

INDEPENDENT REVIEW PANEL

In the matter of:

Asea Brown Boveri Ltd

(Applicant)

v/s

Central Electricity Board

(Respondent)

(Cause No. 17/09/IRP)

Decision

A. Background

1. On 25 March 2009, the Central Electricity Board invited, through open advertised bidding, bids from suppliers/manufacturers for 22KV Indoor Switchgear Panels. The deadline for the submission of bids was 29 April 2009 at 13.30 hrs at the Central Procurement Board. However, at the request of the Public Body, the Central Procurement Board re-scheduled the closing date for the submission of bids for 06 May 2009 at 13.30 hrs. The bids were to remain valid up to 02 September 2009.
2. The five bids received were opened in public on 06 May 2009 at 14.00 hrs at the Central Procurement Board. Two of the bidders proposed an optional offer each. Thus, a total of seven offers were received. The Central Procurement Board appointed a Bid Evaluation Committee to evaluate the offers received.

B. Grounds for Review

The Grounds for Review are as follows:

- “1. *Central Electricity Board (CEB)/Central Procurement Board (CPB) was wrong not to have accepted the offer of the Applicant inasmuch as the bid submitted by the latter:*
 - (a) was lower than the bid submitted by Kabelek Engineering Ltd*
 - (b) was substantially responsive; and*
 - (c) met all the qualifications criteria set out in the bidding documents.*
2. *CEB/CPB was wrong to have awarded the bid to Kabelek Engineering Ltd inasmuch as the latter bid was the highest evaluated bid.*
3. *CEB/CPB was wrong to have rejected the bid of the Applicant on the premise that it was technically non-responsive on the basis of major technical deviations for the reasons set out in its letter dated 16 June 2009 marked as Annexure 1. Applicant humbly submits that there have been no major deviations from the technical specifications set out in the tender documents for the reason contained in Annexure 2.*
4. *Applicant submits that its bid is substantially responsive in that it complies with all functional requirement of the specifications set out in the tender documents and has in fact offered features superior the minimum requirements in terms of personnel safety, operational reliability and minimised energy losses.”*

C. The Evaluation Process

1. The Bid Evaluation Committee submitted its report on 21 May 2009. The report indicates that only five offers satisfied all the mandatory requirements and qualifying criteria. Two of these five offers did not satisfy the mandatory technical qualification requirement specified at Section ITB 18.2(5) (pg 38) of the bidding document “The circuit breaker unit of the switchgear panels being offered shall be of withdrawal type and floor mounted. Bids not complying with above shall be disqualified from the evaluation.”

2. Only the following three offers, according to the Bid Evaluation Committee, qualified for detailed technical analysis

Offer from Bidder 2 - Asea Brown Boveri Ltd
 Base Offer from Bidder 3 - Schneider Electric France
 Base Offer from Bidder 4 - Kabelek Engineering Ltd

The offer of Bidder 2, Asea Brown Boveri Ltd was considered to contain 10 major technical deviations and was declared technically non-responsive. No major deviations were observed in the remaining two offers and they were considered to be technically responsive.

3. The Bid Evaluation Committee carried out a detailed financial appraisal of the two technically responsive bids. Table 4: Financial Analysis on pg 7 of the report indicates the following:

Bid No.	Bidder	Make	Country of origin	Quoted Price DDU excl. VAT (EUR)	Equiv. Quoted Price DDU excl. VAT (MUR)	Analysis Price (MUR)	Rank
1	Schneider Electric	Schneider	France/ Turkey	1,365,356.00	59,515,868.04	59,813,447.38	1
2	Kabelek Engineering Ltd	Schneider	France/ Turkey	1,465,440.00	63,878,529.60	63,878,529.60	2

4. However, Schneider Electric France, the lowest responsive bidder, added to qualifications to its offer regarding the “General Conditions of Contract”. The bidder wanted the governing law to be Law of Switzerland in lieu of the Law of Mauritius and has amended the specified liquidated damage from 1% to 0.5% for each week of delay in delivery. The Bid Evaluation Committee considered the offer not to be administratively acceptable.
5. The Bid Evaluation Committee recommended the award of the contract for the supply of 22KV Indoor Switchgear Panel to Kabelek Engineering Ltd for its base offer as it was the only qualified and substantially complying bidder. The contract sum was EUR 1,465,440.00 (Euros one million, four hundred sixty five thousand, four hundred and forty only) excluding VAT.
6. The Central Procurement Board informed the Public Body on 29 May 2005 that it had approved the award of Tender OAB/CPB/35/2009 – Procurement of 22KV Indoor Switchgear Panel Kabelek Engineering Ltd for its base offer and for a total amount of EUR 1,465,440, exclusive of VAT. Pursuant to Sections

40(3) and (4) of the Public Procurement Act 2006, the Public Body notified all the bidders accordingly on 01 June 2009.

7. On 12 June 2009, Asea Brown Boveri Ltd dissatisfied with the decision of the Public Body made a challenge to the award. The Public Body obtained the relevant information from the Central Procurement Board and on 16 June 2009 informed the aggrieved bidder of the eleven major technical deviations that had rendered its bid technically non-responsive.
8. The aggrieved bidder still dissatisfied with the decision of the Public Body made an application for review to the Independent Review Panel on 30 June 2009. Pursuant to Section 45(4) of the Public Procurement Act 2006, the Panel, on 30 June 2009, suspended the procurement proceedings for the contract until the appeal was heard and determined.

D. Submissions and Findings

1. At the first meeting held on 17 July 2009, Mr R. Pursem of Counsel informed that the aggrieved bidder, Asea Brown Boveri Ltd, wanted to call an expert from abroad in support of its case. The Central Electricity Board took note of the request but did not formally object to the proposed course of action. But, at the meeting of 23 July 2009, Mr R. Chetty of Counsel representing the Public Body raised some objections on the procedure being adopted by the Panel. After hearing both Counsels, the Panel ruled that it will allow the witness who had come from abroad to depone and his testimony will be kept in abeyance. Since Counsel for the Public Body did not insist on its initial motion, the Panel is of the view that it can consider the evidence adduced by the witness of the Appellant.
2. The Panel has examined the bidding documents as well as the bid submitted by Asea Brown Boveri Ltd. The panel considers that the following sections of the bidding documents are of importance in determining the fate of this application.
 - (i) Section II – Bidding Data sheet (BDS), ITB 6.1 (pg 36)
The Central Electricity Board shall respond to any request for clarification received earlier than 21 working days prior to the deadline for submission of bids.
 - (ii) Section II - Bidding Data sheet (BDS), ITB 10.1 (pg 37)

The Bidder shall submit the following additional documents in its bid.

1. *Company Profile*
2. *Pamphlets/Catalogues/Drawings*
3. *The Guaranteed particular sheet attached to the bid form, and other requirements as mentioned in Specifications under Section V – Schedule of Requirements.*

- (iii) *Section II - Bidding Data sheet (BDS), ITB 12.1 (pg 37)*

Alternative Bids shall be considered

A Bidder may submit an alternative bid with a bid for the base case provided that the bid complies with ITB 18.2(5). The Purchaser shall consider bids offered for alternatives as specified in the Technical Specifications of Section VI, Schedule of Requirements. All bids received, for the base case, as well as alternative bids meeting the specified requirements, shall be evaluated on their own merits in accordance with the same procedures, as specified in the ITB 36.

- (iv) *Section VIII – Contract Forms, Contract Agreement (pg 116)*
The following documents shall constitute the Contract between the Purchaser and the Supplier, and each shall be read and construed as an integral part of the Contract:

- (a) *This Contract Agreement*
- (b) *Special Conditions of Contract*
- (c) *General Conditions of Contract*
- (d) *Technical Requirements (including Schedule of Requirements and Technical Specifications)*
- (e) *The Supplier’s Bid and original Price Schedules*
- (f) *The Purchaser’s Notification of Award*

3. The Panel concurs with the aggrieved bidder that all signed documents that carry the official seal of the company should be considered as part of the bidding documents. Thus, the Guaranteed Technical Particulars (GTP) and the dedicated drawings for each site do form part of the bid submitted by Asea Brown Boveri Ltd. Item 1.2.3 (pg 82) of the Guaranteed Particulars clearly specifies that the “Rated Making Capacity” should be 63 KA peak. Asea Brown Boveri Ltd concedes that there is a discrepancy between the information provided in the GTP and the drawings. The Panel has examined the bid of Asea Brown Boveri Ltd in details and find no reference to the rated maximum capacity of 63

KA peak. The only reference to rated maximum capacity is found in some test reports that date back as far as the year 1998. The Panel considers that these tests certificates are not acceptable and cannot have precedence over information provided in the GTP and dedicated drawings.

4. Asea Brown Boveri Ltd is an experienced supplier of the types of equipment being procured and at the hearing explained in details that its offer with respect to certain items was the most appropriate for the requirements of the Public Body. The Panel does not dispute the good faith of the bidder, but reiterates its observation made at the hearing that Asea Brown Boveri Ltd should have submitted an alternative bid together with the bid for the base case. Then as provided for by ITB 12.1 (pg 37) the alternative bid would have been considered on its own merit.
5. For some of the items, the aggrieved bidder considered that either the specifications were not clear enough or that there were discrepancies between them and the drawings. The Panel feels that the bidder should have clarified all these technical details with the Public Body, as provided for by ITB 6.1 (pg 36), before finalising its bid. The precise requirements of the Public Body would thus have been ascertained.
6. The Panel appreciates that the bidder did bring in an expert from abroad to present its case and that the Public Body, through its Counsel, allowed the bidder to expatiate on all the issues it felt aggrieved about. After having considered all the evidence adduced, the Panel is of the view that the bidder has not examined the provisions of the bidding documents in sufficient details before preparing and submitting its bid. If it had done so, a lot of the issues raised would have been clarified before the closing date for the submission of bids.

For all these reasons, the Panel finds that there is no merit in the application and consequently sets it aside.

(Dr. M. Allybokus)
Chairperson

(H. D. Vellien)
Member

(Mrs. E. Hanoomanjee)
Member

Dated this 23rd of September 2009