

## **INDEPENDENT REVIEW PANEL**

**In the matter of:**

**Bospavy Ltd**

**(Applicant)**

**v/s**

**Pamplemousses/Riv. Du Rempart District Council**

**(Respondent)**

**(Cause No. 08/08/IRP)**

### **Decision**

#### **A. Background**

The Pamplemousses/Riv. Du Rempart District Council published an invitation for bids in two dailies during the period 29 March 2008 and 02 April 2008. The invitation for bids appeared twice in each daily and referred to "Derocking, Excavation and Carting Away of Works at New Market Fair, Triolet". The project value was estimated at Rs1.4M. The tender reference number was OAB/A1/07-08. The closing date for the submission of bids was the Wednesday 30 April 2008. Details of specifications, conditions of tenders and general information were contained in the Standard Bidding Documents issued by the Procurement Policy Office. On 16 May 2008, the Chief Executive of the Pamplemousses/Riv. Du Rempart District Council notified the Director of Bospavy Ltd that in respect of tender OAB/A1/07-08 the selected bidder was Square Deal Multipurpose Co-operative Society for a contract price of Rs1,414,487.50. On 20 May 2008, Bospavy Ltd dissatisfied with the decision of the District Council challenged the procurement proceedings by a fax (dated 17 May 2008). On 21 May 2008, the District Council informed the Director of Bospavy Ltd that a challenge made under

Section 43 of the Act should be made on the prescribed form. The appropriate prescribed form for challenge was duly submitted by Bospavy Ltd on 22 May 2008. A meeting chaired by the Chief Executive of the District Council was held on 02 June 2008 with the Director of Bospavy Ltd to discuss his challenge. The reason as to why the bid of Bospavy Ltd was not retained by the District Council was explained and same confirmed by letter dated 02 June 2008. On 17 June 2008, Bospavy Ltd still not satisfied with the reasons given by the District Council made an application to the Independent Review Panel to review the decision of the District Council.

## **B. Grounds for Review**

*“The offer was lowest and fully comprehensive. They have submitted all additional information as requested. The council would make big saving by awarding Bospavy Ltd this project. Bospavy Ltd is a registered Grade G Contractor at the MPI and is hence qualified for the contract.”*

## **C. The Evaluation Process**

Four bids were received by the closing date of 03 April 2008. The bids were opened on the same day and were forwarded to a Bid Evaluation Committee composed of 5 independent evaluators drawn from the Moka/Flacq District Council (3) and Black River District Council (2) respectively. The Bid Evaluation Committee met for the first time on 05 May 2008 and carried out a detailed evaluation of the 4 bids received. Two bids were rejected as one was considered to be non-responsive and the other was substantially above the estimated cost estimate. At this meeting the Bid Evaluation Committee was aware that Bospavy Ltd had submitted a bank guarantee from SBM Ltd 061GTBA081210002 valid until 29 July 2008.

Furthermore, the Bid Evaluation Committee, pursuant to Section 37(1) of the Public Procurement Act 2006 recommended that clarification be sought from “Bospavy Ltd” and “Square Deal Cooperative Soc.” On 06 May information were requested from these two bidders. The required information were to be submitted by noon, on Thursday 08 May 2008 at the latest. The Bid Evaluation Committee also recommended that should Bospavy Ltd fail to submit the missing information as required then the second lowest bidder could be considered. Both bidders duly complied and submitted requested information.

The Bid Evaluation Committee met again on 09 May 2008 to finalise the bid evaluation report. It was then that the Bid Evaluation Committee took note that the bid security provided by Bospavy Ltd did not have a validity period extending for a period of 30 days beyond the expiry of the validity period of its bid. The bid of Bospavy Ltd was rejected as it has provided a bid security valid for 90 days instead of 120 days. The Bid Evaluation Committee analysed the clarifications submitted by Square Deal Cooperative Society and found the bid to be substantially responsive. It recommended the award of the contract to that bidder for the sum of Rs1,414,487.50 (inclusive VAT). The Departmental Tender Committee approved the recommendations on 14 May 2008.

#### **D. Submissions and Findings**

The rejection of the bid of Bospavy Ltd is based on the fact that the bid security submitted was valid for only 90 days while it should have been for 120 days (Clause 17.6). It is noted that while the procurement process was still in progress, Bospavy Ltd submitted an amended Bank Guarantee dated 09 May 2008 valid up to 23 August 2008. The document was submitted on 14 May 2008. At the meeting held on 02 June 2008 with the District Council representatives to discuss his challenge the Director of Bospavy Ltd, Mr N. Seepaul pointed out that he had been informed by someone from the District Council about non-compliance of his bid security. Hence the amended version submitted.

The methodology used by the Bid Evaluation Committee to evaluate the bids is questionable. Section 27 of the Instructions to Bidders of the Bid Document deals with the examination of bids and determination of responsiveness. Clause 27.3(c) stipulates that to determine whether a bid is substantially responsive the public body should examine whether the bid complies with the bid validity period requirements and (g) whether a bid security, in the amount and format prescribed has been provided. If a bid is not substantially responsive it shall be rejected by the public body, Clause 27.4. The need to determine whether a bid is substantially responsive is also stipulated in Section 37(3)(b)(ii) of the Public Procurement Act 2006. Section 28 allows for correction of errors in substantially responsive bids. Clause 28.1 allows for arithmetic errors and Clause 28.3 for submission of additional information on issues that do not affect the principal that bids should be substantially responsive.

Thus, if as stressed by the Chief Executive, at the meeting of 02 June 2008 and by the District Council during the hearing that Bid Security was a vital requirement and was not subject to any “negotiation”

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then the Bid Evaluation Committee should have considered the bid of Bospavy Ltd to be non-responsive at its meeting of 05 May 2008. No clarifications should have been sought from the bidder. The only substantially responsive bidder would have been examined in accordance with Section 28 of the Instructions to Bidders.

Based on the documentary evidence and submissions made to the Panel, it is considered that the whole procurement proceeding has been vitiated. In our view, the seeking of clarifications means that there are no major deviations on the part of Bospavy Ltd in respect of the expiry of the validity period of its bid.

We thus recommend the annulment of the decision of the District Council to award the contract to Square Deal Multipurpose Cooperative Society Ltd.

Mr N. Kistnen, Counsel for the Respondent submitted that the application should be set aside because the statutory delay to determine the application has not been complied with. He referred to Section 45(7) of the Public Procurement Act 2006 and stressed on the urgency required in the procurement process.

The Panel shares his view that procurement proceedings should be dealt with diligently, but we do not agree for obvious reasons that this Panel should set aside an application if a decision cannot be made within one month. We say so for the following reasons:

1. There is no specific provisions in the law which cater for the fate of decisions reached after the statutory delay of one month.
2. It would be most unreasonable if a decision reached some days after the statutory period of one month would be considered as ineffective and not executory.
3. The Panel is doing its best to ensure compliance with that statutory delay of one month, but we are of the view that it would be most unfair for the Applicant to find its application set aside through no fault or shortcomings on its part. Furthermore, it is the Panel's duty to ensure that the statutory delay be complied with, we therefore cannot understand how upon failure on its part to do so, it should penalise the Applicant of good faith by setting aside its application.

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**(Dr. M. Allybokus)**  
***Chairperson***

**(H. D. Vellien)**  
***Member***

**(Mrs E. Hanoomanjee)**  
***Member***

**Dated this 31<sup>st</sup> of July 2008**