Independent Review Panel

Decision No. 02/21

In the matter of:

HemaScia Ltd

(Applicant)

v/s

Forensic Science Laboratory

(Respondent)

(Cause No. 02/21/IRP)

Decision

INDEPENDENT REVIEW PANEL MAURITIUS

A. History of the case

On 10th November 2020, the Forensic Science Laboratory (the **"Respondent"**, **"FSL"**, **"Public Body"**), falling under the Prime Minister's Office, issued bidding documents for the procurement of Supply, Installation, Testing, Training and Commissioning (SITTC) of Liquid Chromatography High-Resolution Mass Spectrometry System (LC-HRMS), bearing Procurement Reference No: **FSL/2020-2021/14/RB**. For convenience, we may refer to the machine (with all modules) as an **"HPLC"**. It will, we gather, be used, *inter alia* to detect drugs and other prohibited substances in the blood of persons being investigated.

Six bids were received including those of the Applicant and of the successful bidder.

B. Evaluation

A Bid Evaluation Committee was set up to evaluate the bids received and identify the lowest evaluated technically responsive bid that met the qualification criteria. The Bid Evaluation Report was completed on 22nd December 2020.

C. Notification of Award

On 6th January 2021, the Public Body informed the Applicant and other unsuccessful bidders, that an evaluation of the bids received has been carried out and the particulars of the successful bidder were:

Item No.	***Description***	***Qty***	***Selected Bidder***	***Address***	***Contract Price Exclusive of VAT (Rs)***
1.	***Supply, Installation, Testing and Commissioning of Liquid Chromatography High Resolution Mass Spectrometer Make: SCIEX Model: MS: X500R QTOF UHPLC: ExionLC AD Series Country of Origin: EU/USA/ASIA***	***1 lot***	***Separation Scientific (MRU) Ltd***	***1, Avenue Des Orchidees, Quatre Bornes***	***21,666,368.00***

D. The Challenge

On 8th January 2021, the Applicant challenged the procurement proceedings on the following grounds:

"(a) The Public Body failed to carry out a proper evaluation and assessment of the bids inasmuch as Separation Scientific (MRU) Ltd should not have been selected for award as it is not the lowest evaluated substantially responsive bidder.

(b) The Public Body ought to have awarded the contract to HemaScia Ltd, the lowest substantially evaluated responsive bidder."

E. The Reply to Challenge

On 11th January 2021, the Public Body made the following reply to the challenge and stated that:

"(i) ***Separation Scientific (MRU) Ltd is the lowest substantially technically responsive bidder; and***

(ii) ***The bid submitted by HemaScia Ltd is not technically responsive."***

F. Grounds for Review

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

"(a) The Public Body failed in its duty to carry out a proper evaluation, assessment and comparison of the bids when it awarded the contract to the selected bidder, Separation Scientific (MRU) Ltd for the contract price of MUR 21,666,368.00 inasmuch as it is not the lowest bidder.

(b) The Public Body ought to have awarded the contract to HemaScia Ltd, whose bid is the lowest evaluated substantially technically responsive bid. The contract price of HemaScia Ltd is MUR 19,498,426.41.

(c) The Applicant avers that in reply to its challenge, by the letter dated 11th January 2021, received by the Applicant on the 12th January 2021, the Public Body provided clarifications as follows:

(i) *Separation Scientific (MRU) Ltd is the lowest substantially technically responsive bidder; and*

(ii) *The bid submitted by HemaScia Ltd is not technically responsive.*

The Applicant avers that the said letter dated 11th January 2021 is not in conformity with the Public Procurement Act 2006 in that it fails to reply to the Applicant's challenge inasmuch as the Applicant did not ask for clarifications.

(d) *Upon receipt of the letter dated 11th January 2021, the Applicant sent a letter dated 12th January 2021 to the Public Body wherein it requested for full detailed particulars of the finding that its bid was 'not technically responsive'. By letter dated 12th January 2021, received by the Applicant on the 13th January 2021, the Public Body informed the Applicant that the "Forensic Science Laboratory stands by its reply of 11 January 2021 to you. A copy of same is hereby being enclosed." By maintaining such stand, this confirms that the Public Body has clearly failed to carry out a proper evaluation and assessment of the Applicant's bid as it cannot provide the detailed particulars of the very reason why the Applicant, whose bid price is lower than that of Separation Scientic (MRU) Ltd, was not selected for award.*

(e) *The Applicant maintains that its bid is the lowest evaluated substantially technically responsive bid."*

H. The Hearing

Hearings were held on 3rd and 10th February 2021. At the second hearing, there was on record a Statement of Case and a Statement of Reply, by the Applicant and a Statement of Defence by the Respondent.

The Applicant was assisted by Mr Gavin Glover SC and Ms S.Chuong while the Respondent was assisted by Mr Beeharry, Principal State Counsel and Ms Pem, State Counsel. The latter two were instructed by Deputy State Attorney.

Mr N. Ramburn SC appeared for the successful bidder.

I. Findings

PRELIMINARY POINTS

On the day of the first hearing, which was held on 3rd February 2021, the Applicant asked for leave to put in a Statement of Reply to the Respondent's Reply to the Applicant's Statement of Case, which we will call the Respondent's Statement of Defence, convenience.

Mr Beeharry, Principal State Counsel, for the Respondent, took objection since the proposed Reply was being filed one day late and in breach of Regulation 55(2) of the Public Procurement Regulations 2008 (the **"PPR"**).

We drew the attention of the Respondent that it had itself filed its Statement of Defence some five days late, on 26th January 2021, in breach of Regulation 55(1) of the PPR. Indeed, the Application for Review having been filed on 15th January 2021, the deadline for submission of the Statement of Defence was the 21st of January but, like countless other public bodies in almost all cases before this Panel, the Respondent has failed to abide by Regulation 55(1) of the PPR. We are often told that this is because of 'delays' in public bodies instructing the Attorney General's Office or their private counsel. We can only hope that litigants, including the various public bodies, appearing before us will be mindful of those relevant Regulations of the PPR and sections of the PPA, the latter especially relevant to applicants. Too many times have we found ourselves in a race against time to complete the hearings and issue our decisions within 30 days because of delays at the very outset by respondents filing their statements of defence. One should remember that the Panel can only conduct a hearing 7 days after the Respondent has filed its statement of defence, 14 days if the Applicant has filed a statement of reply. The Panel has, on those countless occasions, been accommodating but, as commented by Mr Glover, there may very well be a case where a public body will find itself having its statement of defence not made part of the record, especially if this inconsiderate attitude by public bodies jeopardises the Panel's ability to deliver judgment within the 30 days intended by Parliament.

Be that as it may, Mr Beeharry rightly pointed out that the Applicant had not challenged the late filing of the Respondent's Statement of Defence. After we had commented that Regulation 56 of the PPR, which gives the Panel a discretion to dismiss applications for review, may not find its application to a statement of reply, Mr Beeharry submitted that, in fact, we could even consider dismissing the application for review for breach of Regulations 56(a) and (c) of the PPR. Regulation 56 reads as follows:

"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."

We find that Regulation 56(c) relates to filing of applications for review in very express terms while Regulation 56(a) is of a more general nature. However, even though it does not make a second reference to applications for review, as is the case for Regulation 56(c), we feel that fairness warrants that the discretion to dismiss applications for review under those two paragraphs should be used sparsely and in cases where there is a serious defect or blatant breach in the application itself, not a Statement of Reply. The sanction for breaches in respect of the latter would, first and foremost, take the form of a refusal to allow filing a statement of reply by applicants, not the dismissal of the whole proceedings.

In the present matter, we, thus, after hearing submissions of all counsel appearing for the three parties, declined to exercise any discretion to dismiss the Application for Review on the basis of a belated filing, by one day, of the Statement of Reply. Furthermore, on the facts, we found that it was warranted that we allow the Statement of Reply to be put in even though one day late. The least that could be said about the reply of the Respondent to the applicant's challenge under section 43 of the Public Procurement Act 2006 (the **"PPA"**) was that it was laconic. It took the form of only a few lines stating the self-evident - that the successful bidder was the lowest substantially responsive bid – and then proceeds with a vague statement that the Applicant's bid was not technically responsive, without more. It was only when the proceedings began before the Panel, under section 45 of the PPA, and the Attorney General's Office took up the file that the Applicant was informed, through the Statement of Defence, as to how it was deemed technically unresponsive. The Statement of Reply sought to respond to those points made, finally, in the Statement of Defence and it was only fair for this Panel to allow the Statement of Reply to be put in. We note, here, the gracious remarks of Senior Counsel appearing for the successful bidder who supported the submissions made on behalf of the Applicant to allow the Statement of Reply to be on record.

The second preliminary point by Mr Beeharry arose on the second day of hearing, 10th February 2021. Mr Glover did not call any representative of the Applicant to give evidence and he stated that the Applicant's case was based on its statements together with the documents on record and those attached to its two statements of case. Mr Beeharry sought a ruling from this Panel that Mr Glover was to call a representative and tender him or her for cross-examination. Mr Glover submitted that the Panel had no such power and that the Applicant had the carriage of the case. Mr Ramburn appearing for the successful bidder also intervened and supported the Applicant's submissions and added that there was also no need for the representative of the Applicant to give oral evidence. Indeed, one should not forget that the default position in the law, albeit hardly ever used in practice, is that the Panel should hold hearings 'on papers', so to speak. It is only if an applicant requests, and the Panel accepts, that oral hearings are held. The Panel will then require the Applicant and the public body to attend but we do not feel that requesting attendance extends to forcing a party to give evidence or be tendered to opposing counsel to be cross-examined. Any party may choose not to give evidence and suffer any disadvantage that may arise from such a course of action.

Accordingly, the hearing proceeded with the Applicant's case being based on the documents on record, its two statements filed and any evidence in its favour elicited during cross-examination of other parties' witnesses by its counsel.

INDEPENDENT REVIEW PANEL MAURITIUS

ANALYSIS OF THE GROUNDS FOR REVIEW

The adequacy of the Respondent's reply under section 43

As we have seen above, the FSL's response to the challenge under section 43 of the PPA was most certainly far below the level we have come to expect from public bodies. To respond to a challenge by simply stating the obvious, that the successful bidder offered the lowest substantially responsive bid – which is what successful bidders do - and then stating that the challenger was not technically responsive, without more, is probably not what the legislator intended when passing section 43(4) of the PPA and requiring public body's Chief executives to: *'issue a written decision, stating his reasons'*. It would have been proper to at least tell the challenger why its bid was not technically responsive. The Applicant, in fact, gave the FSL a second opportunity to explain but it limited itself to 'stand by' its previous reply to the challenge.

The Applicant, therefore, found itself in no better position than it would have been had the Respondent not replied to the challenge at all! The Applicant, understandably, lodged a broad-brush application for review and it was then, thankfully, that the real

issues about its purported technical non-compliance came to light, in the FLS's Statement of Defence.

We find that the FSL reply to the challenge, though reproachable, is not unlawful, in the circumstances. It took its time but all issues were made live and canvassed by the time the Panel heard the case. Had there been no review mechanism and no Independent Review Panel (sections 44 and 45 of the PPA), the Applicant might have had an arguable point to make in judicial review proceedings before the Supreme Court of the Mauritius against a public body blatantly failing in its duty to give reasons, an established principle of law, a hallmark of good administration to borrow the words of Lord Woolf, former Lord Chief Justice of England and Wales.

However, in the present case, we find that any such shortcoming would have been cured through exchange of documents and statements of case before us, which brings us to the real and ultimate issue in this case. Was the Applicant's product, its thermostat in the column oven to be precise, technically compliant?

Variation-precision-accuracy

Item C6 of the Schedule of Requirements, Section V of the Bidding Documents, reads:

"Column thermostats: 20 C up to 80 C (or better) with temperature variations of ±0.2 C"

This case rests on the interpretation and application of the word variation and the related terms 'precision' and 'accuracy'. A substantial amount of evidence was adduced by both the Applicant and the Respondent on the issue in the form of articles from scientific journals and books. The Applicant also annexed an 'opinion' from Dr Charl Yeates, the Product Manager at Shimadzu Corporation, the manufacturer of the product proposed by the Applicant.

Ms Reddi, a scientist (chemistry), the chairperson of the Bid Evaluation Committee (**"BEC"**), testified on behalf of the Respondent. At the outset, she explained why the HPLC was needed and that the separation process of compounds in the liquids to be tested was very temperature-sensitive. She took issue with some of the evidence being relied upon by the Applicant. Some articles, she says, are not peer-reviewed, others are blogs, others still, such as Dr Yeates', are not independent. She produced three articles to explain her understanding of variation and FSL's when it included requirement C6 in the Bidding Documents.

We gather from the documents that the Applicant, understandably, based its case, through its Statement of Reply, on Dr Yeates' views which he communicated after having received the FSL's Statement of Defence. Ms Reddi also took issue with the fact that Dr Yeates began his report with the words, *'It is our opinion'*. We do not propose to dwell much on this issue and the long-established underlying legal principles. Suffice it to say that expert evidence usually takes the form of 'opinions' and experts called upon to testify or submit reports often use this terminology and Mr Glover sought to establish, through cross-examination, that Ms Reddi herself was an expert witness, in addition to being a witness of fact, stating her expert opinions on certain matters. As such, we have given due consideration to the evidence of Dr Yeates as well as that of Ms Reddi's on the three words in issue before us.

About the blogs, one could forgive the Applicant for trying to explain things to the Panel and the audience in more 'unscientific' jargon but we will, for the purposes of this judgment, rely on the more scholarly articles and books.

One such document is the extract, produced by the Applicant in its Statement of Reply, of *Fundamentals of Analytical Chemistry, 7th Edition, by Skoog, West and Holler (1996)*. Precision, they state, 'describes the reproducibility of measurements-that is, the closeness of results that have been obtained in *exactly the same way*. Generally, the precision of a measurement is readily determined by simply repeating the measurement. Three terms are widely used to describe the precision of a set of replicate data: standard *deviation*, *variance*, and *coefficient of variation*…'

Accuracy, *Skoog, West and Holler*, 'indicated the closeness of the measurement to its true or accepted value and is expressed by the *error*... Accuracy measures agreement between a result and its true value. Precision describes the agreement among several results that have been measured in the same way. Precision is determined by simply replicating a measurement. On the other hand, accuracy can never be determined exactly because the true value of a quantity can never be known exactly.'

These authors provide a useful illustration, which mirrors a drawing Ms Reddi showed to us during the hearing, and we provide the said illustration by *Skoog, West and Holler* below. It uses targets to describe the interplay between accuracy and precision.

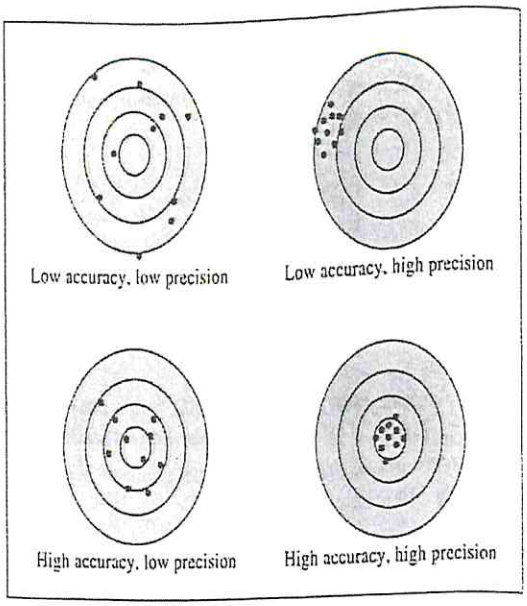

Figure 2-2
Accuracy and precision.

Absolute Error

The term "absolute" has a different meaning here than it does in mathematics. An absolute value in mathematics means the magnitude of a number *ignoring its sign*. As we shall use it, the absolute error is the difference between an *experimental result and the accepted value including its sign.*

The absolute error of a measurement is the difference between the measured value and the true value. It bears a sign.

The *absolute error* E in the measurement of a quantity x_i is given by the equation

$$E = x_i - x_t \tag{2-3}$$

where x_t is the true, or accepted, value of the quantity. Returning to the data displayed in Figure 2-1, the absolute error of the result immediately by the left of the true value of 20.00 ppm is -0.2 ppm Fe; the result at 20.10 ppm is in error by $+0.1$ ppm Fe. Note that we retain the sign in stating the error. Thus, the negative sign in the first case shows that the experimental result is smaller than the accepted value.

Relative Error

The relative error of a measurement is the absolute error divided by the true value.

Often, the *relative error* E_r is a more useful quantity than the absolute error. The percent relative error is given by the expression

$$E_r = \frac{x_i - x_t}{x_t} \times 100\% \tag{2-4}$$

We understand, from this, that the product proposed by the successful bidder (high precision and high accuracy in the diagram) will be more precise and accurate in that it will have little fluctuations from the indicated temperature (the one set on the thermostat) and the temperature inside the oven will itself be very accurate and near the true value and near 'reality', as it were.

On the other hand, the Applicant's proposal (high precision, lower accuracy), even though it will have little fluctuations from the set temperature, will be less accurate than what is expected as the true temperature inside the oven: far from the bullseye at the centre of the target. The thermostat may be precise but the actual temperature within the oven will be further away from the intended temperature.

Ms Reddi explained that the word 'variation' used in Item C6 of the Schedule of Requirements would require a combination of accuracy and precision but the ultimate goal was that the temperature inside the oven should not deviate from the intended true or real temperature by more, or less, than 0.2 degrees Celsius.

We have given anxious consideration to the documents produced by each side and the submissions made by Counsel of all parties and we find that, although a better description could have been used by the FSL in its Bidding Documents, it is not unreasonable and perverse for it to consider that a 'variation' of $\pm$0.2 C was in relation to both accuracy and precision of the thermostat. The FSL meant that all along since, we understand, there would be not much use for an oven that provides a reading with low accuracy even though that instrument could maintain the 'comparatively inaccurate' reading (for lack of a better word) very precisely. The lower accuracy would likely affect the separation process of the compounds, such as synthetic drugs and substances from blood samples. We, therefore, subscribe to the submissions made by the Respondent and by Mr Ramburn for the successful bidder.

The verification of bid specifications

During the hearing, it came to light that the BEC carried out what it terms a verification of the specification sheets submitted by all six bidders. Generally, this is encouraged and provides an independent check of the products on offers.

We note, from the Bid Evaluation Report, that all of the six bids were abnormally low, as per the definition in Directive No.52 of the Procurement Policy Office, but we understand that the BEC had no concern in respect of the suitability of the bidders' products and the pricing. The BEC addressed clarifications sought by the various bidders. Item C6 was not part of those requests. It then verified, online, the specifications of each product on offer by each bidder. This included an assessment of

both accuracy and precision as per the various manufacturers' published specifications. Two bidders, including the Applicant, were found not compliant to item C6 because the proposed accuracy range was too wide.

However, we note that the successful bidder had not provided a manufacturer specification sheet indicating the level of accuracy of the column oven module (SCIEX's ExionLC AC Column Oven). The BEC, as it did for the other bidders, looked up online and obtained the same brochure provided by the successful bidder as well as the relevant page from the online brochure indicating not only precision but accuracy. Both accuracy and precision were at $\pm$0.1 C. The BEC then carried on evaluation without expressly asking the successful bidder to confirm or clarify.

The Applicant takes issue with this and the Panel queried from Ms Reddi as to whether this could amount to 'adding' to the bid of a bidder what had not been included in the bid papers at bid submission stage. In essence, her response was that the BEC had the information it needed and did not feel it necessary to ask the bidder anew, for practical reasons.

Even though verification is laudable and must be encouraged, and is in line with Directive No.3 of the PPO, we feel it would have been preferable for the BEC to ask for clarification from the successful bidder in line with the mechanisms provided under the law. This is ever more important when the bidder has failed to provide a crucial piece of information. Here, however, we find that the additional information obtained by the BEC on its own was not only readily available but related to an item that would, ultimately, be easily clarified by the successful bidder. Indeed, one can safely say that all instruments have both accuracy and precision ranges. Moreover, in this present case, it is hardly disputed that the successful bidder's product is a high precision, high accuracy one while the Applicant's is a high precision, low accuracy one.

The real issue is what the term 'variation' in the Bidding Document meant. In those exceptional circumstances, we do not feel that the decision of the BEC not to formally ask the successful bidder for clarification was of major incidence on the evaluation of the bids or had placed the successful bidder in a more advantageous position or was to the detriment of the other bidders. However, we feel that public bodies should avoid gathering information on their own when such information is readily available from a bidder or of a kind expected to be requested from a bidder.

Be that as it may, the BEC carried out the evaluation in line with Directive No.3 and only the successful bidder, out of the six bidders, was found to be technically

compliant as per the Schedule of Requirements and we see no compelling reason to interfere with this finding.

Sample injection volume

In its Statement of Reply, which addressed and thoroughly examined the modules of UHPLC ExionLC AD Series, the product proposed by the successful bidder – even though the column oven module proposed was an AC Series - the Applicant took issue with the autosampler proposed by the successful bidder and its sample volume injection rate not complying with Item C5 of the Schedule of Requirements. We have perused the bid of the successful bidder and it has, similarly to the Applicant, provided the *'option for loop extension'* as described in the Bid Evaluation Reported drawn up by the BEC.

As such, we do not feel any intervention of the Panel is necessary on this Item.

J. Conclusion

On the whole, even though the Applicant makes a compelling argument in support of its case and that it is very much comprehensible that Item C6, as written by the FSL in the Bidding Documents and the use of the word 'variation' which, scientifically-speaking, could create a confusion in the minds of bidders between accuracy and precision, the public body required a column oven that was both accurate and precise for the use it intends on making of the HPLC. The Grounds for Review cannot, in the circumstances, succeed.

Accordingly, we hold that this Application for Review is devoid of merit and it is set aside.

A. K. Namdarkhan
(Member)

R. Mungra
(Member)

A. Gathani
(Member)

Dated: 15 February 2021