

INDEPENDENT REVIEW PANEL

In the matter of:

Geogas Trading SA

(Applicant)

v/s

State Trading Corporation

(Respondent)

(Cause No. 15/09/IRP)

Decision

A. Background

1. The State Trading Corporation through open advertised bidding, dated 24 March 2009, invited bids from local and overseas firms for the supply of 65,000 metric tons of Liquefied Petroleum Gas for the period 01 July 2009 to 30 June 2010 (CPB Ref: CPB/37/09). The deadline for the submission of bids was 23 April 2009 at 13.30 hrs and bids received were opened in public on the same day at 14.00 hrs.
2. The Central Procurement Board set up a Bid Evaluation Committee to examine and evaluate the four bids received. The Bid Evaluation Committee submitted its report on 30 April 2009. The Central Procurement Board approved the recommendations of the Bid Evaluation Committee and on 05 May 2009 requested the State Trading Corporation to award the tender to Petredec (Bermuda) Ltd, the only responsive bidder, at a premium of USD 174 per metric ton. The contract period was 01 July 2009 to 30 June 2010.

3. The State Trading Corporation on 07 May 2009 requested information from the Central Procurement Board on the reasons for which the quote of the other three bidders – Geogas Trading SA, Shell Eastern Trading (PTE) Ltd and Vitol Asia Pte Ltd were not retained. The Central Procurement Board provided the requested information on 14 May 2009 and the State Trading Corporation was requested to proceed with the notification of award.
4. The bid of Petredec (Bermuda) Ltd was considered to be on the high side by the State Trading Corporation. In accordance with circular no. 15 of 2008 of the Procurement Policy Office it requested the Central Procurement Board on 27 May 2009 to negotiate with Petredec (Bermuda) Ltd to receive an acceptable quote.
5. On 03 June 2009, the Central Procurement Board informed the State Trading Corporation that it had carried out negotiations with Petredec (Bermuda) Ltd and the negotiated premium was now USD 130 per metric ton. On the same day the Public Body notified all the bidders accordingly.
6. There were several exchanges of correspondences between an aggrieved bidder, Geogas Trading SA, and the Public Body during the period 03 June 2009 and 05 June 2009.
7. The aggrieved bidder filed a challenge through its attorney at Law on 08 June 2009. The State Trading Corporation responded to the challenge on 10 June 2009. Still dissatisfied with the decision of the public Body, Geogas Trading SA made an application for review to the Independent Review Panel on 17 June 2009.
8. On 17 June 2009, the Independent Review Panel informed the Public Body and the aggrieved bidder that pursuant to Section 45(4) of the Public Procurement Act 2006, the procurement contract was suspended until the appeal was heard and determined.
9. The Public Body certified, giving reasons, that urgent public interest considerations required the procurement proceedings to proceed. Pursuant to Section 45(4), (5), (6) and (7) of the Public Procurement Act 2006, the suspension on the procurement proceedings were lifted on 18 June 2009.
10. A third and final hearing was held on 26 October 2009.

B. Grounds for Review

The Grounds for Review are as follows:

- “(i) The STC was wrong to have declared the bid of the applicant non responsive in view of the provisions of section 2, 21(1) of the PPA and Regulations 28 and 29 made under the provisions of section 61 of the PPA. The bid of the applicant was ‘substantially responsive’ the more so that the applicant was the supplier in LPG gas for 2008-2009 and STC already had in its possession a guarantee of USD 3 Million. Geogas was therefore reliable operationally and financially and was ‘substantially responsive’ at the material time.”*
- “(ii) The STC, having accepted the bid security, albeit an hour and a half after the prescribed time, was debarred from rejecting the bid of Geogas on the ground that the bid security was not filed on time. Furthermore, there was evidence, filed at the time of submission of the bid, that ‘Credit Agricole Suisse’ a reputable Swiss bank had already instructed Barclays Bank Mauritius to issue the required bid security.”*
- “(iii) The STC was wrong to have failed to comply with the strict provisions of sections 21(1), (3)(b) and 39 (10 (b)) of the PPA. The STC ought to have launched new tenders instead of negotiating a lower price from the allegedly only substantially responsive bidder. The whole process of negotiation vitiates the philosophy behind the provisions of the law (PPA) which is to provide a transparent and ‘see through’ mechanism. The Bidder contends that the selection of the alleged sole responsive bid and the initiation of negotiations with it was unlawful in as much as there were no ‘special circumstances’ warranting the departure from the normal process which should have ended with a re-bidding process.”*

C. The Evaluation Process

The Bid Evaluation Committee appointed by the Central Procurement Board submitted its report on 30 April 2009. At page 4 and paragraph 8 of the report, the list of bidders and the bid prices, as read out in public opening, is provided in a tabular form. It is recorded that Geogas Trading SA had not submitted its bid

security in the sum of USD200,000. At page 6, paragraph d(i), it is further indicated that “in a footnote in the bid submitted, bidder (Geogas Trading SA) has indicated that the original bid bond to be provided by Barclays within the hour”. It was concluded that Geogas Trading SA had not met all mandatory requirements and was therefore not retained for further evaluation.

The Bid Evaluation Committee makes its recommendations at page 8, paragraph 17 of its report as follows:

“Recommendation

The BEC recommends that the contract be awarded to Petredec (Bermuda) Ltd, which is the only compliant Bidder, for the premium amount of USD 174 per Metric Ton and demurrage of USD 19,750 per day prorata for period of 01 July 2009 to 30 June 2010”.

A report on negotiations dated 03 June 2009 indicates that Petredec (Bermuda) Ltd had made a revised offer of USD130 per metric ton and a demurrage rate of USD18,000 per day on a pro-rata basis.

D. Submissions and Findings

1. For the purpose of this determination the Panel considers that Section 8, at pg 5, of the Instruction to Bidders, is of utmost importance. The Section reads as follows:

“8. Bid Security

(i) The Bidder shall submit with his offer an ORIGINAL Bid Security in accordance with the attached Proforma – Annex II – issued by a commercial/offshore bank registered and operating in Mauritius in favour of STC for the amount of USD 200,000 guaranteeing that he shall maintain the said offer during its validity period and shall enter into a contract, including the submission of a Performance Bond within ten (10) days of the date of notification of acceptance of the said offer.

(ii) Bids not supported by a valid Bid Security shall be rejected.

- 8.2 *This Bid Security in **Original** shall reach the **Chairman of the Central Procurement Board by Thursday 23 April 2009 up to 13.30 hrs, Mauritian time at latest.***
- 8.3** *The Bid Security shall be valid up to and including **Saturday 19 September 2009.***
- 8.4 *The Bid Security shall be forfeited without any notice, demand or other legal process if a Bidder fails to comply with any of the conditions contained in the Bid Security.”*
2. The aggrieved bidder does not dispute the fact that by the deadline for bid submission, 23 April 2009 at 13.30 hrs, it did not have in its possession an original bid security in favour of State Trading Corporation for the amount of USD200,000. The bidder did not try to hide the information either because it indicated in its bid that the original bid bond is to be provided by Barclays within the hour. Also, in its ground for review, the bidder indicates that “there was evidence, filed at the time of submission of the bid, that credit Agricole Suisse – a reputable Swiss Bank – had already instructed Barclays Bank Mauritius to issue the required bid security.”
3. The records at the Central Procurement Board indicate that the bid security was received at the Board at 15.00 hrs on 23 April 2009. This fact is also not disputed by the aggrieved bidder which states in its ground for review that “the State Trading Corporation, having accepted the bid security, albeit an hour and a half after the prescribed time, was debarred from rejecting the bid of Geogas Trading SA on the ground that the bid security was not filed on time”.
4. The Panel observes that at the public opening on 23 April 2009 at 14.00 hrs it was clearly indicated that Geogas Trading SA had not submitted the required bid security. It cannot be construed as argued by Mr G. Glover of Counsel, that by sending the bid of Geogas Trading SA to the Bid Evaluation Committee there has been a tacit acceptance of the bid. Further, at no point in time does the Central Procurement Board indicate that it had accepted the bid security provided by Barclays Bank Ltd. It is recorded that the said document was received at the Central Procurement Board at 15.00 hrs on 23 April 2009.
5. Section 36 of the Public Procurement Act 2006 deals with the opening of bids and Section 36(5) states without any ambiguity

that “no decision regarding the disqualification or rejection of a bid shall be taken or announced at the bid opening session”. Thus, the Panel considers that the Central Procurement Board had acted strictly within the provisions of the Public Procurement Act 2006 and that in accordance with Section 8(ii) of the ITB, the bid from Geogas Trading SA had to be rejected.

For all the reasons given above, the Panel considers that there is no merit in the application, which is accordingly dismissed.

(Dr. M. Allybokus)
Chairperson

(H. D. Vellien)
Member

(Mrs. E. Hanoomanjee)
Member

06 November 2009