

INDEPENDENT REVIEW PANEL

In the matter of:

MSJ LTD (Unicorn)

(Applicant)

v/s

Ministry of Health & Quality of Life

(Respondent)

(Cause No. 21/08/IRP)

Decision

A. Background

1. The Ministry of Health & Quality of Life through open advertised bidding invited bids for the supply of Pharmaceutical Products on 10 June 2008. The tender reference TU/95/6/8 (pharmaceuticals) was for the procurement of Health Sector Goods for the year 2008-2009. The closing date for submission of bids was 30 July 2008 at noon at the Central Procurement Board. The public opening was on the same day at 12.30 hrs.
2. Two addenda and a corrigendum were issued by the Public Body
 - (i) Addendum no. 1 issued on 09 July 2008 specified the quantity and gave additional details on some of the items to be procured. Four items were covered under this addendum.
 - (ii) Addendum no. 2 was issued on 24 July 2008 following an advice received from the Procurement Policy Office on 23

July 2008. The Public Body had written to the Procurement Policy Office on 16 July to request the advice. This addendum is relevant to this present request for review.

The addendum states:

“Following representations from few potential bidders the clarifications made:

(a) clause 15

Local bidders should submit their offer in Mauritian Rupees. However, they may chose to quote in Mauritian Rupees based on the exchange rate prevailing at the time the bidding document was prepared.

Payment to local suppliers will be effected in Mauritian Rupees where applicable, the amount to be paid to local suppliers will be adjusted based on the rate of exchange declared in the Bill of Entry.

This Addendum has been published on the website of the Ministry of Health and Quality of Life.”

(iii) The corrigendum was issued on 10 July 2008 and clarifies ITB 32.5(d) – Evaluation criteria for items/lots. The corrected clause reads as follows:

“Bids have been invited for items only. Bidders may bid for any one or more items. Bids will be evaluated for each item and the contract will comprise the item(s) awarded to the successful bidder.

Note that the part concerning lots is deleted.”

3. The Central Procurement Board set up a Bid Evaluation Committee to examine and evaluate the 61 bids received. The bidding documents had packaged the drugs into 11 lots and each drug was given an item number e.g. AA1 or SC1. The first letter indicates whether the drug must be air freighted or sea freighted (A or S) and the second letter indicates the level of criticality, with A being the highest level. The Bid Evaluation Committee submitted its report on 18 September 2008. From the evaluation report it is observed that:

(i) 16 bidders did not submit the required bid security

- (ii) 18 bidders did not submit a valid bid security
- (ii) 3 bidders submitted a bid security in the name of their local representative
- (iv) 1 bidder submitted a bid which was subject to price fluctuation at buyer's account.

Thus, 38 bidders were considered to be non responsive and only the remaining 23 responsive bidders were evaluated further.

Paragraph 10 of the evaluation report should be corrected to include bids no. 30 and 58 as they are also non responsive.

4. During the period 11 September 2008 to 18 September 2008 the Central Procurement Board submitted the names of the recommended bidders for the items in each of the 11 lots. The approved prices which were considered to be fair and reasonable were also given. Pursuant to Section 40(3) of the Public Procurement Act 2006 the Senior Chief Executive of the Ministry of Health & Quality of Life informed all the bidders accordingly on 14 October 2008.
5. On 15 October 2008, MSJ Ltd (Unicorn) dissatisfied with the decision of the Ministry of Health & Quality of Life challenged the procurement proceedings. The bidder wrote to the Senior Chief Executive of the Ministry of Health & Quality of Life requesting a reply to its challenge of 15 October 2008. On 27 October 2008, following an advice from the Central Procurement Board, the Senior Chief Executive of the Ministry of Health & Quality of Life informed the bidder that his bid had not been retained because his quoted prices were not fixed as per ITB 16.5.

On 29 October 2008, the bidder still not satisfied with the reasons given by the Senior Chief Executive of the Ministry of Health & Quality of Life made an application to the Independent Review Panel to review the decision of the Public Body, for the 26 items on the list it had submitted with his challenge of 15 October 2008. The Independent Review Panel notified the Senior Chief Executive of the Ministry of Health & Quality of Life on 20 October 2008 of the application of MSJ Ltd (Unicorn) and on 30 October 2008 informed the Ministry of Health & Quality of Life that pursuant to Section 45(4) of the Public Procurement Act 2006, the procurement proceedings for Ref. No. TU 95/6/8/MHPQ/PHARM/07-08/OAB1 for supply of Pharmaceutical Products, Annual Tender 2008-2009 has been suspended. On 03 November 2008, the Independent Review Panel informed the Ministry of Health & Quality of Life that the suspension refer only to bids submitted by MSJ Ltd (Unicorn).

B. Grounds for Review

The grounds for review submitted by MSJ Ltd (Unicorn) are as follows:

“Unfair rejection of our bid as the contents of addendum no. 2 issued by the Ministry of Health & Quality of Life on 24 July 2008 have not been taken into consideration.”

C. The Evaluation Process

The Bid Evaluation Committee appointed by the Central Procurement Board to carry out the evaluation process submitted its report on 18 September 2008. The Bid Evaluation Committee does make reference to invitation for bids and to the two addendum and the corrigendum issued by the Ministry of Health & Quality of Life.

D. Submission and Findings

1. For the purpose of reaching a determination for this request for review, the Independent Review Panel has considered the challenge made by MSJ Ltd (Unicorn), on 15 October 2008, the reply made by the Ministry of Health & Quality of Life to the Applicant. On 27 October 2008, the grounds for review submitted on 29 October 2008, the contents of addendum no. 2 issued by the Ministry of Health & Quality of Life on 24 July 2008 and ITB 16.5 of the Bid Data Sheet.
2. ITB 16.5 of the bidding documents stipulates: Prices quoted by the bidder shall be **fixed**.

However, on 24 July 2008 and following an advice received from the Procurement Policy Office on 23 July 2008, the Ministry of Health & Quality of Life addressed addendum no. 2 to all bidders. This addendum clearly modifies the terms of ITB 16.5. By allowing bidders to quote in Mauritian Rupees based on the prevailing exchange rate on 30 July 2008 and effecting payment to them based on the rate of exchange declared on the Bill of Entry clearly implies that prices quoted were not meant to be fixed. This was confirmed in a letter from the Ministry of Health & Quality of Life to the Independent Review Panel on 10 November 2008 –

comments by Ministry on application for review made by MSJ Ltd (Unicorn).

3. The Independent Review Panel considers that the decision of the Bid Evaluation Committee to reject the bid of MSJ Ltd (Unicorn) because “Price not fixed – subject to fluctuation at buyer’s account” was wrong. The Bid Evaluation Committee was aware of the addendum no. 2 and quotes it on pg 3 of its report. However, on pg 6 of the same report as a mandatory requirement, it is stated that price quoted shall be fixed. This statement on pg 6 clearly contradicts the contents of addendum no. 2 on pg 3. The bidder ascertains that he has prepaid its bid on the basis of the contents of addendum no. 2.
4. For this specific reason, the Independent Review Panel finds that there is merit in the application and recommends a re-evaluation of bids of the applicant for the 26 items in dispute.

(Dr. M. Allybokus)
Chairperson

(H. D. Vellien)
Member

(Mrs E. Hanoomanjee)
Member

Dated this 26th of November 2008