

INDEPENDENT REVIEW PANEL

In the matter of:

H & B Co. Ltd

(Applicant)

v/s

Ministry of Health & Quality of Life

(Respondent)

(Cause No. 31/10/IRP)

Decision

A. Background

1. The contract for the construction of New Psychiatric Hospital at Beau Bassin was awarded to Gamma Civic Ltd on 05 July 2005 and the making good defects certificate was issued in December 2009. The Consulting Quantity Surveyor, J. Bhurtun & Associates Ltd, has since gone into liquidation and thus all the claims for loss and expense remained pending.
2. The Ministry of Health & Quality of life using the restricted bidding method of procurement invited bids from nine Quantity Surveyor firms on 14 July 2010 to study the claims for loss and expense from the main contractor and its sub-contractors and eventually submit a report with recommendations on the said claims.
3. The initial deadline for the submission of bids was 18 August 2010 up to 13.30 hrs. However, following the pre-bid meeting of 05 August 2010, the deadline was re-scheduled for 08 September 2010 at 13.30 hrs.

4. Two addenda were issued:
 - (i) Addendum No. 1 issued on 10 August 2010 extended the deadline for bid submission to 08 September 2010.
 - (ii) Addendum No. 2 issued on 19 August 2010 provided replies to queries raised by consultants at the pre-bid meeting.
5. Three bids were received by the deadline for bid submission of 08 September 2010. A four-member Bid Evaluation Committee was appointed to evaluate the bids received and they are all staff of the Ministry of Public Infrastructure, National Development Unit, Land Transport & Shipping except for the Secretary of the Committee who is from the Ministry of Health & Quality of Life.
6. The Bid Evaluation Committee submitted its Technical Evaluation Report on 27 September 2010 and at paragraph 10 of the report the total marks obtained by the bidders are indicated as follows:

Serial No.	Bidder	Total Marks
1	<i>Mooroogan & Associates</i>	88
2	<i>Ong Seng Goburdhun and Partners</i>	94
3	<i>H & B Co. Ltd</i>	91

As a minimum technical score of 70 points was required for a bidder to be eligible for financial appraisal all three bidders were considered to be responsive and their bids recommended for financial evaluation.

7. The Ministry of Health & Quality of Life invited the three bidders to a meeting on 08 October 2010 for the public opening of their financial proposals. The name of the Consultant and the proposed prices were read aloud and recorded when the financial proposals were opened. Minutes of the public opening were prepared by the Public Body and at paragraph 3.0 of the notes of meeting, it is recorded that the aggrieved bidder did not attend the meeting.

The financial proposals were as follows:

Serial No.	Bidder	Total amount quoted (Excluding VAT)
1	Mooroogan & Associates	800,000
2	Ong Seng Goburdhun and Partners	800,000
3	H & B Co. Ltd	749,999

8. The Bid Evaluation Committee met again on 08 October 2010 for the financial evaluation of the bids received. At paragraph J of the report dated 08 October 2010 it is indicated that:

“As per Clause 5.8 of the bid document, the combined scores of the three bidders in the ratio of 70:30 (technical:financial) is as follows:

Combined Technical and Financial Score

Bidders	Technical Score on 100 marks	Technical Score on 70%	Price quoted (Rs) VAT (Excl.)	Financial Score on 30%	Total Score
Mooroogan Associates	88	61.60	800,000	28.12	89.72
Ong Seng Goburdhun & Partners	94	65.80	800,00	28.12	93.92
H & B Co. Ltd	91	63.70	749,999	30.00	93.70

The report concludes at paragraph 6 that: *“The bidder receiving the highest combined score, that is Ong Seng Goburdhun & Partners is recommended for award for the assessment of Loss and Expenses Claims for the New Psychiatric Hospital at Beau Bassin.”*

9. On 15 November 2010 the Ministry of Health & Quality of Life pursuant to Section 24(11) of the Public Procurement Act 2006 notified all bidders of the outcome of the procurement exercise. H & B Co. Ltd aggrieved by the decision of the Public Body submitted a challenge pursuant to Section 43 of the Public Procurement Act 2006 on 18 November 2010.
10. The aggrieved bidder submitted an application for review to the Panel on 17 December 2010 and in a covering letter indicated that it had not received a reply from the Public Body following its challenge of 18 November 2010. However, it appears from the

record that on the very 17 December 2010 the Public Body provided a detailed reply to the challenge of the aggrieved bidder.

11. On 20 December 2010, the Panel informed all parties concerned about the application for review and suspended the procurement proceedings until the appeal was heard and determined.

B. Grounds for Review

The Grounds for Review are as follows:

- *“Please review our workplan and methodology in detail (Section Tech 3D) and let us know how we have scored on these two criteria compared to Messrs Ong-Seng Goburdhun & Partners and whether the scores are justified as compared to them.*
- *Please review Section Tech 3G (Proposed personnel) and Section Tech 3F (CVs of key staff) and confirm if the fact that we have allowed for TWO FULL TIME CHARTERED QUANTITY SURVEYORS (i.e. TWO MEMBERS OF THE RICS) and ONE PART TIME CONSTRUCTION BARRISTER for the duration of the works has been into consideration in the evaluation. Please let us know how we have scored on this criteria and how this compares to Messrs Ong-Seng Goburdhun & Partners’ score and whether the scores are justified.*
- *Please confirm if the fact that we have included an eminent construction barrister to provide legal advice as part of our team has been taken into consideration in the evaluation. The importance of having a construction barrister to provide legal advice cannot be stressed enough. Our assessment of the claim will be based on the legal advice of the construction barrister and would ensure that even if the main contractor does not accept the recommended settlement and seeks redress by arbitration or common law, he would be unsuccessful.*
- *We have made several comments and suggestions on the Terms of Reference. Please confirm if this has been taken into consideration in the evaluation.*
- *We have proposed to carry out the assignment in 14 weeks (3 months). Please confirm if this has been taken into consideration in the evaluation.*

- *We would also like to point out that 0.2 marks have costed the Government an additional Rs50,000.”*

C. The Evaluation Process

1. According to Mr O. K. Dabidin, Permanent Secretary of the Ministry of Health & Quality of Life, the Public Body to avoid any potential conflict of interest requested the Ministry of Public Infrastructure, National Development Unit, Land Transport & Shipping to carry out the evaluation process on its behalf. As it was a ‘two envelopes’ system the technical proposals of the three bidders were first evaluated. The technical evaluation report qualifying all three bidders was submitted on 27 September 2010 and was accepted by the Public Body.
2. In strict accordance with the bidding document the Public Body opened the financial proposals of the three bidders on 08 October 2010 and then requested the Bid Evaluation Committee that carried out the technical evaluation to carry out the financial evaluation of the bids received.
3. The Bid Evaluation Committee submitted its report on 08 October 2010 and recommended an award to Ong Seng Goburdhun & Partners for a contract sum of Rs800,000 (VAT exclusive).
4. The Public Body endorsed the recommendations of the Bid Evaluation Committee and all bidders were notified accordingly on 15 November 2010.

D. Submissions and Findings

1. The aggrieved bidder scored 91 marks out of a total of 100 for its technical proposal and the maximum of 30 marks for its financial proposal as it was the lowest bidder. The selected bidder scored the highest marks, 94 as technical score and 28.12 for its financial proposal. After combining the scores in the ratio of 70:30 (technical:financial) the difference in total score between the selected bidder and the aggrieved bidder is 0.22 marks. At the hearing held on 19 January 2011 the aggrieved bidder argued strongly that because of its experience and the quality of its

technical proposal it should have scored 100 marks for its technical proposal.

2. The Panel was provided with the comments of the Public Body on the application for review inclusive of the details of the marks scored by each bidder for the technical evaluation, referred to as Annex 4, on the day of the hearing itself. The Bid Evaluation Committee was requested to submit to the Panel and in strict confidentiality the detailed marking scheme that it used to evaluate:
 - (a) the work plan (20 marks) and
 - (b) Methodology (20 marks) of the bidders.

The detailed evaluation criteria were not available in either the bidding documents or the technical evaluation report dated 27 September 2010.

3. A document giving the detailed evaluation criteria, signed by members of the Bid Evaluation Committee on 21 January 2011, was submitted to the Panel on 24 January 2011. The document indicates that the aggrieved bidder scored 3 out of 5 for compliance to Terms of Reference in “Work Plan” section and 0 out of 2 for the item “Work” within a consultancy team with the Architect as Team Leader in “Methodology”. Thus the aggrieved bidder scored a total of 36 marks out of 40 for these two items.
4. Mr A. Domun, member of the Bid Evaluation Committee explained that at pg 48: “Terms of Reference for Consulting Quantity Surveyor” paragraph 6 indicates: “*assist the client and the consulting team on any dispute with the contractor and/or sub-contractors*”. Whereas the aggrieved bidder at pg 14 of its technical proposal provides its comments on the Terms of Reference and indicates at paragraph 5:

“We would like to point out that the terms of reference does not make provision for the services of the QS in the case that the contractor is not happy with the quantity surveyor’s proposed award and brings the claim to arbitration or seeks redress by common law.”

Thus, according to the Bid Evaluation Committee the aggrieved bidder failed to interpret the Terms of Reference properly, which resulted in a deduction of two marks.

The Panel has considered the above in the light of Question 13 and the reply as provided in addendum 2 dated 19 August 2010.

“13. The fees of Rs600,000 at page seems to be low as this may cost much more if it has to go to arbitration process. Can this financial budget be increased?”

The financial proposal is being increased to Rs1,000,000.00 (excluding VAT). The clause 3.3 at page 21 of the bidding document should now read:

The financial proposal shall not exceed the available budget of Rs1,000,000.00 (excluding VAT).”

The Panel can only conclude on the basis of the above that the term “any dispute with the contractor and/or sub-contractor” includes arbitration and concurs with the assessment made by the Bid Evaluation Committee.

5. Paragraph 1 of the Terms of Reference for the Consulting Quantity Surveyor indicates “*work within a consultancy team, where the Consulting architect would be the team leader*”. The Bid Evaluation Committee allocated two marks to a bidder for describing how this requirement will be carried out in practice, in the section “Methodology”.

It appears that none of the three qualified bidders could demonstrate compliance to this clause to the satisfaction of the Bid Evaluation Committee. The approach used by the three bidders are similar in nature and this explains why they all scored zero out of two for this specific item.

6. Section 5.3 (iii) gives the details of the 50 points allocated for the “Qualifications and Competence of the key staff for the Assignment” as follows:

(i)	One member of the RICS or equivalent	30 points
(ii)	One Assistant Quantity Surveyor (degree holder)	10 points
(iii)	One Technician (Diploma Holder)	5 points
(iv)	Administrative staff	5 points

The aggrieved bidder in its technical proposal at pg20 indicated the name of Mr S. Lallah SC, as one of its proposed staff to provide legal advice. It was explained at the hearing that a lawyer was being provided to fill the role of one Technician (Diploma Holder).

The role of the lawyer is described at pg 17 in the methodology to be adopted for the successful implementation of the assignment. In its financial proposals the bidder earmarks the following for the legal adviser:

Activity	Amount (Rs)
Meetings (Client Contractor)	95 000
Investigations/Research	60 000
Preparing the report	25 000

At page 16 of its bid H & B Co. Ltd indicates clearly that it has *“allowed in our submission for 20 hrs of legal advice from Mr S. Lallah SC, an eminent construction barrister”*.

In its grounds for challenge the aggrieved bidder indicates its rationale for including a barrister in its team as follows: *“Our assessment of the claim will be based on the legal advice of the construction barrister and would ensure that even if the main contractor does not accept the recommended settlement and seeks redress by arbitration or common law, he would be unsuccessful”*. The Panel considers that the bidder has been quite coherent and consistent in its submission on the role of the designated barrister.

The provision of a barrister by the aggrieved bidder has enhanced its proposal and according to Mr A. Domun explains why it was the only one to score under the item “Quality Control”, in the section “Methodology”.

However, the Panel is of the view that the barrister cannot be considered to be the key personnel whose competence and qualification was defined as a technician who holds a diploma.

7. Admittedly the field in which the diploma should be is not specified and as such it cannot be interpreted that it should solely be in the field of “Quantity Surveying”. In the absence of such specification the Panel feels that a diploma in a related technical field such as “Civil Engineering” or “Architecture” would have been acceptable but obviously the term technician holding a diploma cannot be construed as including a practising barrister.
8. It is also the contention of the Applicant that the bidding documents did not contain a detailed evaluation criteria grid for the items “Work Plan” and “Methodology”. The grid and marking scheme used were devised by the independent Bid Evaluation Committee which had been appointed by the Public Body. The

Panel considers that the Bid Evaluation Committee did not have to seek the approval of the Ministry of Health & Quality of Life before using the grid and marking scheme. The Bid Evaluation Committee had been provided with a clear mandate and it was its duty to devise the appropriate methodology to carry out its assignment. It is noted that the Ministry of Health & Quality of Life did not query the Bid Evaluation Committee on any aspect of the technical evaluation report it submitted on 27 September 2010.

9. The detailed evaluation criteria used for “Work Plan” and “Methodology” were made available to the aggrieved bidder at the hearing of 08 February 2011. The aggrieved bidder did not challenge any of the criterion used to allocate the total of 40 marks under these two items but was rather aggrieved by the marks allocated to it by the Bid Evaluation Committee.
10. After having heard all the parties and examined the bidding documents and the evaluation report, the Panel finds that the evaluation process has been carried out in a proper manner. In these circumstances, the Panel holds that there is no merit in the application which is accordingly dismissed.

(Dr. M. Allybokus)
Chairperson

(H. D. Vellien)
Member

Dated 25 February 2011