

INDEPENDENT REVIEW PANEL

In the matter of:

CRISIL Risk & Infrastructure Solutions Ltd
(Applicant)

v/s

Road Development Authority
(Respondent)
(Cause No. 27/08/IRP)

Decision

A. Background

1. The Road development Authority invited requests for proposals on 03 June 2008 for the provision of transaction advisory services for the Design, Construction, Financing, Operation and Maintenance of the Port Louis Ring Road Project and Harbour Bridge Project in Mauritius. The closing date for the submission of bids was 09 July 2008. Through an addendum issued on 02 July 2008 the closing date was postponed to 01 August 2008.

In the introduction section (pg1) of the Request for Proposals it is specified that “Government of Mauritius through the Road Development Authority wishes to test the feasibility of implementing this project as a Public-Private Partnership (PPP) in terms of Public Private Partnership Act 2004”.

2. The scope of the services to be provided by the transaction advisor, representing a team of suitably qualified and experienced financial,

technical and legal advisors to assist the Road Development Authority are:

Stage 1: Undertake a comprehensive feasibility study to establish and qualify the feasibility of the Project.

Stage 2: Subject to Government decision to proceed, provide advisory services in the procurement of an appropriate service provider to deliver the project, including its marketing.

3. The total sum budgeted for remuneration of professional services under these terms of reference is capped at US\$1,500,000, split on the following basis:

Stage 1: PPP Feasibility study of the project – US\$600,000

Stage 2: Procurement of the project cycle including marketing of the project – US\$900,000

A remuneration schedule is set out in Section 5.2 (pg12) of the bidding documents. Bidders are advised to bid within the total sum budgeted and to allocate resources according to the remuneration schedule. Section 6.2.2.1 (pg12) indicates that “the fee quote is inclusive of VAT”.

4. Transaction advisors were required to submit their proposals in two envelopes as follows:

Envelope 1: Technical and local (Mauritian) counterpart proposals

Envelope 2: Price proposal

Section 6.3 (pg17) of the bidding documents details the evaluation criteria. It is specified that bid evaluation will be based on a point system and the weightage awarded for each element and the threshold score for each are as follows:

<u>Evaluation Element</u>	<u>Weightage</u>	<u>Threshold Score</u>
Technical proposal	70	65%
Mauritian counterpart proposal	10	60%
Price proposal	20	N/A
Total	100	

The bid which achieves the highest total points out of 100 will be recommended by the Bid Evaluation Committee as the preferred transaction advisor.

5. Section 6.4(pg19) of the bidding documents deals with bid evaluation and it is stated that “The price proposals of only those bids whose technical and local counterpart proposals meet or better the respective threshold scores will be considered”.
6. The eight bids received were opened in public on the closing date of 01 August 2008 at 14.00 hrs. The bids were evaluated by a Bid Evaluation Committee appointed by the Central Procurement Board. It submitted its technical evaluation report on 16 September 2008 and its financial evaluation report on 07 October 2008 following a Public Opening of financial bids on 25 September 2008. The Committee then held negotiations with the proposed selected bidder on 18 and 19 November 2008.
7. The Road Development Authority notified SPP Project Solutions (Pty) Ltd, South Africa on 21 November 2008 that its bid to provide the advisory services had been selected for an award for the sum of US\$600,000 inclusive of VAT for Phase 1 and US\$900,000 inclusive of VAT for Phase 2. A copy of the letter was forwarded to the unsuccessful bidders to notify them of the decision.
8. CRISIL Risk & Infrastructure Solutions Ltd challenged the decision of the Public Body on 26 November 2008. The Road Development Authority responded to the challenge on 04 December 2008. The aggrieved bidder still dissatisfied with the decision of the Public body submitted an application to the Independent Review Panel on 11 December 2008, the Public body was informed that the procurement proceedings for the provision of transaction advisory services had been suspended until the appeal is heard and determined by the Review Panel.

B. Grounds for Review

The grounds for review are as follows:

“I. The Grounds of our Challenge raised via letter dated November 26, 2008:

- (i) The financial bids for the captioned project were opened on 25 September 2008 (Ref: CPB/RDA/RHBOR/57/08) when only two bidders i.e. CRISIL Risk & Infrastructure Solutions Limited (CRIS) and SPP Project Solutions (Pty) Limited (SPPPS) were retained for further evaluation. The fact that CRIS was selected for further evaluation*

would show that our technical bid was accepted by Road Development Authority.

- (ii) *Under Clause 24(6) of the Public Procurement Act 2006, the results of the technical evaluation of the bids should be announced before opening the financial bids. The financial bids were either opened before the technical evaluation of the bids or the results of the evaluation were deliberately either withheld or not announced. Hence the section 24(6) of the Act was clearly violated.*
- (iii) *The comparative bids submitted by CRISIL Risk & Infrastructure Solutions Ltd (CRIS) and SPPPS as announced by during the public opening of the financial offers were as under:*
 - (a) **CRIS**
Phase 1: 600 000 USD including VAT
Phase 2: 900 000 USD including VAT
 - (b) **SPPPS**
Phase 1: 600 000 USD excluding VAT
Phase 2: 900 000 USD excluding VAT
- (iv) *From the foregoing bids, it is clear that as compared to the original bid of SPPS, our bid was competitive and much lower because our bid was including VAT whereas the bid of SPPPS was excluding VAT, although the base amounts were identical. This would mean a saving of about US\$225,000 being VAT, if our bid was accepted.*
- (v) *Under clause 5.2, 6.2.2.1 and 6.4 of the RFP, all the bids should be inclusive of VAT. As the bid of SPPS was exclusive of VAT, it should have been treated as non-responsive as per clause 6.4 of RPF.*
- (vi) *Under clause 37(1) of the Public Procurement Act 2006, the financial proposals of the bidders cannot be modified at any stage. For your immediate reference, the afore-mentioned clause is reproduced below.*

37. Examination and evaluation of bids

1. *A public body may seek clarification during the examination of bids from any bidder to facilitate evaluation, but it shall neither ask nor permit any bidder to change the price or substance of his bid.*

- (vii) *As mentioned in Point (ii) above, the financial bid of a total of US\$1,500,000 of SPPPS was excluding VAT. However, as per RDA letter 21 November 2008, RDA awarded the contract to SPPPS mentioning the total amount as US\$1,500,000 BUT including VAT.*
- (viii) *Clause 24.9(b) makes it clear that price (i.e. the bid amount) shall not be subject to negotiation. However, only the cost of reimbursable items may be negotiated. The bid of SPPPS does not contain any reimbursable items like out-of-pocket expenses. VAT being a tax payable to the Government of Mauritius cannot be a reimbursable item.*
- (ix) *From the foregoing, it is clear that award of the contract to SPPPS was in clear violation of clause 24(6) and clause 37(1) of the Act because the technical evaluation results were either withheld or not announced and further SPPPS was permitted to change the price of its bid by as high an amount as US\$225,000 being VAT.*

II. The RDA Response to our Challenge: Ref Fax no. RDA/P/1434 V2

The RDA response to our challenge raised via letter dated November 26, 2008 does not address all the grounds of our challenge.

We reproduce the RDA response and our concerns to these responses.

Point no. 4

A: The price quoted by SPP Project Solutions (Pty) Ltd is inclusive of VAT. This has been confirmed during negotiations with the bidders

As mentioned in Points I, II & III, during the opening of the financial bid, the SPPPS bid was declared to be exclusive of VAT and it is evident that negotiations were carried out to make it inclusive of VAT. This is in direct conflict to Clause 37(1) of the Public Procurement Act 2006 and the reasons of conflict have been raised in our above mentioned grounds of challenge; Point no. VI, VII & VIII. Since there is a discrepancy between the amounts announced during public opening of financial bids and the Amount of Award, we think it is within

our right to inspect the original financial bid of SPPPS and the correspondence/ emails exchanged between RDA and SPPPS.

B: The bids were assessed according to the bid evaluation criteria given in the Request for proposal document and the bid from SPP Project Solutions (Pty) Ltd has achieved the highest total score.

We have still not been informed by RDA our respective Technical scores. As per clause 24(6) of the Public Procurement Act 2006, the Technical Scores of both the bidders viz. CRIS and SPPPS should have been announced before the financial bids on 25 September 2008. This issue was raised in our above mentioned grounds of challenge; Point no. II. We have not been provided by RDA the details as yet. Since the Act requires the declaration of the technical evaluation results, we think, we were denied our right to inspect the technical scores received by each bidder, prior to opening of the financial offers.

C: The Bid of SPP Project Solutions (Pty) Ltd has therefore been retained for award

Apart from the non-conformity with clauses 24(6), 24.9(b) & 37(1) of the Public Procurement Act 2006, raised in our Challenge letter via point nos. V, VI, VII & VIII, we had also pointed out the non-conformance of Clauses 5.2, 6.2.2.1 and 6.4 of the RFP document via point no. V. In its response letter, RDA appears to have intentionally chosen not to reply to us on the issue of their not conforming to the above clauses.”

C. The Evaluation Process

The Central Procurement Board appointed a bid Evaluation Committee to evaluate the eight bids received by the closing date of 01 August 2008. The Bid Evaluation Committee in its report of 16 September 2008 concluded that only two bidders, SPP Project Solutions – South Africa and CRISIL – India satisfied the minimum threshold levels set for technical proposal and Mauritian counterpart proposal respectively. The Central Procurement Board approved the recommendation that the financial bids of the two substantially responsive bidders be opened for evaluation.

The public opening of financial proposals was held at the Central Procurement Board on 25 September 2008 at 11.00 a.m. The Chairman announced results of the Technical Evaluation and then proceeded with the opening of the financial proposals of the two qualified bidders. The quoted prices were registered as follows:

Bidder	Quoted Price
(i) SPP Project Solutions, South Africa	USD 600,000 exc. VAT (Phase 1) USD 900,000 exc. VAT (Phase 2)
(ii) CRISIL – India	USD 600,000 inc. VAT (Phase 1) USD 900,000 inc. VAT (Phase 2)
Variant bid for	USD 960,000 inc. VAT (Phase 1)
Additional scope of works	USD 540,000 inc. VAT (Phase 2) USD 750,000 inc. VAT (success fee component)

The two financial proposals were submitted to the Bid Evaluation Committee for evaluation and recommendation.

The Bid Evaluation Committee submitted its report on 07 October 2008 and concluded that on the basis of overall score, as defined in Section 6.3 of the bidding documents, the preferred bidder is SPP Project Solutions Pty Ltd, South Africa. The Committee recommended that SPP Project Solutions Pty Ltd, South Africa be convened for negotiations prior to contract award on nine issues.

D. Submissions and Findings

It is the contention of the Applicant that the provisions of Section 24(6) of the Act have not been complied with by the Central Procurement Board. Section 24(6) reads as follows:

“The financial proposals of bidders who have secured the minimum pass mark in the technical evaluation shall then be considered and evaluated by the public body after a public announcement of the results of the technical evaluation.”

In the Request For Proposals bidding document issued by Road Development Authority in May 2008, there is no reference to a public announcement of the results of the technical evaluation, but it is provided in section 6.4 that the price of proposals of only the bids whose technical and local counter part proposals meet or better the respective

threshold scores set out in the bid evaluation criteria described in Section 3, will be considered.

In a letter dated 11 December 2008, the Applicant referred to the public announcement of the financial proposals held on 25 September 2008, but in the same paragraph, it stressed also on the fact that “Despite repeated requests by CRISIL and written communication we did not receive any details of the technical evaluation from Road Development Authority, which is in clear violation of Clause 24(6) of the Public Procurement Act 2006”. If this letter dispels doubts as to the public announcement which should have been made, on the other hand the interpretation given to the terms “Results of Technical Evaluation” remains still a live issue.

The issue of VAT

In order to examine the financial proposal of the bidder in respect of the issue of VAT, one must take into account the following:

- (a) The requirements contained in the Request for Proposals prepared and issued by the Road Development Authority.
- (b) The interpretation given to the terms “zero rated” by the Central Procurement Board.
- (c) The bidder’s intention at the time of submitting its bid.
- (d) The interpretation of the Bid Evaluation Committee.

The requirements contained in the Request for Proposals

Under the heading Price Proposal, in Section 6.2.2, it is stated that “VAT must be specified as a separate total for each of the feasibility study and the PPP procurement stages. While VAT will be paid pro rata for each delivery item in each stage of the assignment it should be indicated as a total sum per stage for purposes of this submission. Please note that the fee quoted is inclusive of VAT”.

It is stipulated in Section 6.1.3 that foreign firms providing proposals must become familiar with local conditions and Laws and take them into account in preparing their proposals, whereas Section 6.1.10 allows firms to ask for clarification on the terms of reference or any of its annexure up to close of business 14 days before the deadline for the submission of bids.

The interpretation of the Central Procurement Board

One of the Vice Chairman of the Central Procurement Board, at the public opening of the financial proposals held on 25 September 2008, announced that the quote fees submitted by SPP Project Solutions Pty Ltd, South Africa were exclusive of VAT. The representative of the preferred bidder was present, but did not react to this announcement, in order to bring the necessary clarifications.

On 16 October 2008, the Chairman of the Central Procurement Board wrote “approved and recommended with price to be exclusive of VAT and negotiations/clarifications prior to award.”

The bidder’s intention at the time of submitting its bid

The preferred bidder explained in its financial proposal in a cogent manner, that the following stipulation will apply to the price quoted by it. “SPP Project Solutions (Pty) Ltd, South Africa, is a registered VAT vendor in South Africa. The supply of advisory service to the Road Development Authority by SPP Project Solutions (Pty) Ltd, South Africa is a zero rated supply. SPP Project Solutions (Pty) Ltd, South Africa has accordingly applied VAT on the fee proposal at a zero rate. Sub-contractors to SPP Project Solutions (Pty) Ltd, South Africa will raise VAT in accordance with the VAT legislation applicable to them. SPP Project Solutions (Pty) Ltd, South Africa does not anticipate being subject to VAT in Mauritius”. In clear terms the bidder distinguishes between its position and that of the subcontractors in respect of VAT in Mauritius.

The interpretation of the Bid Evaluation Committee

For the Bid Evaluation Committee, the qualifying statement made by SPP Project Solutions (Pty) Ltd, South Africa has no bearing on its responsiveness and that the fee proposed by SPP Project Solutions (Pty) Ltd, South Africa is deemed to include VAT as required by the Request For Proposals. This is in contradiction with the subsequent comment of the bid Evaluation Committee which highlights the fact that “SPP Project Solutions (Pty) Ltd, South Africa financial proposal is based on a zero rating for VAT in South Africa and assumes not to be subjected to VAT in Mauritius. This has to be ascertained but in any case, if VAT is applicable for the services, SPP Project Solutions (Pty) Ltd, South Africa has to bear the cost”.

All these factors lead the Panel to conclude that the bidder basing upon its own reasons, inserted VAT as zero rated in its price proposal with respect to its own component.

Negotiations

It is trite Law that except in special circumstances, negotiations cannot be conducted in respect of the price of the bid. There are several instances in our Public Procurement Act, which prohibit negotiations on price. One example is Section 24 (9)(b) where it provides that if the price has been a factor, the fee for services shall not be subject to negotiation.

True it is that the Bid Evaluation Committee listed nine items for negotiation/discussion prior to award with SPP Project Solutions (Pty) Ltd, South Africa and none of them referred to the VAT. It is also true that the Bid Evaluation Committee would like to highlight “the fact that SPP Project Solutions (Pty) Ltd, South Africa financial proposal is based on a zero rating for VAT in South Africa and assumes not to be subjected to VAT in Mauritius. This has to be ascertained but in any case if VAT is applicable for the services, SPP Project Solutions (Pty) Ltd, South Africa has to bear the cost”.

Unfortunately indeed, this issue of VAT as well as three other issues which need to be highlighted, were subject to negotiations as revealed by the notes of proceeding dated 18 and 19 November 2008. Moreover, at this meeting, the representatives of the preferred bidder were called upon only to confirm whether the fee quoted was deemed to include VAT as applicable but not to ascertain the quantum of VAT applicable for services, as recommended by the Bid Evaluation Committee.

In response to a letter dated 28 November 2008, the officer in charge of the Road Development Authority wrote to the Applicant informing the latter among others that the price quoted by SPP Project Solutions (Pty) Ltd, South Africa has been confirmed during negotiations with the bidder. In the light of negotiations which confirmed that the proposal fee was inclusive of VAT, and the reply of the officer in charge of the Road Development Authority in the above mentioned letter dated 04 December 2008, it is not surprising upon taking cognisance of the two documents that one may conclude that negotiations took place on this issue.

We shall therefore hold that the application has merit in it and recommend a review of the decision for an award on the following grounds:

- (a) the short comings and deficiencies in respect of the financial proposal of the preferred bidder on the issue of VAT which it quoted zero rated in respect to its own output.
- (b) the interpretation of the latter's bid by the Chairman and Vice Chairman of the Central Procurement Board.
- (c) the ambiguity raised by the use of the terms negotiations both in the notes of proceedings dated 18 and 19 November 2008 of the Central Procurement board and the letter of the officer in charge of the Road Development Authority dated 04 December 2008.

The Panel wishes to make the following observations:

Before the Panel, Counsel for the Applicant forcefully contended that the term "results" in Section 24(6) would mean scores of each bidder. For the Respondent's Counsel, the term "results" in Section 24(6) referred to the minimum pass mark obtained without further specification of the scores of each bidder or qualified bidders.

The Standard Bidding Documents for Selection of Consultants clearly indicates that Section 24(6) should be complied with by reading aloud the scores of all the bidders. Admittedly the project is a Public Private-Partnership which is governed by the Public-Private Partnership Act of 2004. There is no provision in the said Act which excludes the bidding procedure of the Central Procurement Board in case of a Public-Private Partnership project from the purview of Section 24 of the Public Procurement Act 2006. On the other hand it is provided under Section 7 of the Public Private Partnership Act 2004 that the contracting Authority shall submit a request for proposal to the Board to obtain its written authorisation to advertise, invite, solicit or call for bids. Once referred to the Central Procurement Board, the latter has to perform its duties within the parameters of the Public Procurement Act, more specifically Section 24 of the Act in the present matter.

It is therefore a moot point as to whether the interpretation ascribed to the terms "Results of the Technical Evaluation" by the Central Procurement Board should be in compliance with Section 26(6) of the Act as explained by the mandatory Standard Bidding Documents for Selection of Consultants issued by the Procurement Policy Office.

Independent Review Panel – Decision No. 03/09

For the benefit of all stakeholders and in a spirit of transparency and fairness, the Panel feels that it would be highly advisable at this stage for the Procurement Policy Office to issue directive as to the proper procedure and requirements to be complied with by the bidders as well as the Central Procurement Board and the Bid Evaluation Committee in respect of procurement proceedings under Section 24 of the Public Procurement Act 2006.

Moreover, it has been observed that in the minutes of proceedings in respect of public opening of bids, that the names and/or capacity of the representatives of the bidder are not disclosed. It would be highly desirable that the names of the representatives appeared in the minutes of proceedings.

(Dr. M. Allybokus)
Chairperson

(H. D. Vellien)
Member

Dated this 20th of February 2009