

INDEPENDENT REVIEW PANEL

In the matter of:

General Construction Co. Ltd

(Applicant)

v/s

Road Development Authority

(Respondent)

(Cause No. 28/12/IRP)

Decision

A. Background

1. The Road Development Authority using the open advertised bidding process invited bids from eligible and qualified bidders on 09 May 2012 for Contract No. RDA/18/2012 – Construction of an additional lane along Motorway M1 in Northbound Direction from Ruisseau Creole to Place D’Armes. The deadline for the submission of bids was 23 May 2012 at 13.30 hrs and public opening of bids was scheduled for the same day at 13.45 hrs. The cost estimate of the project by the Public Body is MUR 78,579,413.75.
2. The names of the bidders and the prices as read out at the public opening as indicated in the evaluation report are as follows:

	<i>Name of Bidder</i>	<i>Reference used in this report</i>	<i>Bid Amount (MRs – VAT Inclusive)</i>
1	<i>REHM Grinaker Construction Co. Ltd</i>	<i>REHM</i>	<i>93,314,676.54</i>
2	<i>General Construction Co. Ltd</i>	<i>GCC</i>	<i>71,843,296.70</i>
3	<i>Sinohydro Corporation Limited</i>	<i>SCL</i>	<i>74,110,418.55</i>
4	<i>Gamma Construction Ltd</i>	<i>Gamma</i>	<i>82,427,163.10</i>

The Public Body then appointed a three-member Bid Evaluation Committee to evaluate the four bids received and it submitted its first report on 18 June 2012.

Following a preliminary examination of the bids and pursuant to advice received from the Chairman of Road Development Authority's Procurement Committee bids submitted by REHM Grinaker Construction Co. Ltd and General Construction Co. Ltd were disqualified and were not evaluated any further.

3. The Bid Evaluation Committee then carried out a detailed evaluation of the remaining two bids with respect to commercial terms as defined by ITB 5 and 6 respectively.

Both bids were considered to be substantially responsive and were retained for technical evaluation. The Bid Evaluation Committee, following a detailed examination of the bids, concluded that both bids were technically responsive.

However, the Bid Evaluation Committee made it clear that in case of award, the successful bidder will have to submit all missing information and will also have to comply strictly with Laws and Regulations applicable in Mauritius.

4. The financial proposals of the two bidders were then examined by the Bid Evaluation Committee and it recommended that the contract be awarded to the lowest evaluated and responsive bidder, Sinohydro Corporation Limited for a corrected sum of Rs74,110,420.19 (Mauritian Rupees Seventy Four Million One Hundred and Ten Thousand Four Hundred and Twenty and Cents Nineteen Only) inclusive of VAT but subject to twelve conditions.
5. The Bid Evaluation Committee then examined the clarifications provided by Sinohydro Corporation Limited and in a supplementary report dated 16 July 2012 confirmed its recommendation to award the contract RDA/18/2012 to the bidder.
6. The Public Body informed all bidders of the outcome of the bidding exercise on 07 August 2012. General Construction Co. Ltd, as an aggrieved bidder, challenged the decision of the Public Body on 09 August 2012. The Public Body replied to the challenge on 10 August 2012 and explained to the bidder the reasons as to why its bid had not been retained. General Construction Co. Ltd still dissatisfied with the decision of the Public Body submitted an application for review to the Panel on 16 August 2012. The Panel

pursuant to Section 45(4) of the Public Procurement Act 2006 suspended the procurement proceedings until the appeal was heard and determined. A hearing was held by the Panel on 11 September 2012 in the presence of the selected bidder.

B. Grounds for Review

The Grounds for Review are as follows:

“The Public body did not retain the bid of the Applicant because another bidder namely Rehm Grinaker Construction Co. Ltd had, according to the Public Body, in their bid for the same project (i.e. the Construction of an additional lane along Motorway M1 in Northbound Direction from Ruisseau Creole to Place D’Armes), proposed General Construction Co. Ltd as their sub-contractor for asphalt works. In its letter dated 10 August 2012, the Public Body states that this was in breach of Clause 5.2(e) of the ITB which provides that “Participation by a Bidder in more than one bid will result in the disqualification of all bids in which the party is involved”.

The Applicant strenuously denies having given its consent to Rehm Grinaker Construction Co. Ltd to propose its name as their sub-contractor for asphalt works. The Applicant was also not aware that they had done so, and only learned about it when the Public Body replied to its challenge on the 10th August 2012 to give its reason why the bid of the Applicant had not been retained. The Applicant avers that it never authorised Rehm Grinaker Construction Co. Ltd to include its name in the latter’s bid documents.

The Applicant had submitted a fully responsive bid satisfying all the prequalification criteria and it will be grossly unfair and prejudicial to its interests if the Applicant is penalised because a competitor participating in the same bidding exercise submitted the name of the Applicant as its sub-contractor behind the Applicant’s back and without the latter’s prior authorisation and consent.

The Applicant also feels aggrieved by the decision of the Public Body because the latter failed, during the evaluation stage of the bids received, to seek clarification from the Applicant as to whether it had agreed to be the sub-contractor of Rehm Grinaker Construction Co. Ltd on the project. The Public Body ought to have noted that the bid submitted by Rehm Grinaker Construction Co. Ltd did not contain any quote by the Applicant for performing asphalt works on the project as their sub-contractor nor any sub-contracting agreement

between the Applicant and Rehm Grinaker Construction Co. Ltd. A simple search for clarification from the Applicant or even from Rehm Grinaker Construction Co. Ltd for asphalt works on that project and that the Applicant was not at all aware that Rehm Grinaker Construction Co. Ltd had submitted the Applicant's name as sub-contractor for asphalt works. In these circumstances the Applicant denies that it has participated in more than one bid as alleged by the Public Body.

Finally, the Applicant is of the view that the decision of the Public Body, which rejected its otherwise fully responsive bid on the SOLE and UNSUBSTANTIATED basis that the Applicant, being a bidder, was allegedly a subcontractor of Rehm Grinaker Construction Co. Ltd, was frivolous and in breach of its duties under the Public procurement Act 2006, as amended."

C. The Evaluation Process

1. The Public Body appointed a three-member Bid Evaluation Committee to evaluate the four bids received by 03 May 2012, the deadline for the submission of bids. The Bid Evaluation Committee first carried out a preliminary examination of the bids to check compliance of the bidders to the specifications of the Instruction to Bidders and the Bidding Data Sheet. The Bid Evaluation Committee observed that one of the bidders, General Construction Co. Ltd had been proposed as a sub-contractor by another bidder REHM Grinaker Construction Co. Ltd. It was also noted by the Committee that no written undertaking had been submitted to that effect.
2. Clause 5.2 of the Instruction to Bidders refers to conflict of interest and sub-clause 5.2(e) stipulates that "*Participation by a Bidder in more than one Bid will result in the disqualification of all bids in which the party is involved*". The Chairman of the Bid Evaluation Committee wrote to the Chairman of the Road Development Authority's Procurement Committee on 28 May 2012 for clarification and advice on the course of action to be adopted. In a memorandum dated 30 May 2012 to the Chairman of the Bid Evaluation Committee, the Chairman of the Road Development Authority's Procurement Committee informed that in the opinion of his Committee both bids in which General Construction Co. Ltd is involved should be disqualified and this is in accordance to sub-clause 5.2(e) of the ITB. The bids submitted by REHM Grinaker Construction Co. Ltd and General Construction Co. Ltd were

consequently not evaluated any further by the Bid Evaluation Committee.

3. The Bid Evaluation Committee then examined the remaining two bids to check compliance with the commercial terms. “Table 1 – Verification of Submissions” at page 8 of the Evaluation Report details the compliance of both bidders with respect to the qualifying documents that had to be submitted with the bids as defined at ITB 6.2 of the bidding document.

Bidder Sinohydro Corporation Limited failed to submit four documents and submitted only partial information for three other requirements. Gamma Construction Ltd for its part failed to submit one document and only partial information for another requirement.

The lists of construction equipment proposed by the two bidders were then critically examined by the Bid Evaluation Committee to check compliance with ITB 6.3(c) of the BDS and the results are presented in “Table 2 – Evaluation of Construction Equipment” at page 9 of the Evaluation Report.

Finally, the Bid Evaluation Committee examined the bid requirements with respect to personnel as per ITB 6.3(d) of the BDS and the results are presented in “Table 3 – Evaluation of Personnel”.

- 4(i) The Bid Evaluation Committee at paragraph 14 (page 11) of its report indicates that it considers that the non-submission or improper format of some documents by both bidders as minor deviations. It thus, considered both bids to be substantially responsive and retained them for further evaluation.
 - (ii) The list of equipment, Qualification and Experience of Key Personnel and method statements of both bidders were considered to be responsive by the Bid Evaluation Committee and it was concluded that both bids were technically responsive and qualified for detailed financial appraisal.
5. Arithmetical check was then carried out on the two bids as per the methodology described in the bidding document. The corrected bid amount as reported at page 13 of the evaluation report are as follows:

<i>Order of Opening</i>	<i>Bidder</i>	<i>Corrected Bid Amount (Rs) (Inclusive of VAT)</i>	<i>Rank</i>
3	SCL	74,110,420.19	1
4	Gamma	82,424,863.10	2

The Bid Evaluation Committee after carrying out a detailed examination of the two bids concluded that the bid from the lowest evaluated and responsive bidder - Sinohydro Corporation Limited is substantially responsive to the bid requirements and the corrected bid price is fair and reasonable.

The Bid Evaluation Committee then went on to recommend an award of the contract to Sinohydro Corporation Limited for the corrected sum of Rs74,110,420.19 inclusive of VAT subject to twelve conditions in its report dated 18 June 2012. Following the receipt of clarifications on the twelve issues the Bid Evaluation Committee confirmed its recommendation to award the contract to Sinohydro Corporation Limited in a supplementary report on 16 July 2012.

D. Submissions and Findings

After having heard both counsel, the Panel is of the view that this application should succeed for two reasons:

- (a) failure on the part of the Bid Evaluation Committee to consider the provisions of Directive No. 3
- (b) absence of agreement on the part of the Applicant to act as sub-contractor.

Failure on the part of the Bid Evaluation Committee to consider the provisions of Directive No. 3

The report of the Bid Evaluation Committee indicates at Section 13(e) page 11 with respect to the bid of Sinohydro Corporation Limited that “Evidence of adequacy of working capital (Minimum Rs20M) has not been submitted despite such information has been requested under Instruction to Bidders Clause 6.3(e) of Bidding Data Sheet”.

ITB 6.3(e) of the bidding document indicates that one of the minimum qualifying criteria that bidders shall meet to qualify for the award of the contract is:

“Liquid assets and/or credit facilities, net of other contractual commitments and exclusive of any advance payments which may be made under the Contract, of no less than the amount specified in the BDS”.

The BDS with respect to ITB 6.3(e) indicates the following at page 19 of the bidding document:

“The minimum amount of liquid assets and/or credit facilities, net of other contractual commitments of the successful Bidder shall be Rs20M. Bidders are requested to submit fresh and updated documentary evidence from recognized financial institutions. The amount available in liquid assets or credit facilities should be mentioned in these documents.”

The Procurement Policy Office issued Directive No. 3 pursuant to Section 7 of the Public Procurement Act on 30 April 2010 and a Section provides “Guidelines for the determination of responsiveness of bids”. Part (iv) of that Section gives examples of non conformance to commercial terms and conditions, which are justifiable grounds for rejection of a bid indicates the following:

“Failure to submit major supporting documents required by the bidding documents to determine substantial responsiveness of a bid (e.g. (i) evidence of authorization for the signatory to sign the bid on behalf of the company, where applicable; (ii) evidence of adequacy of working capital if so required in the bidding document, (iii) proposals for sub-contracting more than a set percentage of the Contract Price, etc.....).”

This particular Section of Directive No. 3 – (iv)(k) was amended by Directive No. 6 issued by the Procurement Policy Office on 23 April 2012. However, the provision with respect to evidence of working capital was maintained.

The Panel considers that in the light of the clear provisions of the bidding document at ITB 6.3(e) and BDS 6.3(e) and the provision of the Directives from the Procurement Policy Office the Bid Evaluation Committee was wrong to consider that the non-submission of evidence of working capital by Sinohydro Corporation Limited as a minor deviation. The bid from Sinohydro Corporation Limited should have been considered to be non-

responsive and should have been rejected at the preliminary stage of the evaluation.

Absence of agreement on the part of the Applicant to act as sub-contractor

The reason put forward by the Public Body to reject the bid of the Applicant is that *“another bidder, viz Rehm Grinaker Construction Co. Ltd has proposed General Construction Co. Ltd as their sub-contractor for asphalt works. Pursuant to Clause 5.2(e) of the ITB which stated that “Participation by a Bidder in more than one Bid will result in the disqualification of all bids in which the Party is involved”, both the bids of Rehm Grinaker Construction Co. Ltd and General Construction Co. Ltd Have been rejected.”*

On that score, Mr D. Basset, SC for the Applicant referred to the admission of the Public Body to the effect that, besides the unilateral declaration subscribed by a bidder REHM Grinaker Construction Co. Ltd in its bid that General Construction Co. Ltd is one of the three proposed sub-contractors to carry asphalt works, there is no document in the possession of the Road Development Authority indicating that the Applicant was aware or agreeable to being a sub-contractor of REHM Grinaker Construction Co. Ltd for the project. He submitted that in the absence of an agreement on the part of the Applicant to perform as sub-contractor for REHM Grinaker Construction Co. Ltd, the Bid Evaluation Committee cannot reach a finding that the Applicant has participated twice in the bidding exercise, as a result of which pursuant to Clause 5.2(e) of Section 1, Instruction to Bidders, the latter should be disqualified.

In his reply, Mr S. Lallah, SC for the Respondent submitted that for the present bidding exercise only the name of the sub-contractors was sought, it was not specifically requested from bidders to include the consent to act as sub-contractor for a bidder. According to him the onus lies on the Applicant to demonstrate that it was not agreeable to act as subcontractor of REHM Grinaker Construction Co. Ltd.

The Panel feels that the absence of requirement of consent of the proposed sub-contractors in the bid documents should not be construed, as sufficient to allow the Bid Evaluation Committee to act solely on the unilateral statement of REHM Grinaker

Construction Co. Ltd to disqualify the Applicant. Nor should this absence of requirement of consent, prevent the Applicant from claiming that its name has been used against its will as a result of which it was unjustly disqualified.

Indeed, the Panel holds that the conclusion reached by the Bid Evaluation Committee to disqualify the Applicant was wrong, because though it is not a specific requirement in the bidding document, the Bid Evaluation Committee failed to seek other documentary evidence proving that the Applicant agreed to act as sub-contractor of REHM Grinaker Construction Co. Ltd. It based itself solely on the unilateral statement of a bidder that the Applicant is one of its sub-contractors to disqualify the Applicant.

Based on all the above, the Panel considers that there is merit in this application and pursuant to Section 45(10)(b) and (c) of the Public Procurement Act 2006 recommends an annulment of the award to Sinohydro Corporation Limited and a re-evaluation of the bids.

(Dr. M. Allybokus)
Chairperson

(H. D. Vellien)
Member

(Mrs. E. Hanoomanjee)
Member

Dated 13 September 2012