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Independent Review Panel

Decision No. 25/21

In the matter of:

SN Ramsaha Ltd

(Applicant)

v/s

Central Water Authority

(Respondent)

(Cause No. 26/21/IRP)

Decision

INDEPENDENT REVIEW PANEL MAURITIUS

A. History of the case

The Respondent Public Body, the Central Water Authority ("CWA"), invited bids bearing Procurement Reference No.: **CWA/C2020/135 – CPB/14/2021 - Fixing of New Supplies and Road Reinstatement in Six Water Supply Zones.**

The Applicant was one of the bidders.

B. Evaluation

This being a major contract for the CWA, a Bid Evaluation Committee **("BEC")** was set up by the Central Procurement Board to evaluate the bids received by the Board, and to identify the lowest evaluated substantially responsive bid.

C. Notification of Award

On 15th November 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 bidders were as mentioned below:

Zone No.	***Zone Name***	***Bidder***	***Bid Price (MUR) (Excl, VAT)***
1.	*Port Louis*	*Trivan & Co. Ltd*	*23,440,201*
2.	*North*	*R.K. Bhoyroo*	*29,157,708*
3.	*East*	*Societe Chatursing & CIE*	*23,652,525*
4.	*South*	***No Award** since no bidder selected for the zone*	
5.	*MAV Upper*	*Dhruva Co Ltd*	*20,996,125*
6.	*MAV Lower*	*Safety Construction Co. Ltd*	*27,544,082*

D. Challenge

On 18th November 2021, the Applicant challenged the procurement proceedings on the following grounds:

"

- *Our bid is lowest in Zone 3 East (Rs. 22,994,900) than selected bidder's price (Rs. 23,652,525)*
- *Our bid is substantially lowest in Zone 6 MAV Lower (Rs. 24,599,300) than selected bidder's price (Rs. 27,544,082)*
- *We have under our belt many contracts of similar nature (fixing of new supply and road reinstatement) where we were selected and awarded by the CWA in the past, as well as pipe-laying works, yet we are surprised as to why other bidders were selected but not us*
- *Trivan & Co Ltd has litigations over previous CWA contract(s) (namely Fixing of New Supply & Road Reinstatement) for failure to perform and has still been selected*
- *All documents pertaining to the tender exercise, as well as clarifications requested during the evaluation period were submitted accordingly, as per requirements"*

E. Reply to Challenge

On 26th November 2021, the Respondent in reply to the Challenge by the Applicant, stated that:

"With reference to your letter dated 22 November 2021, you have not challenged the decision of the above project as you have not filled in the form under Section 43 of the Act as stated in the Public Procurement Act at Section 48. However, in spite of that materials for reply is being submitted as follows:

In accordance with the criteria for qualification and experience, the bidder shall have the following minimum experience:

1. General Experience (Factor 2.4.1)

You have complied with the requirement.

2. Specific Experience (a) (Factor 2.4.2 (a) & Mandatory Criteria – 1.4 Technical Requirement)

Participation as contractor, Management contractor in at least Two (2) works of a nature and complexity equivalent to the Works over a period of TEN (10) years, laying of a minimum of 500m of HDPE 90 mm diameter pipeline, including household connections

The BEC has observed that you have specific experience in only one pipe laying project instead of two as required (pipe laying project at Baie Due Cap to Le Morne Village in year 2020 (5Km, 200mm HDPE pipe). You have also submitted a list of other projects without specifying the length, type of pipe and diameter of pipeline laid.

Vide letter dated 08 September 2021, you were requested to clarify and demonstrate his specific experience as mentioned above. In his clarification letter, the bidder failed to demonstrate that if he has experience in Two (2) works of a nature and complexity equivalent to the works over a period of Ten (10) years; laying of a minimum of 500 m of HDPE 90mm diameter or DI 100mm diameter pipeline, including household connections. The details of projects were examined and its was found that the pipe laid ranged from 20 to 63mm diameter HDPE pipe and as such does not meet the requirement of the bidding exercise

3. <u>Specific experience (b) (Factor 2.2.2(b) & Mandatory criteria – 1.4 Technical Requirement</u>

A Minimum of experience in Reinstatement of tarred road over a length of at least one (1km) along Public Roads

You have complied with this requirement

Based on the above you have not complied with the Mandatory Requirement

(specific experience) of the bidding exercise and your bid was found to be non-responsive."

F. Grounds for Review

On 2nd December 2021, the Applicant seized the Independent Review Panel for review on the following grounds:

"1. The Public Body (CWA) was wrong in its letter dated 26th November 2021 (ANNEX D), by erroneously stating that the Applicant's Challenge is not valid as it has not filled in the Form under Section 43 of the Public Procurement Act 2006 [The Act].

2. Applicant confirms that it did submit with the Challenge the prescribed Form duly filled.

3. This is confirmed in a letter dated 26th November 2021 addressed to the General Manager of the Public Body [ANNEX E] with was annexed the prescribed Form which accompanied the initial Challenge [ANNEX F]

4. As per letter dated 26th November 2021 [ANNEX D], the BEC wrongly concluded that the Applicant had participated and had the specific experience in only ONE (1) pipe laying project. When in truth and in fact, the Applicant submitted separate Completion Certificates of Contracts from the CWA namely:

i. Ref. CWA/C2019/135 [ANNEX G]

ii. Ref. CWA/C2019/137 [ANNEX H]

iii. Ref. CWA/C2019/138 [ANNEX I]

5. *This clearly shows the Applicant satisfies the Mandatory Criterion under Clause 1.4 "Technical Compliance", S.No.1 of the Section II – Bid Data Sheet (BDS) [ANNEX J]*

6. *The BEC erroneously assumed that the "other projects" were without specifications when in real terms, these "other projects" refer to three (3) separate Contracts awarded to the Applicant as more fully described at Paragraph 4 above.*

7. *These three (3) separate Contracts refer to the Le Morne Water Project with a defined diameter of 200mm HDPE Pipe with a total length of approximately 5km.*

8. *The Applicant states that the purpose of the clarification letter dated 13th September 2021 [ANNEX K] was simply to demonstrate the exact nature of works on site, as required by the CWA on this specific contract, thus showing additional experience of the Applicant.*

9. *The Applicant also states that the BEC wrongly interpreted ANNEX K as showing laying of pipes of diameter under 200mm, when it is not the case.*

10. *With regards to Specific Experience (b) [Factor 2.2.2 (b)] and Mandatory Criteria – 1.4 Technical, Applicant states that it was not compulsory to satisfy same as the Employer was the CWA [Mandatory Criteria – S.No.3 of Section II – Bid Data Sheet (BDS), see ANNEX J.]*

11. *The BEC has wrongly and erroneously interpreted its own criteria and/or has failed to properly apply its set criteria, thereby penalising the Applicant.*

12. *The BEC has failed to take into account relevant factors and/or has focused on irrelevant matters in the bid assessment exercise.*

13. *Applicant is presently challenging the award of the contracts to*

    i. *Societe Chatursing & Cie (Zone 3 - East)*

    ii. *Safety Construction Co. Ltd (Zone 6 – MAV Lower)*

14. *Applicant also reasonably suspects that some selected contractors do not possess the required experience and criteria for that type of work.*

15. *Applicant has reasonable grounds to believe that it is fully and/or substantially responsive to undertake works for Zone 4 – South and that the evaluation of BEC is wrong.*

16. *The Public Body is wrong in stating that no bidder has been selected for Zone 4 – South.*

17. *The Public Body has failed to comply with principles of Natural Justice due to several shortcomings in the assessment of the bids."*

G. The Hearing

A hearing was held on 16th December 2021.

The Applicant was represented by Mr R. Unnuth, Barrister, whereas the Respondent was represented by Mr R. K. Ramdewar, Attorney.

The Central Procurement Board was also in attendance. Only one of the successful bidders, Safety Construction Ltd, responded to the Panel's invitation to attend the hearing.

The Applicant called one witness, Mr V. Ramsaha. Witnesses called by the Respondent were Mr S. Ramsurn, the representative of the CWA and Mr Ramrekha, the Chairman of the BEC.

H. Findings

Preliminary Objection by the CWA

We begin with a preliminary objection raised by the CWA in its Statement of Defence which reads:

" A. The Respondent avers that the bidding exercise and the evaluation, selection and approval of award of contract/ project has been carried out by the Central Procurement Board.

B. As such the Applicant has failed to put into cause the Central Procurement Board and hence the present application is misconceived and ought to be set aside.

C. Respondent moves that the present application be set aside and the deposit, if any, made by the Applicant be forfeited."

At the start of the hearing of 16th December 2021, we heard the submissions of Mr Attorney Ramdewar, appearing for the CWA, and of Mr Unnuth, of Counsel, appearing for the Applicant.

We shall avoid embarking on an academic analysis of the very well-established statutory procedural framework contained in the Public Procurement Act 2006 **("PPA")** and Public Procurement Regulations 2008 **("PPR")** and we shall deal with this objection succinctly.

The objection made, forcefully pressed and insisted upon, cannot be wider in scope. It seeks to punish the Applicant by throwing out its case for its alleged failure to put the CPB into cause. Moreover, the security deposit (Rs 100,000 here, presumably) is to be forfeited.

The failure to join parties is a very common objection raised by lawyers before the courts of law and, more often than not, the courts postpone the matter and allow the joinder of the new party or parties. In appeal cases, failure to join a party clearly part of the initial proceedings may be fatal to an appeal. This may well be very first time in a while, or at all, where a party, a

public body no less, has sought to extinguish a case entered against it on this technicality. We find that it rests on a misconceived reading of the law by the CWA.

A reading of the PPA and PPR, on the whole, will lead to the inescapable conclusion that the legislator intended that the parties to a procurement contract are to be the public body and the successful bidder selected after having gone through the procurement process. A challenge is to be between aggrieved bidder(s) and the public body. In the case of major contracts because of their high value, the CPB steps in on behalf of the public body. The Board issues the bidding documents, receives the bids and evaluates them. It then directs the public body who is to be selected as successful bidder. An award cannot be made by a public body, in the case of a major contract, except with the approval of the CPB. Of course, the CPB is an interested party, in the legal sense, to any proceedings before a judicial body and perhaps, in the days before specialised procurement tribunals, a judicial review application would necessarily have included the CPB as a designated respondent as opposed to a co-respondent/third party.

It is important to note that, in the case of every major contract, the CPB is always invited by the Panel to be in attendance at the substantive hearings. The successful bidders are also invited, in furtherance of the *audi alteram partem* principle of natural justice, and this Panel can state, in no uncertain terms, that the Board has almost always sent representatives to attend hearings. Moreover, through their duty of disclosure to the Panel, we receive from the public bodies all the documents used by the CPB and all exchanges with the CPB together with all other documents used in the procurement proceedings.

Mr Ramdewar's argument, and the preliminary objection, also failed to take into account that the CWA could have secured the attendance of physical persons from the CPB that took part in the evaluation exercise. The Chairman of the BEC set up by the CPB was in attendance during the hearing and we will not venture to say whether he had been brought in by the CWA or by the CPB. We cannot see why we should punish the Applicant for not having brought the CPB as a Co-Respondent, or the like, as suggested by Mr Ramdewar. We must also state that the forms for challenge and review in the Schedule to the PPR have only 'Public Body' as a field to be filled in by applicants/challengers. Nowhere has the legislator even hinted at the CPB being made a full-fledged party to a case before the Independent Review Panel, or a party at all.

We now come to the statutory provision that should give clarity to this issue, if there was ever need for it. Regulation 57 of the PPR deals squarely with hearings before us and provides:

*"**57. Hearings***

(1) At the request of the applicant for review or on its own initiative, the Review Panel may, where it deems appropriate, conduct a hearing.

(2) A hearing shall be completed —

(a) within 7 days from the date of receipt of the reply and comments, if any, made by the applicant pursuant to regulation 55(2); or

(b) in the absence of any reply and comments under subparagraph (a), within 14 days from the date of receipt of the reply and comments made by the public body pursuant to regulation 55(1).

(3) The Review Panel shall request the applicant and the public body concerned to attend a hearing.

(4) The Review Panel may restrict attendance during all or part of the proceeding where it considers appropriate.

(5) During the hearing all proceedings shall be recorded and transcribed." (underlining is ours)

This serves as a useful reminder that this Panel is to hear cases on the papers, something litigants may feel is useful in the days of the pandemic. Hearings are to be called for by applicants and must be acceded to by the Panel. At the hearing, the legislator requires the presence of the Applicant and the public body. Again, no mention of the CPB. One wonders why a representative of the Board must 'necessarily' be in attendance when all decisions taken by it were on behalf of the public body who, by the time a case is heard by us, would have already communicated all the relevant CPB-related documents. Admittedly, the testimony of the CPB representatives, and especially BEC members, are often useful but the issue here is not of the character of such testimony but of representation before a tribunal. A public body facing a challenge to its intended award of a major contract that fails or neglects to bring in a CPB-appointed BEC member would be taking a considerable risk in its defence to the application for review.

In conclusion, we do not find the 'failure' to put the CPB into cause, if that is even a possibility, is a matter to be laid at the door of the Applicant and most certainly not a matter than can justifiably result in the outright dismissal of a case before us.

The preliminary objection raised by the CWA, we find, is not well-taken and is, accordingly, dismissed.

Time-limits

At the end of the hearing, we sought submissions on the deadline applicable to the Applicant to file its application before us. We are thankful to Mr Unnuth and Mr Ramdewar for their written submissions on the point.

In summary, the notification of award was issued and dated 15th November 2021 (a Monday). However, the representative of the Applicant confirmed to us that the company received the notification on 18th November 2021 (a Thursday). Despite having some of its days to challenge apparently eaten away by the belated communication by the CWA, the Applicant was admirably quick to put in a challenge under section 43 of the PPA. It did so on 18th November 2021, the very same day. By operation of law, the CWA had to reply by 24th November 2021. It only did so on the 26th November 2021 and begins it reply with an obscure reference to a letter by the Applicant dated 22nd November 2021. The CWA then continues by taking issue with the format of the challenge but 'graciously' responds to the challenge.

We commend both the Applicant for having confirmed before us that it had submitted its challenge on 18th November 2021 and Mr Unnuth who submitted along those lines in his written submissions on behalf of the Applicant. The 22nd November 2021 reference by the

CWA will thus remain in obscurity. Indeed, and as rightly submitted by Mr Unnuth, if the challenge had been entered on 22nd November 2021, it would have worked in favour of the Applicant. The fairness and conduct of the Applicant in the carriage of its case has been exemplary and deserves our appreciation.

Regrettably, the challenge having been made on 18th November 2021 places the Applicant in a pass, a very similar position to what had occurred in a previous matter before the Panel. The issue turns around Regulation 48(5) of the PPR.

In **CRSE Ltée v Ministry of Social Security, National Solidarity, and Environment and Sustainable Development Decision 20/19**, the issues were extensively canvassed by the Panel and we feel they are sound. We will now reproduce a substantial number of extracts of that Decision given the degree of similarity.

The Panel in *CRSE Ltée* held (at pages 15 to 21 of the Decision):

*"In essence, the issue that we have had to grapple with, for lack of a better term, is, ultimately, the interpretation of Paragraphs 48(4) and 48(5) of the Public Procurement Regulations 2008 as amended in 2013 (the **"PPR"**). They read as follows:*

"(4) Unless the challenge is resolved by mutual agreement, the Chief Executive Officer of the public body shall issue a written decision stating his reasons within 7 days of the filing of the application.

(5) 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 his 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." ***(emphasis is ours)***

It is obvious and for all to see that these paragraphs of the PPR, imply two different acts, by the Public Body and by any applicant, respectively. The former must issue a written decision within 7 days from the date of a challenge under section 43 of the Act, the latter must apply to the Panel within 7 days from receipt of the decision of the Public Body, or, in case there was no such decision, 7 days from the date it 'should have been received'.

In this most unusual case before us, the Public Body issued a notification of award, the actual triggering event of all documents to come, on 5th September 2019. From the papers provided to us by the Public Body, the despatch of the notification was done the next day, that is, 6th September 2019 (even though CRSE avers it received in on the 11th September 2019 – at the very last minute for a challenge. CRSE challenged, within the time-limit, through an application under section 43 of the Act dated 11th September 2019.

By operation of Paragraph 48(4), the Public Body was to issue a decision by 17th September 2019 (in law, 7 days from 11th September 2019). Moreover, we gather that it wrote to the CPB – the authority handling the selection process and whose decision in binding on the Public Body – on 16th September 2019. The CPB promptly replied on 17th September 2019 but the Public Body only issued its decision on the 18th September 2019, that is, outside the time-limit under Paragraph 48(4).

One should bear in mind the peculiar nature of procurement proceedings where, even though the Public Body is the titular respondent, it is in fact the CPB that carries out the selection and is the only authority having sufficient knowledge of the facts to be in a position to respond to such challenges and that is precisely why the Public Body is directed to 'obtain all relevant information from the Board' in Paragraph 48(3) of the PPR.

In this case, the CPB and the Public Body acted as expediently as they could and the CPB had provided the answers on 17th September 2019. The Chief Executive of the Public Body, for some reason, issued and dispatched the CPB comments, which he had rightly made his own, only on the 18th September 2019.

The Applicant thus received that decision of the Public Body on 18th September 2019 and filed its application within 7 days of that date, on 24th September 2019.

We must confess that we have found it difficult to apply this sequence of events to the strict mechanism provided for in Paragraph 48 of the PPR and we feel there is bound to be statutory construction issues that arise. It is a matter of regret that the drafting of that Paragraph of the PPR and its sub-paragraphs has created an ambiguity of such a nature and that, perhaps, this peculiar sequence of events that we see in this case had not been contemplated by the then Minister of Finance, back in 2008. As the Panel set up under the Act, we will now embark into an exercise to try and reconcile the wording of the PPR so as to give proper effect to the spirit of the procurement laws. We do so in the knowledge that our position will have a bearing on future cases before this Panel and we hope that it will clarify the issue pending any eventual intervention by the Minister of Finance or by Parliament.

True it is, also, that section 48(4) of the Act invites us to seek to avoid formality in our procedure as a tribunal but it makes this subject to what may be prescribed and we hold that Paragraph 48 is such a prescription which we are generally bound to apply.

We therefore propose to look at the general wording of Paragraph 48 of the PPR. It has as heading 'Challenge and appeal procedures.' At sub-paragraph (1), it requires that a challenge under section 43 of the Act should be in the form set out in the Second Schedule to the PPR.

At sub-paragraph (2), it prescribes, or defines, the deadline under section 43(3)(b) of the Act – which then has to be read with section 40(4) of the Act which, in turn, needs to be read with Paragraph 38(3) of the PPR to finally conclude that this Paragraph 48(2) of the PPR applies to contracts of less than Rs 15 million but above Rs 1 million, of course, after it is further read with Paragraph 48(6) of the PPR. No wonder litigants and their advisors may find it daunting to navigate their way through the maze that are the 2006 Act and 2008 PPR as presently drafted; this is just one example of the intricacies, out of many, of those two pieces of legislation.

Sub-paragraph (3) of Paragraph 48 directs the Public Body to obtain information from the CPB to respond to challenges under section 43 of the Act.

Sub-paragraph (4) directs the Public Body (its Chief Executive Officer) to <u>issue</u> a written decision, if he cannot resolve the matter or challenge by mutual agreement with the challenger. In case he sets aside the challenge, this written decision of his must contain his reasons and must be issued within 7 days of the <u>application</u> for challenge under section 43. We find that

that, even though not clearly stated, Sub-paragraph (4) is to be read in connection with section 48(4) of the Act of which it is essentially a reproduction.

We will discuss sub-paragraph (5) in more detail below.

Sub-paragraph (6) provides the threshold of Rs 1 million relevant to the 'combination' of Paragraph 48(2) of the PPR - Paragraph 38(3) of the PPR – Section 40(4) of the Act – Section 43(3)(b) of the Act.

Sub-paragraph (7) sets out how an applicant can ask the Panel to review procurement proceedings after a contract has been awarded. The contract must be worth above Rs 1 million (but below Rs 15 million because of Section 40(3) of Act combined with Paragraph 38(3) of the PPR) and the Application for Review must be made within 5 days of the date the applicant 'becomes aware of alleged breach (sic)'

Finally, one notes that section 40(4) of the Act, which actually applies in this case, gives a 7-day time-limit to the challenger to make his challenge under section 43 of the Act from the date of the notice informing a bidder that it has not been retained.

We can safely state that the time-limits under our procurement laws are, broadly speaking, based on events having sufficient certainty or on the date of documents. A CEO of a public body must give his written decision within 7 days from the date of the application for challenge, a challenger must apply for a challenge within 7 days from the date of notice, a challenge for a contract of less than Rs 15 million but above Rs 1 million must be made within 5 days of the bid opening or the invitation to bid, and a review post-award of contract must be applied for within 5 days from the date on which an applicant becomes aware of an alleged breach.

Moreover, a challenge to a public body or application for review before the Panel, under Paragraph 50 of the PPR, may be filed by the Challenger/Applicant by hand delivery, mail or commercial courier. This paragraph even goes further and provides that a challenge filed to the public body is deemed to be filed on the day (by close of business) it is received by the public body.

Sadly, Paragraph 48(5) does not have the same clarity and does not provide for a method of service by the Public Body. After providing for two different situations: the Public Body fails to issue a written decision to respond to a challenge or the Public Body does issue one and the applicant is unsatisfied with the decision, that paragraph then directs that the time computation should start from the date a decision is received or when it should have been received. However, it does not refer to any mechanism of issuing documents or any reference to laws that do, such as the Interpretation and General Clauses Act which would have gone a long way to assist the Panel and parties before us but the latter applies only in cases where communication is to be done through postal services (such as the reference to commercial courier in Paragraph 50 of the PPR).

So, we are left in the dark as to when a 'decision should have been received' while we do know when a decision should be issued – that is, within 7 days from the date of application for challenge.

Even in this case, we have seen that the despatch of the notification itself took place the following day after it was issued, that is, it was issued on 5th September 2019 but dispatched on the 6th and the Applicant avers it received it by fax on 11th. Yet, this did not affect the time limits for challenge because it is 7 days from the date of notification – which would remain the 11th September.

We have tried to obtain further guidance from the other provisions of the PPR and of the Act but they are not helpful to the matter at hand. Section 50(4) only provides that all documents and communications and decisions are to be made in writing. Sections 50(5) and (6) deal with documents in relation to bids and acceptance of bids and not challenges or responses thereto.

Coming back to Paragraph 48(5) of the PPR, our reading is that it is not elective. Indeed, the Applicant, in its submissions, argues that when a CEO issues a decision late, it extends the time-limit for an application for review as from the date of that late decision. Senior Counsel further argues that finding otherwise would be punishing the applicant for the failure of the Public Body to act in time. We do not subscribe to this view in this particular context. We find that the situation where a Public Body does not issue a decision is specifically provided for in the law and has been contemplated by the Minister when passing the PPR. The PPR provide two avenues that are mutually exclusive: either a decision is issued in time or no decision is issued in time. In our opinion, a late decision is tantamount to a case where 'the Chief Executive Officer of the public body fails to issue a decision within 7 days' (Paragraph 48(5) of the PPR).

We believe it is also apposite to set out the two scenarios and provide examples.

First, using this case where a challenge has been made on 11th September 2019 as a case study, we deal with examples where the CEO issues his written decision in time. For example, a hypothetical and particularly diligent CEO issues his decision on 12th September 2019. He sends out the document by despatch on that day itself. By operation of Paragraph 48(5), the application before us should therefore be filed within 7 days from the 12th which is 18th September 2019, in law by applying the Interpretation and General Clauses Act. At the other extreme, we have the complacent CEO who issues his written decision at 15 59 on 17th September 2019 – that is, within the deadline but at the last minute. The despatch takes place on, say, 21st September 2019. In that case, it would be open to an applicant to argue that since there was a decision validly issued under Paragraph 48(4) of the PPR, which decision he received on the 21st, the 7 days must run from the date of receipt and would end on 27th September.

Secondly, we set out what happens when a CEO does not issue a decision under Paragraph 48(4). In those cases, there is no document to dispatch, no document to scan and send by e-mail or fax. Yet, Paragraph 48(5) still, ambiguously, states that the deadline of 7 days starts to run from the date a decision should have been received. And this, without providing for a mechanism to calculate that all-important date of hypothetical receipt. Should we then arbitrarily impose a time-lapse for reception of a hypothetical decision which in reality has not been issued? Could we allow, say, one day for receipt or one week or 10 days?

We find that the current case falls into that second category or avenue. We say so because of the strict wording of the first grammatical clause of Paragraph 48(5) especially when it is read together with Paragraph 48(4); a CEO must issue his decision within 7 days and has not done so. We, therefore, consider that there has been no decision of the CEO in this case. The

document he issued on 18th September 2019 is in breach of the procurement laws (Section 43(4) of the Act and Paragraph 48(4) of the PPR).

We now turn to the final grammatical clause of Paragraph 48(5) which will determine the matter before us and give our interpretation of the words 'should have been received' in the context of procurement laws. In doing so, we have used another principle of statutory interpretation which is that the patent ambiguity created by those words should not be applied in such a way as to reach an absurd result. Here, the wording points towards the hypothetical date of receipt of a decision that was not issued. We do not feel it is within our powers to define such a hypothetical date.

In the context of the very strict deadlines and mechanisms for exchange of documents which are widespread in the Act and the PPR and the ever-tightening time-limits (Paragraph 48 used to have a 15-day time-limit until 2013 when it was reduced to 7), we hold that it could not have been the intention of the Minister, when passing the PPR, to allow for this Panel to randomly create a hypothetical date of receipt for a document that never existed. It did not escape us nor both Senior Counsel that we could then find ourselves with 'extreme' delays that could go on for weeks or months before an application under section 45 is lodged before us and we give our decision within 30 days from that date of application.

Rather, the intention of the Minister, in our view, was that an applicant may apply for review within 7 days from the date a CEO of a public body should have issued a decision. This interpretation would give proper clarity to the law and ensure that the procurement process remains as rapid as possible and without crippling delays – which is and has always been an essential aspect of the procurement laws and of public policy.

We therefore conclude that the Applicant, CRSE, should have computed the time-limit as from the 17th September 2019 – the date a decision should have been issued – and not 18th September 2019 when it received a belated document purporting to be a decision. As such, the application for review has been made one day late and we dismiss the application pursuant to our powers under Paragraphs 56(a) and (c) of the PPR."

We fully subscribe with what the Panel held in *CRSE Ltée*.

On a side note, we would, perhaps, expand on the *obiter* remark made on the issue of notification of award having to be received by an aggrieved/unsuccessful bidder for time to start running. The Panel recently had the opportunity to address the issue in the case of **Mechanization Company Ltd v Mauritius Cane Industry Authority Decision 24/21**, the 'MECOM' case, where the public body issued its notification to unsuccessful bidder on a Friday before a weekend followed by three public holidays in four of the weekdays. The public body, surprisingly, sent the notification to the applicant in that case on the following Friday when a 7-day time-limit is given to aggrieved bidders to enter a challenge under section 43. In spite of that, the MCIA then attempted to have the case set aside by suggesting that the 7 days must be reckoned from the date it indicated in its letter. The Panel found that the date of notification is when the unsuccessful bidders are notified, or put on notice which implies the receipt of the notification document.

Coming back to the issue at hand, we find that applying the correct interpretation to Regulations 48(4) and (5) can lead to only one conclusion. That the last date for the Applicant to lodge its application for review was 30th November 2021.

Mr Unnuth makes a very interesting point on Regulation 48(5) in his written submissions which deserves some scrutiny. He suggests that the use of the word 'may' gives a wide latitude to an aggrieved bidder to file his application either 7 days from when a decision of the public body's CEO should have been received or 7 days from when it is actually received even though that CEO has responded outside delay.

*"(5) 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 his 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."* (**our emphasis**)

We cannot subscribe to that reading of Mr Unnuth. If anything, in our view, the use of the word 'may' by the legislator is in relation to the choice open to a bidder if 'he is not satisfied' to lodge an application for review or not. In other words, the use of the word 'may' is for the sentence preceding it, not what comes afterwards. Its intended meaning is akin to the word 'can', in this context and empowers an aggrieved bidder. Besides, the legislator after using the word 'provided' then sets out two mutually exclusive deadlines to be observed by that unsatisfied bidder – one for when the CEO issues a decision within 7 days, one for when he fails to do so. 'Provided' thus has an intended meaning that would equate to 'only if the applicable deadline out of the two has been observed'.

We feel very much sympathy for this particular Applicant given this unfortunate series of events. It has consistently acted promptly but has made one irremediable mistake at the last step. This is compounded by the fact, as will be seen below, that this Application for Review may have had a proper basis on the merits. However, it is not for a tribunal to depart from deadlines or rules set out in statute, thereby made mandatory, as opposed to directory rules that can be accommodated in a deserving case. (*vide* MECOM (above))

On the Merits

Grounds 4, 5, 6, 7, 8, 9, 10, 11, 12 and 17

Of the 17 grounds of review invoked by the Applicant, the above 9 grounds relate to one main complaint against the Public Body.

As per its Challenge letter, the Applicant avers that it had submitted all necessary documents pertaining to the tender exercise and all clarifications requested during the evaluation period were submitted accordingly, as per requirements. It had under its belt many contracts of similar nature - fixing of new supply and road reinstatement, where it was selected and awarded the contract by the CWA in the past, as well as pipe-laying works.

Hence it had the requisite qualifications and experience for the proposed contract.

According to the CWA, the only issue leading to the disqualification of the Applicant's bid was with regard to its specific qualification and experience for the proposed works under Factor 2.5 (1.4) Technical Compliance of Section III of the Bidding Documents

The clause on Specific Experience in Criteria 2.4.2 (a) & Mandatory Criteria – 1.4 Technical Requirement) stipulates:

> *"1. "The bidder should have participated as contractor, management contractor, or subcontractor in at least **Two (2)** Contracts of a nature and complexity equivalent to the Works over a period of **Ten (10)** years that have been successfully and substantially completed and that are similar to the proposed Works. The similarity shall be based on the physical size, complexity, methods/technology or other characteristic as described in Section – Employer's Requirements.*
>
> *2. For the purpose of this sub-clause, 'nature and complexity equivalent to the Works'' is defined as "laying of a minimum of 500m of HDPE 90 mm diameter or DI 100 mm diameter pipeline, including household connections.*
>
> *3. The Bidder shall also submit the following documents for each of the works listed **except where the Employer is Central Water Authority:***
>
> *1. A certificate from the Employer or Project Manager describing the Works; and*
>
> *2. Complete Certificate or a statement from the Employer or Project Manager for Works which are at least 70% completed."*

In its online bid, the Applicant, in response to the above specific experience, states having specified the following:

> *"One pipe laying project of Baie du Cap to Le Morne Village in year 2020 [5KM 200 mm HDPE pipe];"*

It also referred to other pipe laying projects it was involved in, namely :-

(i) Contract CWA/2028/73 – Fixing of New supply and road reinstatement at MAV Lower.

(ii) Contract CWA/2019/64 fixing of new supply and road reinstatement at MAV lower.

(iii) Contract CWA/2019/95 – Fixing of new supply and road reinstatement at DWS South.

(iv) Contract CWA/2019/150 – Fixing of new supply and road reinstatement at MAV lower.

For the said four projects, it seems clear that no specification was supplied together with the bid. There is no mention of the length, type and diameter of the pipes that were laid.

By letter dated 8th September 2021, the CPB, on behalf of the BEC, wrote to the Applicant requesting for clarifications. The Applicant was asked "to demonstrate his specific experience" as regards the Specific Experience requirement and certain contracts were referred to specifically. The Applicant wrote back to clarify.

By letter dated 13th September 2021 purporting to respond to the CPB, the Applicant gave details on the above contracts. It refers to contracts (i), (ii) and (iv) above providing the requested details. It goes on to list Contract (iii) as two contracts:

(1) CWA/2019/95/Z4

(2) CWA/2010/95/Z6.

Referring to all the said contracts, the letter in response serving as clarification, then reads as follows:

> *"Pipes laid for all the above contracts range between 20mm and 63mm HPDE PN16 ...."*

Finally, that letter of 13th September 2021 goes on to further clarify as follows:

> *"we have recently laid a 5km pipeline for the Le Morne Project by the CWA itself. The project consisted of laying, testing, disinfecting and commissioning of 5000mt of HDPE 200mm diameter from Baie du Cap River Intake to Le Morne Village (completed in July 2020)....."*

In its examination of the clarifications received, the BEC, in the light of the above response, took the view that out of the four projects referred to in those annexes, that the Applicant qualified in only one project namely, pipe laying at Baie du Cap to Le Morne Village in year 2020 (5 km, 200mm HDPE pipe). It found that in the four projects the pipe laid range from 2-0 to 63mm diameter HDPE pipe and as such does not meet the requirements of the bid. We believe this is perfectly reasonable *ex facie* the letter and bid. The BEC witness added that the BEC members formed the view that the Applicant had failed to demonstrate its specific experience as per the Technical Requirements in the Bidding Documents. It concluded that the Applicant's bid was not compliant with Mandatory Criteria 2.4.2(a) as it had submitted experience in only one contract in the last 10 years for the laying of a minimum of 500m of HDPE 90mm diameter or DI 100mm diameter instead of two contracts. Hence the Applicant's bid was found to be non-responsive and was not retained for further examination.

Indeed, the one real issue in the present application revolves around whether the Applicant had complied with the above mandatory requirements of having two projects within the last ten years in works of a specific nature.

The Applicant's witness who, according to the evidence before us, is the third generation as contractor in the Ramsaha family doing contracting work mainly for the CWA, strongly

contended that his bid was substantially responsive as he more than met the mandatory criterion. He placed heavy reliance on three Completion Certificates of Contracts from the CWA, annexed to his Statement of Case as Annexures G, H and I which he claimed he submitted, purporting to prove that he does satisfy the Mandatory Criterion under Clause 1.4 "Technical Compliance". He had indeed been involved in three different pipelaying contracts with the Respondent.

These were as follows:

i. Ref. CWA/C2019/135 (Annex G)

ii. Ref. CWA/C2019/137 (Annex H)

iii. Ref. CWA/C2019/138 (Annex I).

These were the ones he mentioned in his bid as "the pipe laying project at Baie du Cap to Le Morne Village in year 2020." These 3 separate contracts refer to the Le Morne Water Project with a defined diameter of 200mm HDPE pipe with a total length of approximately 5 km.

We were told that the Le Morne Project covers approximately 5 kms of Pipe Line of 200 mm GB, a Pipe Line from Baie Du Cap River intake to Supply Water to Le Morne village. During the tendering exercise, he did submit three completion certificates for three different contracts which sum up that project itself of 5 kms. The first contract 2019/135 which is a 1.4 km Pipe Line highly exceeds the 500 m required by the CWA; so do the second (2.1 km) 200 mm GB Pipe Line, and the third (1.4 km).

The evidence relating to the submission of the three Completion Contracts was, to say the least, confusing. The Applicant, at first maintained in evidence before us that he did submit these Completion Certificates at bidding stage and that he had a copy, highlighting the PDF file attached during the e-procurement exercise before closure of bids, which contains the three completion certificates. These were annexed to his bidding documents. Mr Ramsaha eventually admitted that it was at Challenge stage that he had first referred to the three Completion Certificates, not at bidding stage.

The CWA, on the other hand, strenuously denied that this was the case although its own witness, Mr Ramrekha seems to admit that there were scanned copies of Documents G, H and I, presumably in the Applicant's bid, while asserting that the Applicant mentioned only one project in its bid.

The Respondent therefore maintained that the Applicant's bid was not responsive as it did not meet the mandatory technical compliance criterion by submitting only one pipe laying project instead of two. The Applicant also failed to provide the clarifications requested. As for the allegedly submitted three Completion Certificates, these do not prove anything. The BEC concluded that it was one project with three different completion certificates for each village. It was further stressed that the three Completion certificates do not mention the type, length and diameter of pipe laid and hence do not meet and satisfy the said mandatory criteria.

As for its failure to provide the requested clarifications, the Applicant explained that he provided the relevant information with respect to four (4) Contracts queried by the CPB in its Letter dated the 08th September 2021. This was simply to show that the Applicant had sufficient experience and credentials for Projects of a similar nature, notwithstanding the fact that the diameter of the pipeline there ranged from 20 mm to 63 mm. He also explained that this should not have a negative bearing in the present procurement as it was a "physical impossibility" for the said four (4) Projects to achieve a diameter exceeding 63 mm let alone 200 mm. This was perfectly to the knowledge of the CWA.

Mr Ramsaha also eventually admitted it was an omission in his letter dated the 13th September 2021 **[vide ANNEX K]** that he failed to explain that the Le Morne Water Project was split into three (3) Contracts. According to him, since the CWA was the Client for that Project, it ought to have been to its knowledge.

The CWA is already aware that he has performed these contracts for which it had itself issued Completion Certificates, but the CPB-appointed BEC members were not apprised of these facts. They are directly related to the nature of the current procurement and it was up to the CWA to give to the CPB adequate information on the particular project.

We take the view that the tremendous amount of time spent in disputing whether the three Completion Certificates were submitted at bidding stage is of no real consequence. As the Applicant rightly attempted to impress upon this Panel, the BEC should have been made aware of the fact that the Le Morne Project consisted of three contracts.

Firstly, indeed, Specific Experience in Criteria 2.4.2 (a) & Mandatory Criteria – 1.4 Technical Requirement goes on to stipulate in sub-clause 3:

> ……..
>
> *3. The Bidder shall also submit the following documents for each of the works listed* ***except where the Employer is Central Water Authority:***
>
> 1. *A certificate from the Employer or Project Manager describing the Works; and*
> 2. *Complete Certificate or a statement from the Employer or Project Manager for Works which are at least 70% completed."*

This clearly shows in the present case that since the employer/ client in the previous procurement exercise or projects was the CWA itself, the Applicant was exempted from submitting certificates describing the works, etc... That kind of information would have been necessary in projects where the client was not the CWA.

We take the view that it was the responsibility of the CWA to apprise the CPB of all the former or pending contracts where it is a client and to which bidders have referred to in their

respective bids, especially in view of the above-referred to Sub-Clause 3. In the alternative, the BEC would also be expected to query the CWA on the nature of the various CWA contracts referred to by various bidders.

Crucially, as the Mr Ramdewar, appearing for the CWA, himself suggested on more than one occasion, had those three documents G, H and I been put before the BEC there would not have been this particular application for review since the Applicant would have been retained for further evaluation.

Lastly, it would seem right to suggest that the BEC itself should have been put on notice by the last part of the Applicant's response letter of 18th September 2021 where the Applicant goes on to further clarify as follows:

> *"we have recently laid a 5km pipeline for the Le Morne Project by the CWA itself. The project consisted of laying, testing, disinfecting and commissioning of* ***5000mt of HDPE 200mm diameter*** *from Baie du Cap River Intake to Le Morne Village (completed in July 2020)...."*

Other Grounds

In the light of our conclusions on the above grounds, we do not find it necessary to deal with the remaining grounds.

In light of the above, after having perused the Bid Evaluation Report, we must say that the BEC appointed by the CPB carried out the evaluation thoroughly and diligently, and to a high standard. However, it may very well be that the CWA should have supplied details of its contracts to the BEC or the latter should have queried from the CWA about contracts the various bidders have mentioned in their bids where the CWA was or is the client.

We will not authoritatively state whether the contract awarded by the CWA to the Applicant was one or three but we can say that we would likely have ordered a re-evaluation of the bids on that issue.

I. Conclusion

In *CRSE Ltée*, the Panel dismissed pursuant to Regulation 56, which would entail a forfeiture of the whole of security deposit if deemed frivolous. More often than not, a breach of Regulation 56 would flow from a frivolous application for review. Be that as it may, given the very exceptional circumstances of this case and how the CWA's own laches effectively created the situation that led to the Applicant's case to be dismissed, and the fact that the Application may well have been tenable on the merits, we exercise our discretion and, instead, dismiss the Application for being devoid of merits, not for being frivolous. We, accordingly, order reimbursement of half of the security deposit entered by the Applicant at the registry of the Panel.

J. Observations

Recently, through the intricacies of the cases reaching this Panel, we have noticed a most unwelcome trend on the part of public officers and public bodies involved in procurement proceedings. That trend may have existed from before but it so happens that it has taken a more central role in a few cases before us lately – an unexpected and unnecessary state of affairs in administrative law and government business.

If a letter is issued by a public entity in procurement matters, in the context of the strict deadlines in our laws imposed on aggrieved bidders, the least one would expect is that the letter is communicated to the potentially aggrieved persons reasonably promptly, if not immediately. A letter should not be dated and presumably issued on 15th November 2021 but is only communicated on 18th November, when bidders have only 7 days to challenge.

Such administrative delays, often self-inflicted, are reminiscent of the red-tape of old and hardly have a place in this day and age, an age of instant communication. The Panel has had to intervene so that, in relation to notification documents to unsuccessful bidders, the 7 days begin to run as from the date of communication by public bodies; the legislator has had to provide for a situation where a CEO of a public body fails to even issue a response in good time to a challenge under section 43. However, there are other documents, including statements of case before the Independent Review Panel, about which the time-limits are often ignored by public officers. This is unbecoming.

One wonders whether public officers should give up indicating dates on documents altogether if they are to be so lax in communicating them *a qui de droit*. Perhaps a set of rules, or a better one properly enforced, is needed – focussing on the delivery of correspondence issued by the public bodies in the context of procurement. This may go a long way to help ensure the law and its spirit are efficiently executed and avoid unnecessary legal argument before this Panel and courts of law. We also express our firm belief that the same level of resilience and expedience should consistently be applied whether it is a small procurement contract, an urgent one, a complex one or those worth billions. The overarching principle is the fairness, consistency and integrity of the public procurement process, a matter inextricably linked to public funds.

Copies of this judgment, and others, will be sent to the relevant authorities for the necessary action on their part.

J. Ramano (Mrs)

(Chairperson)

A. K. Namdarkhan

(Member)

V. Mulloo

(Member)

Dated: 30th December 2021