been considered by the Respondent. Mr Jhurry maintained that the wording of this document was not exact/ was different from that of Page 63. The onus was on the bidder to fill in all parts of the Technical Specifications Schedule. It is not the issue that the bidder gives the specifications but he also has the responsibility in the 3<sup>rd</sup> column of the Schedule to insert and specify if he complies with the different



technical specifications and requirements contained in the Schedule of Technical Requirements. As Mr Jhurry put it, the onus is on bidder to write: comply or not comply and it is not the responsibility of the Respondent or anyone to come and correct this. We presume that the BEC would then verify the correctness of the statement of the bidder and, here, there was no 'statement' by the bidder about warranty at all and nothing to verify. He confirmed that that part of the Schedule was "*very necessary*". He also confirmed that the most important information on Page 63 pertained to warranty – an important component. Non-submission of this warranty is deemed a major deviation.

In the light of our above observations, we find that the fact of the Applicant's bid being allegedly the lowest bid is of no consequence. It rightly could not reach the stage of comparative analysis of pricing in the evaluation exercise as it was not initially compliant with the specifications of the bidding documents as per the requirements of the Public Body. It also did not meet the Technical requirements.

In view of all the above, the Panel finds no merit in the present Application. It is therefore set aside.




J. Ramano (Mrs)

**(Chairperson)**



A. Gathani  
**(Member)**



R. Mungra  
**(Member)**

**Dated: 22<sup>nd</sup> December 2021**

