

INDEPENDENT REVIEW PANEL

In the matter of:

**General Construction Co. Ltd/
Group Five (Mauritius) Ltd Joint Venture** (Applicant)

v/s

Airports of Mauritius Co. Ltd (Respondent)

(Cause No. 13/11/IRP)

Decision

A. Background

1. The Airports of Mauritius Co. Ltd, following a pre-qualification exercise on 11 January 2011, invited bids from four firms for the Construction of a Parallel Taxi-way at SSR International Airport. A pre-bid meeting/visit attended by three potential bidders was held on 02 February 2011 and the minutes of the meeting were circulated to all bidders on 07 February 2011. Five addenda were issued and addendum no. 1 extended the deadline for the submission of bids from 22 February 2011 at 13.30 hrs to 01 March 2011 at 13.30 hrs. The public opening of bids was scheduled for 01 March 2011 at 14.00 hrs.
2. The Central Procurement Board appointed a three-member Bid Evaluation Committee assisted by a Consultant and a Technical Expert to evaluate the two bids received. The Bid Evaluation Committee submitted its evaluation report on 22 March 2011 and recommended that the contract be awarded to the lowest evaluated and complying bidder "Colas – RG Parallel Taxiway JV" on its base

offer for the sum of Rs1,942,712,490.35 inclusive of VAT and the commercial discount. The Central Procurement Board approved the recommendations of the Bid Evaluation Committee and informed Airports of Mauritius Co. Ltd accordingly on 10 May 2011. The latter informed all bidders of the outcome of the bidding exercise on 11 May 2011.

3. The Joint Venture General Construction Co. Ltd/Group Five (Mauritius) Ltd as an aggrieved bidder and pursuant to Section 43(1) of the Public Procurement Act 2006 challenged the decision of the Public Body on 18 May 2011. The Public Body sought materials for reply from the Central Procurement Board and then replied to the challenge of the aggrieved bidder on 30 May 2011.
4. The aggrieved bidder still dissatisfied with the decision of the Public Body and pursuant to Section 45(1) of the Public Procurement Act 2006 made an application for review to the Panel on 09 June 2011. The Panel, pursuant to Section 45(4) of the Public Procurement Act 2006, suspended the procurement proceedings until the appeal was heard and determined. All documents relevant to the procurement, including the evaluation report were sent to the Panel by the Public Body on 17 June 2011.
5. The Public body, pursuant to Section 45(5) of the Act, certified on the same 17 June 2011 that urgent public interest considerations require the procurement proceedings to proceed. The Panel pursuant to Section 45(7) of the Act informed all parties on 17 June 2011 that the suspension on the procurement proceedings was lifted.

B. Grounds for Review

The Grounds for Review are as follows:

“1. The Public Body was wrong to have determined that the Applicant’s bid was non-responsive, allegedly pursuant to the sections 30 and 34 of the Instructions to Bidders (ITB), on the incorrect ground that the Applicant had allegedly submitted a conditional bid, which the Public Body wrongly considered as a material deviation, to deny the Applicant, as the lowest bidder, the award in as much as:

1.1 the Public Body had wrongly, unfairly, unreasonably

C. The Evaluation Process

1. The Central Procurement Board appointed a three-member Bid Evaluation Committee, assisted by a Consultant and a Technical Expert, to evaluate the two bids received by deadline for submission of bids of 01 March 2011. The Bid Evaluation Committee submitted its report on 22 March 2011.
2. The Bid Evaluation Committee at paragraph 12.3 (pg10) of its report addresses the issue of “Qualification to Bid – ITB Clause 30.2(d), 30.2(e)” as follows:

The Bid submitted by GC/G5 – JV has a section “conditions and applications applying to our offer” which contains several conditions and clarifications which have been applied to their offer. These conditions relate to the Conditions of Contract, Specifications and Bill of Quantities. There is an introductory note in this section which mentions: “The following conditions and Clarifications will take precedence over the corresponding or relevant clauses wherever they may appear in the different sections of the Tender Documents and define the parameters on which our offer is based.”

Furthermore, in its Method statement GC/G5 - JV has mentioned that: “We have planned and priced the works in line with our Method Statement and Programme of Works POW1 – Tender 25.02.11.

The conditions set out for each sub clause by the aggrieved bidder are then compared in a tabular form with the corresponding provisions of the bidding documents (pg10). Specifications item B4 deals with the provision of materials on site and the following is recorded:

B4	<p><i>Method Statement</i></p> <p><i>Price is based on attached method statement</i></p> <p><i>It must be noted that the method statement comprises of:</i></p> <ul style="list-style-type: none"> • <i>The split condition for fill</i> 	<p><i>The Contractor is to be solely responsible for the supply of the materials required for the execution of the Works and shall ascertain himself of the availability of such materials. He shall ensure that during all phases of the Contract performance.</i></p> <p><i>The Employer shall be under no liability whatsoever by way of indemnity or otherwise in respect of shortage of materials.</i></p>
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	<ul style="list-style-type: none"> • <i>The proposed POW</i> 	<p><i>As per sub-clause 8.3 of the Conditions of Contract, the detailed programme and planning of works shall be subject to the Engineer’s confirmation.</i></p>
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In respect of BOQ item 2.9 which refers to the supply and lay of imported fill material and the aggrieved bidder indicates that it will be as per the following proposed split criteria:

“Our rate is made up of materials obtained from a combination of several quarry sites including one within the airport compound. We have assumed that we will obtain permission to extract 600,000 m³ of material suitable to be used as fill from AML Property free of charge. More details are given in our enclosed Method Statement for earthworks. Should this conditions cannot be met by the employer or the material is not suitable for fill, we will import same from outside quarries and our rate will be adjusted accordingly.”

3. The Bid Evaluation Committee examined in details the proposals from the aggrieved bidder with respect to the supply of fill materials in the light of the provisions of the bid documents, as further clarified through the addendum no. 5, which states unequivocally that it is the responsibility of the bidder to “*source and supply the fill materials meeting the specifications*”. The observations of the Bid Evaluation Committee are as follows:

- *From the above observations and requirements of the bid documents further clarified through the addendum No 5, it is the responsibility of the bidders to source and supply the fill materials meeting the specifications.*
- *The amount for fill materials represents about 36% of the total value of works.*
- *The bid documents neither mentions the availability of 600,000m³ of fill materials with AML properties, nor allow for any location from which borrow areas can be established.*
- *The Bidder GC/G5 – JV has in effect secured only 1,100,000M³ out of the required 1,700,000m³, while assuming availability of the remaining 600,000M³ (in quantity only) from an area (35 hectares extracted to a depth of 2m) identified by the bidder itself within AML premises. The Bidder’s rate for this item has been*

based on this split of materials, i.e 1,100,000 m³ imported fill + 600,000m³ from within AML premises, free of charge.

- *If the Bidder had such intentions, it should have clarified the availability of same with the Public Body prior to submission of its bid either at the Pre-Bid Meeting or in writing prior to the deadline date set for clarifications.*
- *Moreover, the bidder has not ascertained the suitability of the 600,000m³ for use as fill material.*
- *GC/G5 – JV has made a categorical statement as follows: ‘should this condition cannot be met by the Employer or the material is not suitable for fill, we will import same from outside quarries and our rate will be adjusted accordingly.’ In view of the foregoing, a change of substance or price after bid submission is not acceptable.*
- *In making such an assumption, GC/G5 - JV has not taken the full responsibility of sourcing all the fill materials and has not ascertained the quality of the fill materials which it as proposed to be obtained from AML property. Having assumed to obtain the 600,000M³ of fill material without confirming with the Public Body prior to submitting its bid, GC/G5 - JV has in fact submitted a conditional bid.*

These conditions are considered to be material deviations, by the Bid Evaluation Committee, with respect to clauses 30 and 34 (Section 1: Instruction to Bidders), which render the bid of the aggrieved bidder non-responsive. Furthermore, the Bid Evaluation Committee considers that a series of conditions applied to other items are Reservations with respect to Clause 32 and 34. On the basis of the material deviations and Reservations the bid of General Construction Co. Ltd/Group Five (Mauritius) Ltd Joint Venture was considered to be non-responsive.

4. The Bid Evaluation Committee concludes at paragraph 19 (pg 25) of its report that:
 - (a) The Bid Evaluation considers that the bid submitted by the lowest evaluated bidder Colas-RG Parallel Taxiway JV is substantially responsive to tender requirements.

- (b) The bid Evaluation Committee considers that the recommended price is reasonable.

The bidder is then recommended for an award for Rs1,942,712,490.35 inclusive of VAT and the commercial discount.

D. Submissions and Findings

1. Mr D. Basset, S.C., Counsel for the Applicant explained at the hearing that in its “method statement” (pg 2 of Vol II) the joint venture unambiguously states in the section “Borrow Areas” that:

“Alternative sources for the required materials have been identified by the General Construction Co. Ltd/Group Five (Mauritius) Ltd Joint Venture, with the result that additional cost premiums are included in the tender pricing for the following elements.”

Then, the bidder goes on to explain how it will acquire the site, excavate for the material and haul it to the site while taking all necessary traffic precautions and finally rehabilitate the borrow site. He then went on to state that in Bill No. 2 – Earthworks item 2.9 refers to the “supply and lay of imported fill for embankment and underneath pavements” and the bidder had filled that section without attaching any condition – Rs315.25 per m³ for a total amount of Rs535,925,000.00.

2. However, Mr Y. Mohamed, S.C., Counsel for the Public Body argued that the item of imported fill material had to viewed in the context of all the details to be found in the submission of the aggrieved bidder. Thus, under the heading of “Borrow Arrears” referred to above the bidder states that:

In order to reduce, or even eliminate, these additional cost premiums to the contract GCC/G5 JV has identified sources of material within the perimeter of the new primary security area of the airport. The combined area is approximately 350,000 m² and is shown on the Google Image at the end of this document.

A conservative estimate of the material available in this area for bulk filling purposes is 600,000 m³, which effectively reduces the remote fill requirement to 1,100,000 m³.

The rates quoted in the submission are based on the above split of material availability, and include for the following activities.

3. The Panel notes that at Pg 4 of the “Method Statement” the bidder under the heading “Additional borrow areas identified within the airport perimeter” indicates that:

“Should additional suitable borrow areas within the airport perimeter be jointly identified by the Engineer and the Contractors, a revision to the contract rates will be agreed as soon as the haulage distances and volumes of material available have been assessed.”

This, according to the Panel, clearly indicates that any reduction in rates will be subject to additional suitable borrow areas being identified within the airport perimeter. This clearly indicates that reduction in rates does not apply to the offer made by the bidder and if any as per Clause C5 of “Conditions and Clarifications applying to our offer” the bidder will ask for an increase in rate if the 600,000m³ of materials is not available free of charge.

4. The above interpretation of the offer of the bidder is reinforced by the latter itself as it wrote to the Central Procurement Board on 18 April 2011 to state that: *“However, should this material (i.e. 600,000 m³ of fill material) be unavailable from within the airport compound, in part or in toto, we are agreeable to import same from external quarries at no additional cost to the Employer.”*

The Panel notes that this unsolicited offer was made after the evaluation report had been submitted to the Central Procurement Board by the Bid Evaluation Committee on 22 March 2011 and same was still under consideration. The issue of 600,000 m³ of fill material has a prominent place in that evaluation report and according to the Bid Evaluation Committee the amount of fill material represents about 36% of the total value of the works.

At the hearing Mr Y. Mohamed, S.C. made available to the Panel copy of letter dated 17 June 2011 addressed to Airports of Mauritius Co. Ltd by the Central Procurement Board on the same issue. This unsolicited letter had been considered “not receivable” by the Central Procurement Board.

5. Directive No. 3 issued pursuant to Section 7(b) of the Public Procurement Act on 30 April 2010 and addresses the issue of “Determination of Responsiveness of bids”. The directives give examples at Section (iv) (pg 4) of the non-conformance to commercial terms and conditions which are justifiable grounds for rejection of a bid and at paragraph (h) conditional bids is given as one of the examples. A conditional bid is defined among other reasons as one submitted with qualifications to the conditions of contract.

The Panel on the basis of all the above concurs with the Bid Evaluation Committee that the condition attached to the bid of the Joint Venture with respect to the supply and lay of imported fill is a material deviation with respect to clauses 30 and 34 (Section I: Instruction to Bidders) renders that bid non-responsive.

6. The Joint Venture additionally submitted its bid with thirty three other conditions and the bidder itself unequivocally states in its bid that these conditions will take precedence over the corresponding or relevant clauses of the tender documents and “define the parameters on which our offer is based”. The Consultant of the Public Body has examined all the conditions in details and has determined that most of them are not acceptable. These unacceptable conditions attached to the bid of the Joint Venture reinforces the conclusion that this bid is non-responsive.

On the basis of all the above, the Panel finds that there is no merit in the application and pursuant to Section 45(10) of the Public Procurement Act dismisses it.

(Dr. M. Allybokus)
Chairperson

(H. D. Vellien)
Member

(Mrs. E. Hanoomanjee)
Member

Dated 05 September 2011