

## INDEPENDENT REVIEW PANEL

In the matter of:

**P. Mungur & Son Ltd**

**(Applicant)**

**v/s**

**Human Resource Development Council**

**(Respondent)**

**(Cause No. 04/10/IRP)**

### **Decision**

#### **A. Background**

1. The Human Resource Development Council using the Open Advertised Bidding Method invited bids on 11 December 2009 for “Interior fit-out works at 4<sup>th</sup> and 5<sup>th</sup> floors – NG Tower – Ebene Cyber City”. Site visit/pre-bid conferences were held on 16 and 22 December 2009. The initial closing date for the submissions of bids was 08 January 2010. However, at the request of some bidders the closing date was rescheduled for 15 January 2010. Clarifications were issued to all bidders on 08 January 2010 and 13 January 2010. Six bids were received by the closing date of 15 January 2010 and they were opened on the same day. The pre-bid estimate for the works was Rs40 M inclusive of 1% for signage and artworks, 5% contingency and VAT at 15%.
2. The Bid Evaluation Committee appointed by the Human Resource Development Council concluded in its report submitted on 03 February 2010 that Nundun Gopee Co. Ltd was the only technically substantially responsive bidder. It recommended that

negotiations be held with the selected bidder as its bid price at Rs43,173,258.29 was some 17.5% higher than the estimated cost. The Public Body informed the Panel on 26 May 2010 that the bid was actually 7.5% higher than estimated cost. The error was considered to be a typing one.

3. The Public Body informed all bidders on 24 March 2010 that the evaluation of bids received had been completed and that Nundun Gopee Co. Ltd was the successful bidder for a contract price of Rs41,014,595.47.
4. P. Mungur & Son Ltd an aggrieved bidder challenged the decision of the Public Body on 30 March 2010. The Human Resource Development Council replied to the challenge on 09 April 2010. The reasons as to why the bid submitted by P. Mungur & Son Ltd was considered to be non-responsive and as such rejected were explained in details.
5. The aggrieved bidder still dissatisfied with the decision of the Public Body submitted an application for review to the Independent Review Panel on 20 April 2010. The Panel suspended the procurement proceedings on the same day until the appeal was heard and determined. The Public Body and the aggrieved bidder were informed accordingly. On 21 April 2010, the Public Body was requested for its comments on the application for review. The required comments were provided to the Panel on 27 April 2010 and 29 April 2010.

Hearings were held on 29 April 2010, 07 May 2010 and 17 May 2010.

## **B. Grounds for Review**

The Grounds for Review are as follows:

- “(a) The Applicant is dissatisfied with the decision of the Public Body with regards to the challenge filed by it on the abovementioned date.*
- “(b) It is the Applicant’s contention that all the technical specifications of the contract were met, contrary to what is being asserted by the Public Body.*
- “(c) The human Resource Development Council failed to award the contract to P. Mungur & Son Ltd which was the bidder with the lowest evaluated substantially responsive bid which*

*meets the qualification criteria specified in the bidding document.*

- (d) It is the contention of the Applicant that Nundun Gopee Co. Ltd was in a position of conflict of interest inasmuch it is the owner of the building save and except that part of the said building which is the subject matter of the present contract. As such Nundun Gopee Co. Ltd has disqualified itself and therefore it was not a responsive bid.*
- (e) The Human Resource Development Council negotiated with Nundun Gopee Co. Ltd when it should not have done so.*
- (f) Being the lowest substantially responsive bid, the Human Resource Development Council ought to have awarded the contract to the Applicant (P. Mungur & Son Ltd).*
- (g) The Human Resource Development Council has awarded the said contract to a bidder which was disqualified to tender because of conflict of interest.”*

### **C. The Evaluation Process**

The Human Resource Development Council appointed a 6-member Bid Evaluation Committee to evaluate the six bids received for the interior fit out works contract number HRDC/ADM/N/430(A). The evaluation process was carried out in strict accordance with the provisions of the bidding documents. The Bid Evaluation Committee in its evaluation report submitted on 03 February 2010, concluded that:

- (i) The bid from Nundun Gopee Co. Ltd was the only technically substantially responsive bid.
- (ii) The bid from Nundun Gopee Co. Ltd at Rs43,173,258.29 was the highest of the six bids received and was some 17.5% higher than the estimated cost.

The Committee then went on to recommend price negotiations with Nundun Gopee Co. Ltd the lowest evaluated substantially responsive bidder. This recommendation is in line with the provisions of the Public Procurement Act 2006 and took into consideration the urgency of the present exercise as the Public Body had to vacate its present premises by June 2010.

Nundun Gopee Co. Ltd on 18 March 2010 informed the Public Body that following the meeting they had on 17 March 2010 and after having consulted the Company Directors a discount of 5% was exceptionally being given. The new bid price was Rs41,014,595.47 (VAT included). All bidders were accordingly informed on 24 March 2010 after the Human

Resource Development Council had received the approval of its Executive Committee on 19 March 2010.

**D. Submissions and Findings**

1. The Panel has considered carefully the submissions of Mr A. Kutowaroo and Mr J. Gujadhur, Counsel and Attorney respectively, for the Applicant as well as those of Mr L. Aujoyeb Principal State Counsel for the Public Body.
2. The Panel concurs with the Bid Evaluation Committee in that the bid of P. Mungur & Son Ltd is not substantially responsive as it fails to satisfy several mandatory requirements. These shortcomings cannot be cured once the bids have been received and evaluated. Two of these shortcomings are highlighted to indicate the justness of the decision of the Bid Evaluation Committee.

The Evaluation and Qualification Criteria specifies

- (i) The financial situation the requirements that must be met. Thus 2.3.2 Average Annual Turnover *“Minimum average annual turnover of MUR 40.00 million, calculated as total certified payments received for contracts in progress or completed, within the last five years.”*

According to the bid submitted by P. Mungur & Son Ltd its average annual turnover for the period 2005 to 2009 is just above MUR 34.00 million. The bidder does not qualify for an award as it does not satisfy the minimum criterion with respect to financial situation.

- (ii) The personnel that the bidder must have for three key positions are as follows:

**“2.5 Personnel**

*The Bidder must demonstrate that it will have the personnel for the key positions that meet the following requirements:*

**Independent Review Panel – Decision No. 07/10**

No.	Position	Total work Similar Experience (years)	In similar works experience (years)
1	Contract Manager	Ten years	Five years
2	Site Supervisor (full time)	Five years	Three years
3	M&E Coordinator (full time)	Ten years	Five years

*The Bidder shall provide details of the proposed personnel and their experience records in the relevant Forms included in Section IV, Bidding Forms.”*

The bidder failed to provide the required mandatory information. Thus, the Bid Evaluation Committee could not evaluate the bid of P. Mungur & Son Ltd with respect to personnel requirements of the Public Body.

3. On the issue of conflict of interest, it is the contention of the Applicant that:

“Nundun Gopee Co. Ltd was in a position of conflict of interest inasmuch it is the owner of the building save and except that part of the said building which is the subject matter of the present contract. As such Nundun Gopee Co. Ltd has disqualified itself and therefore it was not a responsive bid.”

Mr A. Kutowaroo of Counsel for Applicant relies more specifically on Section 4.3 (d) of the bidding documents which provides that “A bidder may be considered to have a conflict of interest with one or more parties in this bidding process if they have a relationship with each other, directly or through common third parties that puts them in a position to have access to information about or influence on the bid of another bidder, or influence the decisions of the Employer regarding this bidding process.”

In respect of the present matter, the conflict of interest will arise when they have a relationship with each other, directly or through common third parties that puts them in a position to influence the decisions of the Employer regarding this bidding process.

In a letter dated 29 April 2010 from the Human Resource Development Council addressed to the Panel, it is stated that the Human Resource Development Council purchased the 4<sup>th</sup> and 5<sup>th</sup>

floors at the NG Tower from Société Nundun Gopee Tower and became the owner of the said floors, whereas it was Nundun Gopee & Co. Ltd a separate entity which had tendered for the interior fit outs and in these circumstances, there is no conflict of interest. This is, in our view, too simplistic an approach. In matters of conflict of interest, in order to demonstrate that two entities are in fact in truth the same one, one should not limit himself to the name. He should probe further into the ownership of shares or actions sociales or other factors such a family links. On the assumption that he reaches the conclusion that the previous owner of the 4<sup>th</sup> and 5<sup>th</sup> floors of Nundun Gopee Tower and the bidder, is in fact the same legal entity, there is another hurdle to cross. It is whether the relationship between the bidder and the Employer (Public Body) puts them in a position to influence the decision of the Employer regarding this bidding process.

On that score, there is no relevant evidence which has been adduced by the Applicant to indicate that this relationship has influenced the decision of the Employer. The Applicant has referred to the eventual use of the lift which is under to the control of the Société Civile Immobilière d'Attribution Nundun Gopee for the execution of the works. This is not true because the Société Civile Immobilière d'Attribution Nundun Gopee was due to lapse after two years by October 2009. It is the Syndic comprising of representatives of all owners of each floor, which decides on the use of the lift for the benefit of all co-owners of the building.

The Panel is of the view that the Applicant has not been able to demonstrate in a significant manner

- (i) That Nundun Gopee & Co. Ltd and Société Civile Immobilière d'Attribution Nundun Gopee Tower, being given of the physical persons owning the shares and action sociaux in the two entities should be considered as the same entity.
- (ii) And assuming that it is so, that the relationship between the bidder and the Public Body has influenced the decisions of the Public Body.

For all the reasons given above, the Panel finds that there is no merit in the application, which is accordingly set aside.

**(Dr. M. Allybokus)**  
***Chairperson***

**(H. D. Vellien)**  
***Member***

**(Mrs. E. Hanoomanjee)**  
***Member***

**Dated 31 May 2010**