

INDEPENDENT REVIEW PANEL

In the matter of:

Proguard Ltd/Abra Marketing

(Applicant)

v/s

Mauritius Police Force

(Respondent)

(Cause No. 26/08/IRP)

Decision

A. Background

1. The Police Department invited tenders for the supply of “CCTV Street Surveillance System for Flic en Flac” through the restricted bidding process from four short listed firms on 22 August 2008. A pre-bid meeting followed by a site visit was held on 29 August 2008. The deadline for the submission of bids was 25 September 2008 at 13.30 hrs. The bid opening took place on the same day at 14.00 hrs at the Central Procurement Board.
2. A two envelope procedure was adopted for evaluating the proposals, with the technical evaluation being completed prior to any financial proposal being opened and evaluated. The evaluation criteria for technical proposals are specified at ITB 32, pg 38, of the bidding documents. It is also indicated that only bidders with technical proposals scoring at least 70 marks will be considered further. A combined technical and price score worked out as per the following formula was used:

Weighted Total Score = Technical score x 0.70 + Price score x 0.30

The best evaluated proposal is the one with the highest total weighted score.

3. The four invited firms submitted their bids by the closing date of 25 September 2008 and three of them were found to be technically substantially responsive. Their price envelopes were opened for financial evaluation.
4. On 12 November 2008 the Police Department informed the bidders that the proposed selected bidder was Messrs Brinks (Mtius) Co. Ltd and the contract sum, inclusive of a contingency sum of Rs50,000 and 15% VAT, was Rs34,264,966.51. A dissatisfied bidder Proguard Ltd/Abra Marketing, challenged the decision of the Public Body on 17 November 2008. The Public Body promptly replied to the challenge on 19 November 2008 and informed the aggrieved bidder of the reasons for which its bid had been considered non responsive. The bidder still not satisfied with the reasons given by the Central Procurement Board, through the Public Body, made an application for review to the Independent Review Panel on 01 December 2008.
5. The Public Body was informed on 01 December 2008 that the procurement proceedings were suspended until the appeal was heard and determined by the Independent Review Panel. On 04 December 2008 the Public Body, the bidder and his Counsel were informed that a hearing had been fixed for 10 December 2008 at 13.30 hrs at the Independent Review Panel.

B. Grounds for Review

The grounds for review submitted by Proguard Ltd/Abra Marketing are as follows:

- (i) The Bid Security, per se, is not a criterion for selection.*
- (ii) The Bid Security is only a Guarantee that ensures that the Responsive Bidder, if selected, will not default.*
- (iii) The Bid Security is only a Guarantee to ensure the submission of a Performance Bond from the Responsive Bidder and it cannot on a **purely** and mere technical error and/or mistake be a ground for the disqualification of the Responsive Bidder.*
- (iv) The mere fact that the Bidder has submitted the lowest financial bid imposes a duty upon the Public Body to request for clarification of*

- any “technical error” the more so that the Project is being funded out of Public Fund.
- (v) The fact that the Bid Security was issued in the name of “PROGUARD LTD ONLY” is in the nature of a mere “error” or “omission” which is not a ground justifying the disqualification of the Bidder, under **Clause 30.1 of the Instructions to Bidders**.
 - (vi) The Bidder has submitted a substantially responsive Bid based upon the contents of the Bid **itself** and this excludes any weight given to the Bid Security. The present Bid Security issued to “Proguard Ltd” only is an omission which, if rectified, would not unfairly affect the competitive position of other bidders presenting the financially lowest bid. (**Clause 29.2(c) of the Instruction to Bidders**).
 - (vii) Since the Bidder has “in substance” and on the “contents” complied with all conditions of the Bidding Documents, notwithstanding the ambiguity conveyed by the “validity period of bid security”; the Public Body ought to have sought clarification from the Bidder, on this issue, before issuing the letter of intent dated 12 November 2008.
 - (viii) In carrying out the exercise of evaluation of Bids, the Public Body and/or the Central Procurement Board was wrong to have concluded that the Bidder’s bid was non-responsive simply because the Bid Security had been issued in the name of “Proguard Ltd” only. It is the contention of the Bidder that, under **Clause 35 and Clause 36 of the Instructions to Bidders**, for evaluation purposes, the Bid Security is a Document which does not fall within the **prescribed** criteria and methodology of evaluation of Bids.
 - (ix) The Central Procurement Board has failed to take into account that the evaluation criteria and methodology as disclosed in the bidding documents at **Clause 35 of the Instructions to Bidders**, tend to exclude “Bid Security” as a criterion.
 - (x) Since the Bid Security of the Bidder was sent together with the Technical Bid, at the opening of the said Bid, if the Public Body is right (in that the Bid Security was defective and non-responsive), it would have there and then declined to proceed to evaluate the Financial Bid of the Bidder and would have disqualified the Bidder outright.
 - (xi) The Public Body and/or the Central Procurement Board has failed to apply the relevant principles in the evaluation of the Bidder’s bid which tends to offend against the highest standards of transparency and equity.

- (xii) *The Public Body has created a material ambiguity and uncertainty on the validity of Bid Security at **Clause 20.2(e) of the Instructions to Bidders** (pg 23).*
- (xiii) *If the Bidder (Proguard Ltd/Abra Marketing) were to be found non responsive on the Bid Security validity, the Public Body ought to have taken this decision as far back on 25 September 2008 with the opening of the Technical Bid which included the Bid Security of the Bidder.*
- (xiv) *Had the Bidder been non responsive, the Public Body ought not to have considered the Financial Bid of the Bidder at all after the opening of the Financial Bid on 31 October 2008.*
- (xv) *Failure by the Public Body to insert the precise and exact date to demand for payment in the Bid Security (Bank Guarantee) submitted by the Bidder thereby proposing a defective Bid Security (pg67 of Tender Documents) to the Bidder. (Annex 1)*
- (xvi) *By proposing such a defective format of the Bid Security, the Public body has induced the Bank to cause an unintentional error thereby inserting “25 December 2008” after the words “30 days after the expiration of the Bidder’s Bid”.*
- (xvii) *It was the duty of the Public Body to seek clarification during the examination of the Bid, from the Bidder to facilitate evaluation under **Section 37 of the Public Procurement Act 2006** on the issue of the finality of the precise date in the Bid Security to clear any ambiguity.*
- (xviii) *The Bidder has not benefited from a “Fair Treatment” from the Public Body the more so that it appears to have been the lowest and best evaluated Bidder.*

C. The Evaluation Process

The Central Procurement Board appointed a Bid Evaluation Committee to evaluate the four bids received by the closing date of 25 September 2008. The list of bidders, as read at the public opening was as follows:

- A. Brinks (Mtius) Ltd
- B. Huawei Technologies (Mtius) Ltd
- C. Proguard Ltd/Abra Marketing
- D. Harel Mallac Technologies Ltd

The Bid Evaluation Committee indicates clearly in its report dated 14 October 2008 that two important documents will be available for checking at the financial appraisal stage i.e. the bid security and the BOQ. At pg 3 Section 7.1 of the report, the Bid Evaluation Committee indicates the requirements that it examined at the technical evaluation stage and those that it deferred until the financial evaluation stage. Following the technical evaluation, the Bid Evaluation Committee considered two bidders not to be responsive and recommended the remaining two for financial appraisal.

On 23 October 2008, the Central Procurement Board asked the Bid Evaluation Committee to proceed with the evaluation of one of the bids rejected and that the Central Procurement Board will take a decision with respect to the shortcoming noted in due course.

The Bid Evaluation Committee submitted an addendum to its first technical evaluation report on 25 October 2008. The bid evaluated was considered to be substantially responsive and was also recommended for financial evaluation. Thus, the three bidders retained for financial evaluation were:

- A. Brinks (Mtius) Ltd
- B. Proguard Ltd/Abra Marketing
- C. Harel Mallac Technologies Ltd

The financial bids were opened in public on 31 October 2008 at 11.30 a.m. at the Central Procurement Board. The Bid Evaluation Committee submitted its financial evaluation report on 01 November 2008.

The Bid Evaluation Committee examined the bid security of the bidders and concluded that the bid security of two of the bidders did not comply with the requirements. The third bidder Brinks (Mtius) Ltd was considered to be fully compliant with the financial requirements and was recommended for an award for a contract sum of Rs34,264,676.05 inclusive of 15% VAT and contingency sum of Rs50,000.

D. Submission and Findings

1. The Panel has examined the bidding documents issued by the Public Body to ensure that the Bid Evaluation Committee had adhered strictly to the provisions of the documents. Section III of the document contains the criteria that the purchaser will use to evaluate a bid and determine whether a bidder has the required

- qualifications. Section IV contains the bidding forms that must be completed by a bidder and submitted with its financial proposal. The format for the bid security (bank guarantee) referred to in section II of the Bidding Data sheet at ITB 20, pg 20, is included in that Section IV. Thus, the Panel concurs with the methodology used by the Bid Evaluation Committee to consider all financial issues after having carried out the technical evaluation. No bidder has been penalised by this methodology which is in accordance with the bidding documents.
2. ITB 20.1 makes it mandatory for a bidder to furnish a bid security as part of its bid. ITB 19.1 specifies that the bid validity period shall be 90 days and ITB 20.2 fix the bid security amount at Rs200,000. ITB 20.2(e) makes it mandatory for a bid security to remain valid for a period of 30 days beyond the validity period of the bids. A bid not accompanied by a substantially responsive bid security shall be rejected as non-responsive according to ITB 20.3.
 3. The aggrieved bidder submitted a bid security (bank guarantee) dated 26 September 2008 from the Mauritius Post and Cooperative Bank Ltd. The bid security issued in the name of Proguard Ltd was valid up to thirty days after the expiration of the bidder's bid or on 25 December 2008 which ever is earlier. To be fully compliant the bid security should have been in the name of Proguard Ltd/Abra Marketing and should have been valid for 120 days, i.e. up to 22 January 2009. For these two reasons the Central Procurement Board considered the bid to be non responsive.
 4. At the hearing, Counsel for the Applicant made a strong case that ITB 30.1 allows for correction of errors and omissions and submitted evidence to show that both companies, Proguard Ltd and Abra Marketing have the same share holders. He went on to say that this may explain why the invitation to tender was addressed to Proguard Ltd/Abra Marketing. The Panel agrees with Counsel that this error could have been corrected as ITB 20.3 refers to a substantially responsive bid security.
 5. However, the Panel concurs with the Central Procurement Board that the bid is non responsive as the mandatory condition for the bid security to remain valid for a period of 30 days beyond the validity period of the bids has not been fulfilled. ITB 30.1 does not allow for correction of such errors.
 6. The technical evaluation report at Section 1 (pg 1) indicates that the estimated cost of the project is Rs50M. The terms of reference

indicate that the project will be carried out in collaboration with the Mauritius Telecom and the Central Electricity Board. The Panel assumes that the costs of the inputs of the Mauritius Telecom and the Central Electricity Board are included in the estimated project cost of Rs50M. Section 8 of the Regulations provides for negotiations under special circumstances. In view of the substantial price difference that exists between the bid of the proposed selected bidder and the aggrieved bidder, the Public Body and/or the Central Procurement Board may consider carrying out negotiations with Brinks (Mtius) Ltd.

The Panel concurs with the Central Procurement Board and finds that the bid of the Applicant is non responsive and therefore dismisses the application for review.

(Dr. M. Allybokus)
Chairperson

(H. D. Vellien)
Member

(Mrs E. Hanoomanjee)
Member

Dated this 17th of December 2008