

INDEPENDENT REVIEW PANEL

In the matter of:

A. & J. Maurel Construction Ltée

(Applicant)

v/s

Ministry of Environment & National Development Unit

(Respondent)

(Cause No. 09/09/IRP)

Decision

A. Background

1. The Ministry of Environment & National Development Unit invited tenders for the appointment of “Annual Drains and Road Contractors” through the restricted bidding process from eight short listed firms on January 2009. The deadline for the submission of bids was 27 January 2009 at 13.30 hrs. The bid opening took place on the same day at 14.00 hrs at the Central Procurement Board.
2. The eight contractors submitted their bids by the closing date of 27 January 2009 and the Evaluation Committee considered five of them to be technically substantially responsive and went on to appraise their financial proposals. The Bid Evaluation Committee submitted its report on 12 February 2009 and on 27 February 2009 the Public Body notified all bidders that “the tenderers listed hereunder have been selected for award of zone contracts as per attached schedule of Rates”.

Gamma Civic Ltd	Zones 1 and 3
General Construction Co. Ltd	Zones 2 and 4

3. A. & J. Maurel Construction Ltée a dissatisfied bidder challenged the decision of the Public Body on 04 March 2009. The Bidder still not satisfied with the reasons given by the Public Body made an application for review to the Independent Review Panel on 24 March 2009. The public Body was informed on 25 March 2009 that the procurement proceedings were suspended until the appeal was heard and determined by the Independent Review Panel.
4. The public Body submitted its comments on the application for review on 02 April 2009 and also certified, giving reasons, that urgent public interest considerations require the procurement proceedings to proceed. The Panel informed the aggrieved bidder on 03 April 2009, that pursuant to Section 45(4), (5), (6) and (7) of the Public Procurement Act 2006 the procurement proceedings were no longer suspended.
5. A hearing scheduled by the Panel on 09 April 2009 was postponed to 17 April 2009 as Counsel for the aggrieved bidder was abroad.

B. Grounds for Review

The Grounds for review are as follows:

“Absence of a “Contract Price” as defined in Tender G.C.C 1.1(h), being a requisite of a “Procurement Contract” (Section 46(1)(d) of the PPAAct 2006), the same constitute a Breach of duty imposed on Public Body, Section 43(1) of the said Act.”

C. The Evaluation Process

The Central Procurement Board appointed a Bid Evaluation Committee to evaluate the eight bids received by the closing date of 27 February 2009. Section II of the bidding documents contain the bidding data sheet and ITB 9 (pg30) reads “to replace wording relating to “Section VIII” by “Schedule of Rates, List of Prices and Schedule of Dayworks”. The wording replaced is “Bill of Quantities”. The Bid Evaluation Committee in its reports observes at Section 14.2 (pg9) “The marking for item of works in the Schedule of Rates ranges from 1 mark to 50 marks and the Bid Evaluation Committee considers that due consideration must have been given to the importance of each item while allotting the marks”. The marking of items are given in Table BDS 30.5 (Pg40-44) and

ITB 30.5 (pg32) gives the methodology to be used for computing the total score of a bidder. Based on these, the Bid Evaluation Committee calculated the total score for each bidder by zone and the information is provided in Table 7 (pg91) of the Evaluation Report.

	<i>Bid 2 – GCC</i>	<i>Bid 4 - Gamma</i>	<i>Bid 5 - AJMC</i>	<i>Bid 6 – Trio</i>	<i>Bid 7 - Trans</i>
	<i>Marks</i>	<i>Marks</i>	<i>Marks</i>	<i>Marks</i>	<i>Marks</i>
Zone 1	1193.16	1203.43	Not quoted	1032.93	1068.09
Zone 2	1118.57	1126.76	1047.40	1191.23	Not quoted
Zone 3	1190.85	1204.76	1083.13	1026.14	Not quoted
Zone 4	1193.78	1190.62	1024.19	949.97	1071.64

The Bid Evaluation Committee notes on pg 9 of its report that the aggrieved bidder had quoted for zones 2, 3 and 4 and that the rates quoted were generally on the high side.

D. Submissions and Findings

1. The Public Body has opted for a schedule of rates contract because it considers that it is not possible for it to predetermine the full extent of the proposed works to be carried out. Contractors were invited to insert their rates against items and these were then used in comparison against other contractor’s schedules in selecting the best tender. Due consideration was given to the importance to each item in the schedule by a system of allocating marks in the range of 1 to 50. This method does not allow for the prediction of a contract sum as actual quantities of work to be executed are not included. The main purpose of such a contract is therefore in valuing the items of work once they have been completed and measured.

Mr G. Glover, Counsel for the Applicant submitted that the absence of a contract price in a procurement contract constitutes a breach of duty imposed on the Public Body in virtue of Section 43(1) of the Public Procurement Act.

2. Before considering the contention of Counsel, it is useful to understand the following definitions under General Conditions of Contract and Special Conditions of Contract:

“General Conditions of Contract (pg 54):

- (b) Bill of Quantities means the priced and completed Bill of Quantities forming part of the Bid.*
- (h) The Contract Price is the price stated in the Letter of Acceptance and thereafter as adjusted in accordance with the provisions of the Contract.*

Special Conditions of Contract (pg 75):

GCC 1.1(b) Replace whole item by:

“The Schedule of Rates and Schedule of Dayworks mean the priced and completed schedules forming part of the Bid”.

GCC 1.1(h) The Contract Price is defined as the Works Order value, to be calculated on the basis of the agreed Schedule of Rates and Dayworks and quantities of work, corresponding to each project (comprising of works at one or a series of locations defined in the Works Order) separately and independently. For the assessment/determination of any requirement pertaining to a particular project executed under the contract, each Works Order shall be treated independently.

GCC 1.1(r) The intended Completion Date for the whole of the Works shall be:

The Contract shall be for a period of one year to be reckoned as from the date of receipt of the Letter of acceptance by the Contractor. The Public Body will issue Works Orders as and when required during the contract period to indicate the works to be executed under the Contract. The Contractor shall execute each Works Order independently from each other and shall treat each Works Order as a separate and independent contract. Except for requirements relating to Performance Bond, all provisions in the Conditions of Contract shall apply to each Works Order independently and separately.

The scope of works, commencement and completion date will be indicated on each Works Order. The Contractor shall execute all Works Orders which may be issued during the contract period irrespective of the Works Order value, duration of corresponding works and period of issue.”

3. Clause GCC 37 (pg78-79) Subsection 2 defines the method of payment to be adopted as follows:

“Sub-Clause 37.1 – Replace “Bill of Quantities” by “Schedule of Rates and Schedule of Dayworks”.

Sub-Clause 37.2 – “The Schedule of Rates and Schedule of Dayworks shall be used to calculate the value of each Works Order, independently and separately, to be issued under the Contract. The Contractor shall be paid for the quantity of works done under each Works Order at the rates comprised in the Schedule of Rates and Schedule of Dayworks”.

4. The Panel is sensible to the arguments raised by Counsel for the Applicant but considers that all information regarding this procurement exercise were clearly spelt in the various sections of the bidding documents and are not inconsistent with the definition of contract price.
5. Section 46(d) of the Public Procurement Act refers to contract price or its mode of determination. It is not defined in the Act itself but in both the General Conditions of Contract and the Special Conditions of Contract. A reading of Clause 1.1(b) and 1.1(h) of General Conditions of Contract and the Special Conditions of Contract 1.1(b), 1.1(h) and 1.1(r) lead the Panel to conclude that:

Firstly the Bill of Quantities which generally appears in other contracts and yields the final contract price is replaced by the Schedule of Rates and Schedule of Dayworks which mean the priced and completed schedules forming part of the bid.

Secondly in the Special Conditions of Contract, GCC 1.1(h) (pg 75), the contract price is defined as the works order value to be calculated on the basis of the agreed schedule rate and dayworks and quantities of work contrary to the contention of Counsel for the Applicant who relies solely on the definition given to Contract Price under General Conditions of Contract in 1.1 (h). In our view, the special conditions of contract should have precedence over the General Conditions.

In these circumstances and for the above reasons, we are unable to say that the absence of contract price in this procurement contract constitutes a breach of duty.

Furthermore, it is the contention of Counsel for the Respondent that the challenge should have been lodged within five days after

the opening of bid in virtue of Regulation 48(2) made under the Public Procurement Act. In our view, the Applicant, as rightly pointed out by its Counsel, can either institute challenge proceedings within five days after the opening of the bid or within 15 days after the decision of the Chief Executive Officer in relation to its challenge. The Applicant has chosen the second alternative. The Panel does not consider its failure to elect for the first one as fatal for being outside the prescribed delay as suggested by Counsel for the Respondent.

For reasons highlighted above, the Panel finds no merit in the application which is accordingly dismissed.

(Dr. M. Allybokus)
Chairperson

(H. D. Vellien)
Member

(Mrs. E. Hanoomanjee)
Member

Dated this 12th of May 2009