

INDEPENDENT REVIEW PANEL

In the matter of:

Maxi Clean Co. Ltd

(Applicant)

v/s

Municipal Council of Curepipe

(Respondent)

(Cause No. 25/08/IRP)

Decision

A. Background

The Municipal Council of Curepipe through open advertised bidding in the local press invited bids for: The provision of services for Street, Market, Bus Terminals and Market/Fair Cleaning, Refuse Collection and Disposal, including carting away of post cyclonic waste for regions 1 to 6 for a period of three years renewable on a yearly basis subject to the Client being satisfied of the performance of the contractor during preceding period. Clause ITB 5.4(a) of the BDS (pg24) indicates that in the event a contract is not likely to be renewed, the client shall give notice to the contractor in writing one month before the contract is due to be renewed. Section VI (pg48) of the bidding documents describes in details the works to be carried out in each of the six regions included in the contract.

The closing date for the submission of bids was 21 August 2008 by 13.30 hrs at latest and bids were opened on the same day in public at 14.00 hrs.

Independent Review Panel – Decision No. 01/09

Two addenda were issued on 28 July 2008 and 05 August 2008 respectively:

- (i) Addendum no. 1 amended ITB 5.4(c) to bring it in line with the provisions of the evaluation criteria sheet (pg66) and the number of Supervisors was increased to 6 on the bid form (pg30), and
- (ii) Addendum no. 2 replaced word Contract by Contractor.

The Central Procurement Board set up a Bid Evaluation Committee to evaluate the three bids that had been received by the closing date of 21 August 2008 and it submitted its report on 09 September 2008. The three bids were considered to meet the eligibility criteria, to be substantially responsive and satisfied the requirements of the technical criteria. On pg 9 of its report, the Bid Evaluation Committee concludes that the bid by the lowest bidder, Atics Ltd, was substantially responsive to the bid requirements including option for separate collection and disposal of green wastes.

The ranking of bidders in terms of financial offers in ascending order are given in Table A4 (pg8) of the report.

		Quoted sum for 36 months including VAT	AMOUNT INCLUSIVE OF VAT FOR 36 MONTHS	AMOUNT INCLUSIVE OF VAT FOR 36 MONTHS	
		Rs	Rs	Rs	
Sr No.	Bidder	A	B	A+B	RANK
		Street, Market, Bus Terminal, Market/Fair Cleaning, Refuse Collection and Disposal	Carting away of Post Cyclonic Wastes		
1	Atics Ltd	47,592,000.00	98,000.00	47,690,000.00	1
2	Maxiclean Co. Ltd	47,952,000.00	149,500.00	48,101,500.00	2
3	Securiclean Co. Ltd	48,337,199.64	229,000.00	48,566,199.64	3

B. Grounds for Review

The grounds of review are as follows:

- “1. The Municipal Council of Curepipe has failed to consider to severe/split the tender by regions so that in the event that the regions were split, i.e. regions 1, 2 and 4 ought to have been awarded to Maxi Clean Co. Ltd and regions 3, 5 and 6 to Atics Ltd.*
- 2. It was the duty of the Municipal Council of Curepipe to split the awards in compliance with Section 29.3 of the Instructions to Bidders that clearly and unambiguously provide that:
29.3 The Public Body shall indicate in the (Bidding Data Sheet) BDS as to whether the contract shall be allocated to one bidder as a lot for all the sites in which case the comparison of bids will be done as per the lowest evaluated bid for the lot. The Public Body may in case of an important number of sites opt to compare the bids per site and rank the bidders as per the lowest evaluated bid per site. This may involve splitting the contract among two or more successful bidders,
in as much as the tender ought and should have been split region by region thereby saving the Municipal Council of Curepipe approximately Rs4,608,000 for the duration of the contract.*
- 3. By deciding to award the tender on the economical aspect of the said tender and taking into account that the tender provided the submission of its bid on a region wise basis, thereby already splitting the tender exercise, it was in the manifest interest of the Municipal Council of Curepipe and of its bidder to award the tender on a regionwise basis.*
- 4. The decision towards the tender to the lowest bidder as a whole is wrong. Unfair and unjust and against the spirit of the tender exercise.”*

C. The Evaluation Process

- 1. The Central Procurement Board set up a Bid Evaluation Committee to evaluate the three bids received by the closing date of 21 August 2008. The Committee submitted its report on 09 September 2008 and recommended the award of the contract to*

Independent Review Panel – Decision No. 01/09

Atics Ltd for the total sum of Rs47,690,000 for a period of 36 months including VAT @15% and excluding the option for separate collection and disposal of green wastes. The Bid Evaluation Committee based itself on Note 8 (pg61) of section VII, “Activity Schedule”, of the bidding documents to reach its conclusion. The note states: *“Tenderers should note that the grand total (A+B) will be considered for the evaluation and award of this tender. The price of items against which no price is entered will not be considered and the offer will be rejected”.*

Sub-Total (A): Contract – Street, Market, Bus Terminals and Market/Fair Cleaning, Refuse Collection and Disposal.

Sub-Total (B): Contract – Carting away of post cyclonic wastes.

2. The Central Procurement Board informed the Chief Executive Officer of the Municipal Council of Curepipe on 10 October 2008 that it had approved the award of the contract for all the six zones, including the carting away of post cyclonic wastes, to Atics Ltd for the quoted sum of Rs47,690,000 including VAT for a period of 36 months. The award excludes the cost for separate collection and disposal of green wastes quoted by the bidder. The Bill of Quantities, giving the details of the bid of Atics Ltd, was annexed to the letter of 10 October 2008. The third paragraph of the letter requested the Chief Executive Officer to proceed in accordance with Section 40 of the Public Procurement Act 2006 within five days of the receipt of the letter and to revert to the Central Procurement Board after the expiry of the seven days period from notification.
3. The Chief Executive Officer of the Municipal Council of Curepipe informed the Central Procurement Board on 21 October 2008 that due to the increase in the price for the provision of the services the Council had to split the contract. Thus, it proposed that only the contract for regions 1, 2, 3 and 5 be awarded to Atics Ltd without the option for the specific items under region 2. The works for regions 4 and 6 were to be carried out in-house. The option for weekly separation and disposal of green waste was to be done at a later stage upon instruction by the Council. The Chief Executive Officer further explains to the Central Procurement Board that because of the splitting of the contract it had not been possible for him to adhere to paragraph 3 of the letter of 10 October 2008. The approval of the Central Procurement Board was sought for the above course of action. It is noted that no financial details were provided to the Central Procurement Board in this letter.

Independent Review Panel – Decision No. 01/09

4. The Central Procurement Board informed the Chief Executive Officer of the Municipal Council of Curepipe on 23 October 2008 that the matter was outside its purview and that the implementation of projects was solely the responsibility of the Public Body. The Panel, however, notes that at this stage no award had yet been made to the selected bidder.
5. On 06 November 2008, the Chief Executive Officer of the Municipal Council of Curepipe informed Maxi Clean Co. Ltd that the Central Procurement Board had approved the award of the contract for Regions 1 to 6 to Atics Ltd for the quoted sum of Rs47,690,000 including VAT for a period of 36 months.
6. Maxi Clean Co. Ltd, on 12 November 2008 challenged the decision of the Public body and specified the grounds for its challenge in a letter 12 November 2008 from its Attorney, Mr Jaykar Gujadhur.
7. The Central Procurement Board provided material for reply to the challenge of Maxi Clean Co. Ltd on 17 November 2008 and the Public Body transmitted the information to the aggrieved bidder on 20 November 2008. Reference is made to Note 8 (pg61) of Section VII, “Activity Schedule”, of the bidding documents. The letter concludes that the bids of Atics Ltd in the sum of Rs47,690,000 (total A+B) is the lowest evaluated offer, for Regions 1-6, as Maxi Clean Co. Ltd has quoted for the sum of Rs48,101,500 (total A+B).
8. Maxi Clean Co. Ltd being dissatisfied with the explanations of the Public body made an application for review to the Independent Review Panel on 26 November 2008. The Chief Executive Officer of the Municipal Council of Curepipe was informed of the application of Maxi Clean Co. Ltd on 27 November 2008. Subsequently, the procurement proceedings for Contract Ref. No.: AOB No. MCC/011/08 for Cleaning of Street, Market, Bus Terminals and Market/Fair, Refuse Collection and Disposal, including Carting Away of Post Cyclonic Waste for Regions 1-6 were suspended until the appeal was heard and determined by the Review Panel. On 28 November 2008, the Panel requested the Chief Executive Officer of the Public Body to make available all relevant information and documentation in respect to that procurement contract. The Public Body and the aggrieved bidder were requested to attend a meeting with the Panel on 10 December 2008.
9. At the meeting of 10 December 2008, the Chief Executive Officer of the Public Body submitted a letter to the Panel in accordance with Section 45(5) of the public Procurement Act 2006 certifying that urgent public interest considerations require the procurement

Independent Review Panel – Decision No. 01/09

proceedings to proceed. The grounds of the urgent public interest were given as required by Section 45(6). The Panel in accordance with Section 45(7) lifted the suspension on 10 December 2008 and informed all parties concerned. A second meeting was scheduled for 22 December 2008.

10. At the meeting held on 22 December 2008, the Panel took note of a letter dated 17 December 2008 from the Chief Executive Officer of the Public Body stating that the Municipal Council of Curepipe stands guided by the instruction of the Central Procurement Board as per letter dated 10 October 2008. The Chief Executive Officer of the Public Body then submitted another letter dated 19 December 2008 to the Panel. The Panel was informed, among other things, that the Public body had changed the stand taken as per its letter dated 17 December 2008. The Panel was of the opinion that the letter was not explicit enough and wanted a firm undertaking from the Chief Executive Officer of the Public Body on the course of action that he was adopting. A third meeting was fixed for 26 December 2009.
11. The Chief Executive Officer of the Public Body submitted a letter to the Panel on 26 December 2008 whereby he confirmed the withdrawal of the certificate that urgent public interest considerations require the procurement proceedings to proceed. He also informed the Panel that for the month of January 2009 and as an emergency procurement the Council had extended the contract of two of the three companies presently offering the services. The third company had declined the offer of one-month extension.
12. A final meeting of the Panel was held on 08 January 2008. It was at this meeting and upon request that the Public Body made available copies of letter dated 21 October 2008 to the Central Procurement Board and the reply of the Central Procurement Board dated 23 October 2008. The letter of offer to Atics Ltd dated 06 November 2008 and its reply dated 13 November 2008 were also made available on the same day. The Panel had made a request for all relevant information and documentation in respect to that procurement contract to the Public Body on 28 November 2008. The Panel considers that the Public Body should have submitted these documents earlier.
13. The letter of 06 November 2008 from the Municipal Council of Curepipe referred to the meeting of the Tender Committee held on 04 November 2008 wherein it was decided to allocate the contract

Independent Review Panel – Decision No. 01/09

to Atics Ltd for Regions 1, 2, 3 and 5 only. The details for each region are given as follows:

Region	Sum (VAT inclusive) – Rs	Option for separate green waste	
1	9,324,000	25,000	For 36 months renewable on a yearly basis
2	8,100,000	25,000	For 36 months renewable on a yearly basis
3	9,130,000	25,000	For 36 months renewable on a yearly basis
5	6,300,000	5,000	

The letter also states that the Central Procurement Board has approved the award of contract to Atics Ltd. However, the Panel notes that the award being made by the Municipal Council of Curepipe was not the one approved by the Central Procurement Board.

The exact duration of the contract for region 5 is not specified as it is stated that the Council is envisaging the possibility of effecting the work in-house. The said letter does not refer to the reduction in the scope of the works for Region 2 nor to the carting away of post cyclonic wastes.

14. Atics Ltd confirmed acceptance of the award for the contracts for Regions 1, 2, 3 and 5 and for the sum specified. For region 2 Atics Ltd lists the following items: Les Casernes, Camp Carol, SSR B. Garden, Bigarade cemetery and Trou aux Cerfs and the quoted sum is Rs8,100,000. From the annex 1 to the letter of 10 October 2008 from the Central Procurement Board, for the same items the quoted sum for Region 2 is Rs10,080,000.

D. Submissions and Findings

1. The Central Procurement Board informed the Chief Executive Officer of the Municipal Council of Curepipe on 10 October 2008 that it had approved the award of the contracts for the six regions for a period of 36 months, inclusive of the items within each region and the cost for carting away of post cyclonic wastes, to Atics Ltd for the quoted sum of Rs47,690,000 including. The basis for the award is Note 8 of Section VII, “Activity Schedule”, of the bidding

documents. This information was confirmed by the Central Procurement Board to the Chief Executive Officer of the Municipal Council of Curepipe on 17 November 2008 and was transmitted to Maxi Clean Co. Ltd in response to its challenge of 12 November 2008. The same information was made available to the Independent Review Panel. However, it was only at the meeting of 08 January 2009 that the Independent Review panel was informed about the letters exchanged between the Municipal Council of Curepipe and the Central Procurement Board (21 October 2008 and 23 October 2008), the award made to Atics Ltd on 06 November 2008 and the letter of acceptance of the selected bidder on 13 November 2008. The letters of offer and acceptance refer to different conditions and the contract being awarded is not the one approved by the Central Procurement Board, as per letter of 10 October 2008. The representative of the Municipal Council of Curepipe was of the opinion that the letter of 23 October 2008 from the Central Procurement Board was explicit and had given the Council the authority to award the contract to its best financial interest. Thus, it resorted to a reduction in the number of zones (from 6 to 4) and removed certain items within region 2. It would appear that the Municipal Council of Curepipe was so convinced about the justness of its decision that in spite of a detailed financial comparison by the aggrieved bidder, it issued a certificate of urgent public interest considerations requiring the procurement proceedings to proceed. The Independent Review Panel was informed that the Central Procurement Board had not been apprised about the terms and conditions under which the contract was awarded. When the Central Procurement Board provided material for a reply to the challenge of the aggrieved bidder, on 17 November 2008, it was not aware that the scope of the contract had been reduced with respect to a number of regions, the number of items in one region and the proposed duration of the contract for one region.

2. Section 29 (pg 20) of the bidding documents refers to the evaluation and comparison of bids and Section 29.3 states: *“The Public Body shall indicate in the BDS as to whether the contract shall be allocated to one bidder as a lot for all the sites in which case the comparison of bids will be done as per the lowest evaluated bid for the lot. The Public Body may in case of an important number of sites opt to compare the bids per site and rank the bidders as per the lowest evaluated bid per site. This may involve splitting the contract among two or more successful bidders”*. ITB 29.3 (pg25) of the BDS provides the methodology to be used for comparison of bids as follows: The comparison of bids will be “as per the lot for 100% of the sites contained in the Regions”. In the absence of a

definition for the item “lot” in the document and based on the above statement the term can only refer to the contract, as a whole, and as defined at Section V “Special conditions of contract” at paragraph GCC1(q) (pg45) of the bidding documents. The regions and sites contained in the regions are defined in Section VI (pg48) of the bidding documents. Thus, at all times the Public body intended to award the contract to one bidder alone. In the light of the above, the additional statement at ITB 27.3 (pg25) to the effect that “The Municipal Council may for administrative reason decide not to opt for more than one contractor”, is superfluous.

3. The above methodology of the evaluation of the bids is confirmed by the Note 8 at pg61. The subtotal (A) used in the formula refers to the total quoted sum for all six regions (inclusive of sites in each regions) and subtotal (B) refers to the quoted sum for the carting away of post cyclonic wastes. Thus, the Panel considers that the Central Procurement Board was correct to approve the award of the contract to Atics Ltd for the quoted sum of Rs47,690,000 including VAT for a period of 36 months.
4. As per letter dated 06 November 2008, an offer is made to Atics Ltd for four regions (1, 2, 3 and 5) and for a sum of Rs32,854,000 including VAT for 36 months. However, for region 5 the Public Body reserved the right to reduce the duration. Thus, the actual contract value has been reduced by more than 30%. This reduction will increase further if the contract period for region 5 is reduced as envisaged by the Public Body.
5. The letter of 06 November 2008 to Atics Ltd refers to Region 2 for an award sum of Rs8,100,000 and as per the Bill of Quantities the items within the region are
 - (i) region
 - (ii) SSR Botanical Garden
 - (iii) Bigarade Cemetery
 - (iv) Trou aux Cerfs

The quoted sum of Atics Ltd in its bid of 21 August 2008 amounts to Rs10,080,000. However, in its letter of acceptance of 13 November 2008, Atics Ltd accept the offer of Rs8,100,000 and details Region 2 as Les Casernes, Camp Caval, SSR Botanical Garden, Bigarade Cemetery and Trou aux Cerfs. Thus, Atics Ltd has reduced its quoted price from Rs10,080,000 to Rs8,100,000. However, Clause 25 (pg17) of the bidding documents clearly states that no change in the price or substance of the bid shall be sought,

Independent Review Panel – Decision No. 01/09

offered or permitted except as required to confirm the correction of arithmetic errors.

6. It would appear that around 19 December 2008, it suddenly dawned upon the Public Body that it would make a saving of more than Rs1M yearly if the contract is split and informed that it stayed guided by the decision of the Independent Review Panel. But, the Public Body did not mention that unilaterally it had already split the contract contrary to the recommendation of the Central Procurement Board contained in its letter of 10 October 2008. Mr J. Gujadhur, in the challenge of 12 November 2008 had been very explicit on the issue of savings to be made by the Municipal Council of Curepipe.
7. Two factors mitigate against the application of this belated decision of the Public Body to recommend splitting of the contract. The bidding documents do not contain any clause which allow the evaluation of the contract on a region-by-region basis. Additionally, if any such evaluation exercise is carried out it would have to include the bid of Securiclean (Mtius) Ltd, which was also substantially responsive. Though there is convergence of views between the Public Body and the Applicant, the Panel cannot recommend something that is not provided for in the bidding documents.
8. In view of,
 - (i) the substantial differences between the contract awarded by the Public Body and the one evaluated and recommended for an award by the Central Procurement Board, and
 - (ii) the different stands adopted by the Public Body at the meetings held,

the Panel considers that the whole exercise has been vitiated. It, therefore recommends the annulment of the decision of the Public Body to award part of the contract, as per its letter dated 06 November 2008, to Atics Ltd. It is further recommended that a fresh bidding exercise be carried out with a well-defined scope of works and methodology to be adopted for evaluation and award of the contract.

Independent Review Panel – Decision No. 01/09

(Dr. M. Allybokus)
Chairperson

(H. D. Vellien)
Member

Dated this 29th of January 2009