

## INDEPENDENT REVIEW PANEL

In the matter of:

1. Securiclean (Mtius) Ltd

2. Atics Ltd

(Applicants)

v/s

Ministry of Local Government and Outer Islands

(Respondent)

(Cause Nos. 04/11/IRP & 05/11/IRP)

### Decision

#### A. Background

1. The Ministry of Local Government and Outer Islands using the open Advertised Bidding method on 12 November 2010 invited bids from registered local bidders with at least one year experience in the collection and transportation of waste. The procurement reference number is CPB/74/2010 and related to “*Solid waste scavenging Services – Housing Estates and Villages.*”
2. The deadline for submission of bids was 15 December 2010 up to 13.30 hrs at the Central Procurement Board and the opening of bids was scheduled for the same day at 14.00 hrs
3. A pre-bid meeting was held by the Public Body on 22 November 2010 and was attended by five potential bidders. Following the meeting Addendum No. 1 was issued on 26 November 2010.

4. Five bids were received at the Central Procurement Board by the closing date of 15 December 2010 from:
  - (i) Maxiclean Co. Ltd
  - (ii) Atics Ltd
  - (iii) Securiclean (Mtius) Ltd
  - (iv) The Professional Cleaners Ltd
  - (v) Compagnie Regionale de Services et de L'Environnement Ltée

The Central Procurement Board appointed a four member Bid Evaluation Committee to evaluate the bids received. The Bid Evaluation Committee submitted its evaluation report on 13 January 2011 which was approved by the Central Procurement Board on 18 January 2011.

5. The Central Procurement Board informed the Public Body on 19 January 2011 that:
  - (a) the technical proposals of the following three firms have secured the minimum pass mark and are qualified for financial evaluation.
    - (i) Maxiclean Co. Ltd
    - (ii) Atics Ltd
    - (iii) Securiclean (Mauritius) Ltd
  - (b) The financial proposals of the three firms will be opened at the Central Procurement Board on 21 January 2011 at 11.00 hours in the presence of bidders or their representatives who choose to attend.
6. The Bid Evaluation Committee carried out the Financial Evaluation of the three bids and submitted its report on 11 February 2011. The conclusion was that the only responsive offer for the procurement exercise was from Maxi Clean Co. Ltd. The Central Procurement Board informed the Public Body on 17 February 2011 that following an evaluation of the bids received it had “*approved the award of the contract for the project to Maxiclean Co. Ltd as per annex*”. On 18 February 2011, pursuant to section 40(3) of the Public Procurement Act 2006 the Public body informed all parties concerned about the outcome of the bidding exercise.

7. On 23 February 2011 Atics Ltd and Securiclean (Mtius) Ltd challenged the decision of the Public Body to allocate the procurement contract to Maxiclean Ltd. On 24 February 2011, the Public body requested the Central Procurement Board to provide it with materials to reply to the challenges. The Central Procurement Board provided the Public Body with the required information on 28 February 2011 and the two aggrieved bidders were informed accordingly.
8. The two aggrieved bidders still dissatisfied with the decision of the Public Body made separate application for review to the Panel on 10 March 2011. The Panel on 10 March 2011, pursuant to section 45(4) of the Public Procurement Act 2006, suspended the procurement proceedings until the appeal was heard and determined. Both applications were consolidated and a hearing was held on 24 March 2011.

## **B. Grounds for Review**

### **(i) Atics Ltd**

*“The Applicant is not satisfied with the decision of the Ministry of Local Government & Outer Islands (The Ministry) and/or the Central Procurement Board (the Board) on the following grounds:*

- (1) *The Ministry and/or the Board failed to award the contract the contract for Lot No. 4, namely Le Goulet to Grand Bay Police Station to Atics Ltd which was the lowest bidder;*
  - (a) *The financial proposal of Maxiclean for Lot No. 4 – Le Goulet to Grand Bay was 47881975 and that of Securiclean was 50995600 while the financial proposal of Atics Ltd was only 47698550, which was the lowest bid amongst the three bidders.*
- (2) *The Ministry and/or the Board has failed to disqualify Atics Ltd for non-responsiveness of its tender in respect of the bid bond of the Tenderer.*
  - (a) *The Ministry and/or the Board failed to disqualify ATICS Ltd prior to evaluating the bids technically itself when ATICS Ltd did not satisfy the requirements of Clause 18(e) of the Instruction to Bidders (ITB) – Bid*

*Security – which clearly stated that the Bid security ‘shall remain valid for a period of 30 days beyond the validity period of the bids, as extended, if applicable, in accordance with ITB Sub-Clause 17.2’. The Bid Security furnished by Atics Ltd failed to meet the requirement of Clause 18:*

- (b) Prior to evaluating the bids technically, the Ministry and/or the Board should have disqualified Atics Ltd as the Bid of Atics Ltd was not responsive and not in accordance with the requirements of ITB;*
  - (c) At the opening of the Bids itself, the Ministry and/or the Board has failed to ascertain that the required security has been furnished, in breach of Section 37(3) of the Public Procurement Act 2006.*
  - (d) In this respect, the Ministry and/or the Board ought to have rejected the Bid submitted by Atics Ltd, straightaway, in compliance with Clause 18.4 of the ITB;*
  - (e) By proceeding with the evaluation of the Bids submitted by Atics Ltd, the Ministry and/or the Board has created a legitimate expectation for Atics Ltd to believe that the tender documents submitted by it have been tacitly accepted as a substantially responsive Bid as defined under Clause 27.2 of the ITB;*
  - (f) The Ministry and/or the Board has worsened the situation and created further legitimate expectation for Atics Ltd for the financial evaluation as it did through its letter dated 19<sup>th</sup> January 2011;*
- 3. The Board has consequently failed to ensure transparency and equity in the whole evaluation process.*
- 4. The whole evaluation process at financial stage is in breach of Section 11 of the Public Procurement Act 2006 as any bidder quoting a price of Rs 0 and lowest for cyclonic waste deprives the other bidders of a fair and transparent marking system.*

**(ii) Securiclean (Mtius) Ltd**

*The evaluation of the Technical Bid of the Applicant, having been approved by the CPB as per Letter dated 19 January 2011, the Public Body was wrong in disqualifying the Applicant and allocating*

*the Contract to Maxiclean Co. Ltd the moreso that the letter dated 18<sup>th</sup> February 2011 from the Public Body seriously contradicts the decision of the Central Procurement Board.*

1. *The Bid Security is usually submitted as part of the Technical Proposal and by virtue of letter dated 19<sup>th</sup> January 2011, the Central Procurement Board itself confirms that the Applicant has secured the minimum pass mark and qualify for financial evaluation.*
2. *If the Bid Security was invalid, the Technical Proposal of Applicant would have been rejected outright and the Bid of Applicant would not even have qualified and proceeded for Financial evaluation.*
3. *The Public Body has wrongly applied Clause 18.3(e) of the instructions to Bidders (ITB) to disqualify the Applicant.*
4. *The validity period of a Bid Security is that it should run together with the Bid and it cannot exceed the validity period of the Bid itself.*
5. *Here the Bid is valid as specified in the BDS till the 14<sup>th</sup> March 2011 and logic dictates that the validity period of the Bid Security should only expire on the 14<sup>th</sup> March 2011 itself.*
6. *The true and strict interpretation of Clause 18.3(e) of ITB is that, the “30 days period beyond the validity period of the Bid holds good if an only the Bid itself has been extended.*
7. *It is only in exceptional circumstances that the Employer can request for the extension of a Bid for a specified additional period and this also, the request must be made by the Employer ‘in writing’. It is only if the Bidder agrees in writing that Clause 18.3(e) of ITB can then be invoked as per Clause 17.2 of the Instructions to Bidders of the Bidding Documents.*
8. *The Public Body has made a wrongful computation of the Financial Evaluation of the Bid thus falling soul of Section 3 of Annex 1 to BDS (page 28).*
9. *The Public Body has wrongfully and erroneously misapplied the various formulae prescribed to achieve a proper ranking thus falling foul of Section (4) of Annexed I to BDS (page 29).”*

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

1. Following the Public Opening of the five bids received by the deadline for the submission of bids on 15 December 2010 the Central Procurement Board appointed a four member Bid Evaluation Committee to evaluate the bids received. As it was a two-envelope system the Committee first proceeded with the technical evaluation of the bids received. The technical evaluation report was submitted to the Central Procurement Board on 13 January 2011.
2. Paragraph 5 (pg 3) of the report deals with the validity period and it is indicated that: *“Bidders who are bidding for a number of lots whose amount will exceed Rs 200m, are required to submit a bid security amount to Rs 1m. Furthermore, bidders who are submitting bids for a number of lots whose amount is less than Rs 200m, are required to subscribe to the Bid Securing Declaration.”*
3. The Bid Evaluation Committee indicates at paragraph 11 of its report that: *“Prior to undertaking any in-depth analysis, the Bid Evaluation Committee checked whether the bids received met the mandatory requirements as per ITB 5.5. The findings are given at Table 1 below”*. An examination of the table indicates that:
  - (i) Maxiclean Co. Ltd, Atics Ltd and Securiclean (Mtius) Ltd had satisfied all the mandatory conditions and all three of them had submitted a bid security of an amount of Rs 1 million.

The three bidders qualified for technical appraisal.

- (ii) The bidder Professional Cleaners Ltd was considered to be not eligible and was not retained for further evaluation; and
  - (iii) The bidder, Compagnie Regionale de Services et de L’Environnement Ltée was considered to be technically non-responsive and was not retained for evaluation.
4. The Bid Evaluation Committee concludes that:
    - (i) All three bidders had scored more than 40% of the Technical Score and are thus technically responsive as per the provision at Annex 1 to BDS. The bids were to be retained for further financial evaluation.

- (ii) As per provisions of Annex 1 to BDS the price envelopes of the two non-responsive bidders, The Professional Cleaners Ltd and Compagnie Regionale de Services et de L'Environnement Ltée, were to be returned unopened. The Central Procurement Board approved the recommendations of the Bid Evaluation Committee on 18 January 2011 and fixed the opening of financial bids for 21 January 2011 at 11.00 a.m.
5. The Bid Evaluation Committee then carried out the Financial Evaluation of the “three technically responsive bids.” The Financial offers of the three bidders are detailed at Table 3 (paragraph 5) of the report on a lot wise basis.
- However, at paragraph 6, “validity Period”, of the report, it is indicated that:
- (i) Maxiclean Co. Ltd has submitted the required Bid Security of Rs 1M and of a validity of 120 days from the closing date of the bid (ie valid up to 13 April 2011) as specified by ITB 18.1 and ITB 18.3(e).
- (ii) Atics Ltd and Securiclean (Mtius) Ltd have both submitted a Bid Security valid only up to 14 March 2011 and thus failed to comply with the provisions of ITB 18.3(e). The two bidders pursuant to ITB 18.4 were considered to be non-responsible and as such were rejected.
6. The report concludes that *“The bid of Maxiclean Co. Ltd is the only responsive bid and the financial offer for each lot is considerably lower than the Employer’s cost estimate for that corresponding lot.”* As such the bidder is recommended for the award of the contract.
7. The Panel notes that the Bid Evaluation Committee held seven meetings, for the financial evaluation of the three bids during the period 26 January 2011 and 11 February 2011. One member indicates that he signed the report on 04 February 2011 and the two declaration forms signed by members are both dated 04 February 2011. From paragraph (3), page (3), of the report it is observed that meeting No. 5 was held on 04 February 2011. There is no indication for as to why meeting No. 6 on 09 February 2011 and No. 7 on 11 February 2011 were held. The cover of the financial evaluation report is dated 11 February 2011.

8. The Central Procurement Board approved the recommendations of the Bid Evaluation Committee on 16 February 2011 and conveyed its approval to the Public Body on 17 February 2011. The Public Body notified all bidders on 18 February 2011.

**D. Submissions and Findings**

1. ITB 18.1 indicates that a bidder shall furnish, as part of the Bid, a Bid Security or a Bid-Securing Declaration, if required, as specified in the Bidding Data Sheet. In Section II of the bidding documents “Bidding Data Sheet”, subsection C refers to preparation of Bids. For ITB 18.1 the data sheet specifies that: *“Bidders who are bidding for a three year contract for a number of lots whose amount will exceed Rs 200m shall submit a bid security as per the form included in section III, Bidding forms”*. The Bidding Data Sheet goes on to specify that for ITB 18.3, *“the amount of Bid Security shall be Rs 1million rupees”*.
2. The period for which the bids shall remain valid is specified in section 17.1 of the Bidding Data Sheet as follows: *“The bid shall be valid up to 14 March 2011, i.e 90 days after the deadline for Bid submission”*.

ITB 18.3(e) specifies that the bid security shall *“remain valid for a period of 30 days beyond the validity period of the bids, as extended, if applicable, in accordance with ITB sub-clause 17.2.”* As the validity of the bids had not been extended the bid security provided by bidders should have remained valid for 30 days beyond 14 March 2011 ie 13 April 2011.

3. On the basis of the specifications of the bidding documents with respect to the validity period of the bid security to be furnished by the bidders the Panel concurs with the Bid Evaluation Committee that the bids of Atics Ltd and Securiclean (Mtius) Ltd should be considered as being non-responsive and this pursuant to ITB 18.4. The bid security of both bidders was for the required monetary value of Rs 1m but they failed to satisfy the validity period of 120 days.
4. Ms D. Ghose, Attorney for Atics Ltd, conceded that the bid of her client was non-responsive as it did not satisfy the mandatory condition of validity period for Bid Security. According to her Atics Ltd should have been declared non-responsive at the initial phase of the technical evaluation when the responsiveness of bids to the



mandatory requirements were being examined. Thus, the bid of Atics Ltd should not have been examined in detail in accordance with the Technical and Commercial markings provided in Annex 1 to the Bidding Data Sheet and the price envelope of Atics Ltd should have been returned unopened. She went on to add that the bidding exercise had been vitiated and as such should be annulled. She also stressed strongly that serious prejudice had been caused to Atics Ltd as its commercial prices had been unnecessarily made public and the latter was under a legitimate expectation for financial evaluation.

5. Mr R. Unnuth, Counsel for Securiclean (Mtius) Ltd shared the views of Ms D. Ghose but submitted that the bids should be re-evaluated.
6. Mr N. Reddy, Counsel for the Public Body submitted that the bids of the two applicants being non responsive could be rejected at any stage of the evaluation process. He conceded however that the provisions of the Public Procurement Act 2006 are not clear on that issue.

In support of his contention he referred to the decision of the Independent Review Panel in the case of Proguard Ltd/Abra Marketing v/s Mauritius Police Force (Decision No. 20/08). Indeed in this decision, the Panel concluded that the bid was non responsive since *“a mandatory condition for the bid security to remain valid for a period of 30 days beyond the validity period of the bids has not been fulfilled”*.

However before reaching that conclusion, the Panel pointed out that the *“Bid Evaluation Committee indicates clearly in its report dated 14 October that two important documents will be available for checking at the financial appraisal stage i.e. the bid security and the BOQ. At pg 3 Section 7.1 of the report, the Bid Evaluation Committee indicates the requirements that it examined at the technical evaluation stage and those that it deferred until the financial evaluation stage”*.

7. In the present application the Evaluation Committee examined the bid security in respect of its monetary value but most probably failed to scrutinize the contents as contemplated by Sections 5.3, Sections 18 and 27 of the Instruction to Bidders. Section 27 provides that prior to the detailed evaluation of bids, the Employer will determine whether each bid is substantially responsive to the requirements of the bidding documents. Subsequently Section 29 provides that the employer will evaluate and compare only the bids

determined to be substantially responsive in accordance with ITB Clause 27. At a later stage, their technical proposals would be assessed. All these are indicative of the proper time at which the validity of the security should be dealt with. Moreover, the contents of the letter dated 19 January 2011 from the Chairman of the Central Procurement Board to the effect that the Applicant's technical proposal had also been assessed and they have secured the minimum passing mark leave no doubt that their bids had also been found technically responsive.

8. On this issue, it is significant also to refer to Directives No. 3 of 2010 dated 30 April 2010 from Procurement Policy Office which was issued pursuant to Section 7(b) of the Public Procurement Act in respect of determination of responsiveness of bids. It is stated that the Employers determination of a bids responsiveness is to be based on the contents of the bid itself, which includes the bid security or bid securing declaration. For example "*failure to submit an original bid security as specified in the biddings documents (i.e. the bid security is valid for a shorter period or lower amount)*" is a justifiable ground for rejection of a bid. According to the Directives, the scrutiny of bids for substantial responsiveness to the provisions of the bidding documents is one of the most important aspects of the evaluation of bids. The guidelines provide firstly for scrutiny of bids for substantial responsiveness to the commercial terms and conditions of the bidding documents and secondly the scrutiny of bids for substantive responsiveness to the technical requirements. It would appear that the validity of the bid security should have been examined at the initial stage namely in respect of substantive responsiveness to terms and conditions, which the Evaluation Committee failed to do.

It is also recommended in the Directives "*in order to ensure that a thorough check of the substantive responsiveness of all bids is carried out, a Table of Substantive Responsiveness to Commercial Terms and Table of Substantive Responsiveness to Technical Requirements should be prepared. The tables should list all major conditions for Commercial Terms and all major conditions for Technical Requirements which the bidders must meet for their bids to be considered substantially responsive.*"

9. In the present matter the scrutiny for mandatory requirements was limited to criteria laid down by Section 5.5, which contrary to the Directives ignored completely an examination of the validity of the bid security.

The Panel has no difficulty to conclude that the bids of the Applicants were not responsive and should have been rejected before inviting the Applicants for financial opening. The only issue to be determined is whether the defect, in the evaluation process as highlighted above warrants our intervention. Contrary to the case of Proguard Ltd/Abra Marketing v/s Mauritius Police Force which was heard before the issue of Directives No. 3, it is not mentioned that the examination of the bid security would be held at a later stage. Furthermore, at that time, there were neither Directives nor specific provisions in the bidding documents as to when the security bid ought to have been examined.

10. We find that the Evaluation Committee has failed to scrutinize the validity of the bid security at the appropriate time as contemplated by the bid documents and the Directives No.3 of the Procurement Policy Office. Moreover, the Applicants were under a huge expectation that they might be successful the moreso that their offers were lowest in respect of some lots. The rejection of the bids after the opening of the financial proposals has in our opinion caused prejudice to the aggrieved bidders, unfairness among non-responsive bidders and vitiated the whole procurement process. This failure of not examining the bid securities and not informing the bidders of the non-responsiveness of their bids at the appropriate time constitutes in our view significant deficiencies in the evaluation process warranting our intervention.

For these reasons, the Panel finds that there is merit in the applications and thus pursuant to section 45(10)(b) of the Public Procurement Act 2006 recommends the annulment of the decision of the Public Body to award the contract “*solid waste scavenging services – Housing Estates and villages*” to Maxiclean co. Ltd for a contract price of Rs236,971,875 inclusive of VAT.

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

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

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

**Dated 21 April 2011**