

INDEPENDENT REVIEW PANEL

In the matter of:

COLAS Maurice - COLAS Madagascar - TML
(Applicant)

v/s

Road Development Authority
(Respondent)

(Cause No. 24/11/IRP)

Decision

A. Background

1. On 22 February 2011 the Road Development Authority invited bids through local newspapers for the Widening of Motorway M1 from Colville Deverell Bridge to Grewals. The closing date for submission of bids at the Central Procurement Board which was initially fixed for 19 April 2011 was extended to, 04 May 2011 and further extended to 18 May 2011. The public opening was held on the same day at 14.00 hrs and revealed that four bidders have submitted bids, namely:
 - (i) COLAS Maurice Ltee-COLAS Madagascar-Transinvest (Mauritius) Ltd
 - (ii) General Construction Company Ltd
 - (iii) Rehm Grinaker Construction Co. Ltd
 - (iv) Sinohydro Corporation Ltd

2. On 23 September 2011 acting upon the recommendation made by the Bid Evaluation Committee, the Road Development Authority,

notified all bidders that Sinohydro Corporation Ltd had been selected for the award of the procurement contract.

3. In the first instance, on 27 September 2011, the aggrieved bidder COLAS Maurice Ltee-COLAS Madagascar-Transinvest (Mauritius) Ltd challenged the above decision. Being not satisfied with the reply on 05 October 2011 of the Road Development Authority to the challenge, the aggrieved bidder lodged an application for review on 17 October 2011. The Independent Review Panel pursuant to 45(4) of the Public Procurement Act 2006, suspended the procurement proceedings until the appeal would be heard and determined by the Review Panel.
4. However, on 14 December 2011, the Road Development Authority in accordance with the provisions of Section 45(4)(5)(6) and (7) of the Public Procurement Act 2006, issued a certificate of urgency and requested that the suspension be removed. As a result of which, on 15 December 2011, the Independent Review Panel informed the Road Development Authority that the procurement proceedings were no longer suspended.
5. On 27 January 2012, after having heard the submissions of both Mr Glover, SC for the Applicant and Mr S. Lallah, SC for the Respondent as well as the testimony of Mr I. Emrith, a Project Manager at COLAS Maurice Ltee-COLAS Madagascar-Transinvest (Mauritius) Ltd and Mr R. Jugoo, Assistant Divisional Manager for the Road Development Authority, the Panel reserved its determination.

B. Grounds for Review

The Grounds for Review are as follows:

- “(i) The company Sinohydro Corporation Ltd, to whom it is intended to award the bid, was not incorporated in Mauritius at the time of the bid and therefore could not have satisfied the criteria set for eligibility as per the ITB.*
- (ii) The applicant’s offer is the lowest, considering the Margin of Preference of 10% for the employment of more than 85% of local labour. The contract should therefore have been awarded to the applicant.*
- (ii) The Margin of Preference has not been applied in compliance with the Instructions to Bidders more specifically ITB 33, had it been so the lowest bidder is the applicant.”*

C. The Evaluation Process

1. The Central Procurement Board appointed a Bid Evaluation Committee comprising of five members which met on 21 occasions. On 21 June 2011, the Bid Evaluation Committee submitted its report, wherein it determined that the lowest bidder after applying the 10% Margin of Preference is COLAS Maurice Ltee-COLAS Madagascar-Transinvest (Mauritius) Ltd for the sum of Rs283,385,403.50, subject to the acceptance and submissions of some clarifications.
2. On 18 July 2011, the Central Procurement Board invited the Bid Evaluation Committee to review its report in respect of the methodology applied to calculate the Margin of Preference. Indeed on 22 July 2011, the Bid Evaluation Committee submitted a supplementary report taking into account the methodology proposed by the Central Procurement Board. The figure below indicates clearly the deductions effected as advised by the Central Procurement Board before reaching the amount representing the Margin of Preference.

<i>Bidder</i>	<i>Group</i>	<i>Amount Quoted Rs (excl. VAT)</i>	<i>Corrected Amount Rs (excl. VAT)</i>	<i>Bid Price (as per Sections 14.3 & 34.2(a) of ITB)</i>	<i>10% Margin of Preference Amount Rs (excl. VAT)</i>	<i>Ranking</i>
<i>CMTL</i>	<i>A</i>	<i>246,422,090.00</i>	<i>246,422,090.00</i>	<i>232,422,090.00</i>	<i>232,422,090.00</i>	<i>2nd</i>
<i>SCL</i>	<i>B</i>	<i>227,176,975.53</i>	<i>227,176,897.54</i>	<i>210,176,897.54</i>	<i>231,194,587.29</i>	<i>1st</i>

The Bid Evaluation Committee concluded that Sinohydro Corporation Ltd is the lowest responsive bidder and recommended that latter for the award of the contract.

D. Submissions and Findings

1. Before the Panel, Mr G. Glover, SC for the Applicant and Mr S. Lallah, SC for the Respondent stated that the only issue to be determined is in respect of the methodology used by the Bid Evaluation Committee to compute the Margin of Preference of 10%. On that score, Mr G. Glover, SC called and examined Mr I. Emrith, the Project Manager of COLAS Maurice Ltee-COLAS Madagascar-Transinvest (Mauritius) Ltd. He explained in a very cogent manner, the methodology adopted by the Road Development Authority and COLAS Maurice Ltee-COLAS Madagascar-Transinvest (Mauritius) Ltd respectively to calculate the Margin of

Preference of 10% which should be added to the bid price of Sinohydro Corporation Ltd. He contended that the computation of the Margin of Preference should be done strictly according to Section 33.3(b), which does not exclude the provisional sums before calculating the Margin of Preference.

2. When questioned by Mr S. Lallah, SC, he maintained that the provisional sums should be deducted after the application of the 10% of the Margin of Preference on the price of Sinohydro Corporation Ltd. Mr S. Lallah, SC called and examined Mr R. Jugoo, Assistant Divisional Manager for the Road Development Authority, who explained that the calculation to reach the Margin of Preference adopted by the Bid Evaluation Committee in its supplementary report in strict compliance with the provisions of Sections 33, 34 and 35 of the ITB.
3. The Panel heard Counsel and witnesses of both parties. Before proceeding further, the Panel considers that there is no issue in respect of the VAT and the discount of Rs3M. In fact, both parties agreed that their calculations are based on the price exclusive of VAT. As far as the discount of Rs3M offered by Sinohydro Corporation Ltd, both parties did the evaluation after excluding the discount in conformity with the provisions of Section 14.3 of the ITB.
4. The Panel holds that the methodology used by the Bid Evaluation Committee in its supplementary report to reach a figure representing the Margin of Preference is the correct one. It is so, for the following reasons:
 - (i) It is clear that in Section 34 of the ITB under the heading Evaluation of bids, that the Employer shall use the criteria and methodologies listed in this clause and no other evaluation criteria or methodologies shall be permitted.
 - (ii) Section 34.2(a) of the ITB provides that to evaluate a bid, the Employer shall consider inter alia, the bid price, excluding provisional sums.
 - (iii) In compliance with Section 35.1 of the ITB for the determination of the lowest evaluated bid, the Employer shall compare all substantially responsive bids in accordance with Section 34.2 of the ITB.

5. Furthermore, the contention of the Applicant to restrict oneself to the provisions of Section 33 for computation of the Margin of Preference does not stand because:
- (a) Section 33.3(a) of the ITB only describes the procedure and the criteria set down for classification of bids in group A and group B.
 - (b) Section 33.3(b) of the ITB, provides clearly in what circumstances the Margin of Preference would apply referring to the concept of percentage which should be added on the bid price of bidders in group B i.e. foreign bids.
 - (c) The two excises namely evaluation and comparison, contemplated in section 33.3(b) are clearly defined under separate headings, namely under Section 34 Evaluation of Bids and under Section 35 Comparison of bids. Undoubtedly these exercises were needed and carried out in the present bidding process to determine the lowest responsive bid.

For all these reasons, the Panel finds no merit in the present application which is accordingly set aside.

(Dr. M. Allybokus)
Chairperson

(H. D. Vellien)
Member

(Mrs. E. Hanoomanjee)
Member

Dated: 07 March 2012