

## INDEPENDENT REVIEW PANEL

In the matter of:

**Safety Construction Co. Ltd**

**(Applicant)**

**v/s**

**Ministry of Public Infrastructure, National Development Unit, Land  
Transport & Shipping (NDU)**

**(Respondent)**

**(Cause No. 35/12/IRP)**

### **Decision**

#### **A. Background**

1. The National Development Unit of the Ministry of Public Infrastructure, National Development Unit, Land Transport & Shipping, using the open advertised bidding method invited bids on 27 June 2012 from qualified bidders for the Construction and upgrading of roads and drains for the year 2012-2013. The works were to be carried out in two zones:

Zone 2 – Constituencies 5, 6, 7 & 9 - Estimated cost MUR  
190,232,350 (VAT  
excl.)

Zone 3 - Constituencies 8, 10, 15, 16 & 17 - Estimated cost MUR  
167,946,611 (VAT  
excl.)

Two addenda were issued and addendum no. 1, issued on 05 July 2012, amended ITB 1.1 of Section II as follows: “*Any one bidder will be awarded the contract for one zone only*”.

The deadline for the submission of bids was 31 July 2012 at 13.30 hrs.

2. Seven bids were received by the deadline for the submission of bids and were opened in public on the same day at 14.00 hrs. The Central Procurement Board then appointed a three-member Bid Evaluation Committee to evaluate the bids received.

The Bid Evaluation Committee submitted a first report on 31 August 2012 and recommended

- (i) Best Construct Co. Ltd for zone 2 for a contract price of Rs172,753,044.62 (VAT included)
  - (ii) Super Builders Co. Ltd for Zone 3 for a contract price of Rs203,805,366.70 (VAT included).
3. The Bid Evaluation Committee submitted a second report on 05 September 2012 and recommended:

- (i) Safety Construction Co. Ltd for Zone 2 for a contract price of Rs157,282,850.00 (VAT included)
- (ii) Super Builders Co. Ltd for Zone 3 for a contract price of Rs203,805,366.70 (VAT included).

However one member of the Bid Evaluation Committee submitted a dissenting report whereby the recommendations of the first evaluation report dated 31 August 2012 were maintained.

The Public Body notified all bidders of the outcome of the bidding exercise on 24 October 2012.

4. Safety Construction Co. Ltd as an aggrieved bidder challenged the decision of the Public Body on 26 October 2012. The Public Body, after receiving material for reply from the Central Procurement Board, informed the aggrieved bidder on 31 October 2012 of the reason as to why its bid had not been retained.

The aggrieved bidder still dissatisfied with the decision of the Public Body submitted an application for review to the Panel on 12 November 2012. The Panel, pursuant to section 45(4) of the Public Procurement Act 2006, suspended the procurement proceedings until the appeal is heard and determined.

Hearings were held on 17 December 2012 and 21 December 2012 in the presence of the selected bidders.

## **B. Grounds for Review**

The Grounds for Review are as follows:

- “1. *The bid of Safety Construction Co. Ltd is not only responsive but also substantially lower in prices than that of the successful bidders in both Zone 2 and Zone 3.*
2. *The only reason put forward by the Public Body for not retaining the bid of Safety Construction Co. Ltd concerns the “suspension” of Safety Construction Co. Ltd (vide letter dated 31 October 2012).*
3. *However, the unlawful ‘suspension’ of Safety Construction Co. Ltd, has been removed by the Public Procurement Office as per letter dated 07 November 2012.*
4. *Safety Construction Co. Ltd is a very professional and committed to excellence Construction company and has so far successfully completed about more than 100 work orders for the Ministry of Public Infrastructure, National Development Unit, Land Transport and Shipping (National Development Unit) since the last two years. Safety Construction Co. Ltd has unfairly and unreasonably been prejudiced in the evaluation process in this matter and the circumstances of the “suspension” show that it was a colourable device to penalize Safety Construction Co. Ltd.”*

## **C. The Evaluation Process**

1. The Central Procurement Board appointed a three-member Bid Evaluation Committee to evaluate the seven bids received by the deadline for the submission of bids. The bidders and their bid prices as read out at the public opening were as follows:

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<i>Name of Bidder</i>	<i>Read-out Bid Price(s) Amount (MUR)</i>	
	<i>Zone 2</i>	<i>Zone 3</i>
<i>Gamma Construction Ltd</i>	<i>220,807,011.25</i>	<i>222,631,757.61</i>
<i>Super Builders Company Limited</i>	<i>Not quoted</i>	<i>206,507,866.70</i>
<i>Vassant Enterprise Ltd</i>	<i>203,487,612.50</i>	<i>165,487,645.00</i>
<i>Colas (Maurice)Ltee</i>	<i>196,082,622.45</i>	<i>245,138,080.20</i>
<i>PAD &amp; Co. Ltd</i>	<i>172,455,965.00</i>	<i>214,574,255.00</i>
<i>Best Construct Co. Ltd</i>	<i>172,753,044.62</i>	<i>Not quoted</i>
<i>Safety Construction Co. Ltd</i>	<i>157,282,850.00</i>	<i>192,435,674.00</i>

2. In its first report dated 31 August 2012, the Bid Evaluation Committee indicates that two of the bidders were considered to be non-responsive. One failed to satisfy the commercial terms and the second one the technical terms. The corrected bid amounts of the remaining five responsive bids were as follows:

<i>No</i>	<i>Bidder</i>	<i>Quoted Bid Amount (Incl. of VAT) RS</i>	<i>Corrected Bid Amount (Incl. of VAT) RS</i>	<i>Quoted Bid Amount (Incl. of VAT) RS</i>	<i>Corrected Bid Amount (Incl. of VAT) RS</i>
		<i>Zone 2</i>	<i>Zone 2</i>	<i>Zone 3</i>	<i>Zone 3</i>
<i>1</i>	<i>Gamma Construction Ltd</i>	<i>220,807,011.25</i>	<i>220,807,011.25</i>	<i>222,631,757.61</i>	<i>222,631,757.61</i>
<i>2</i>	<i>Super Builders Co. Ltd</i>	<i>Not quoted</i>	<i>Not quoted</i>	<i>206,507,866.70</i>	<i>203,805,366.70 (Error in item 1 in BOQ)</i>
<i>4</i>	<i>Colas (Maurice) Ltee</i>	<i>196,082,622.45</i>	<i>196,082,622.45</i>	<i>245,138,080.20</i>	<i>245,138,080.20</i>
<i>6</i>	<i>Best Construct Co. Ltd</i>	<i>172,753,044.62</i>	<i>172,753,044.62</i>	<i>Not quoted</i>	<i>Not quoted</i>
<i>7</i>	<i>Safety construction Co. Ltd</i>	<i>157,282,850.00</i>	<i>180,875,277.50 (Summary of bid prices has not been filled by the Bidder in BOQ)</i>	<i>192,435,674.00</i>	<i>221,301,025.10 (Summary of bid prices has not been filled by the Bidder in BOQ)</i>

3. The Bid Evaluation Committee then went on to recommend for award:

*“Zone 2 - Best Construct Co. Ltd for a contract price of Rs172,753,044.62 (VAT included)  
Zone 3 - Super Builders Co. Ltd for a contract price of Rs203,805,366.70 (VAT included).”*

4. The Bid Evaluation Committee submitted a second report on 05 September 2012 and at page 9, it is reported with respect to Safety

Construction Co. Ltd that *“The summary of bid prices for the zones has not been filled according to the requirement of Bill of Quantities. BEC considers that the letter of bid prevails over the summary of bid prices hence the rate of each item in the Bill of Quantities is deemed to be inclusive of VAT.”*

The recommendations for award was as follows:

*“Zone 2 - Safety Construction Co. Ltd for the sum of Rs157,282,850.00 (VAT inclusive)*

*Zone 3 - Super Builders Company Ltd for the sum of Rs203,805,366.70 (VAT inclusive).”*

5. In his dissenting report one member of the Bid Evaluation Committee the following is indicated with respect to Safety Construction Co. Ltd at page 2 of the report *“The summary of bid prices for the two zones has not been filed according to the requirement of Bill of Quantities. The total amount for Zone 2 from page 1-49 and the total amount for Zone 3 from page 1-55 of Bill of Quantities had to be carried forward to Summary of Bid Prices of page 1-56 of Bill of Quantities. The Bid price has therefore been adjusted to reflect the actual price through this non conforming component, i.e. to include the VAT component of 15% as detailed overleaf”*.

The member then went on to recommend the following:

*“Zone 2 – Best Construct Co. Ltd for the sum of Rs172,753,044.62 (VAT inclusive)*

*Zone 3 - Super Builders Company Ltd for the sum of Rs203,805,366.70 (VAT inclusive).”*

6. The Central Procurement Board sought confirmations from Safety Construction Co. Ltd on 14 September 2012 as to whether *“the price as brought forward in the Bid Submission Form for zones 2 and 3 are inclusive of VAT”*. The bidder confirmed on 17 September 2012 that its prices were inclusive of VAT.
7. The Central Procurement Board informed the Public Body on 27 September 2012 that it had approved the award of contracts to Best Construct Co. Ltd for zone 2 and to Super Builders Co. Ltd for zone 3. However, the Central Procurement Board informed the Public Body on 28 September 2012 to withhold the notification of

award until further notice. On 23 October 2012, the Central Procurement Board informed the Public Body that it may proceed with the notification of award as communicated on 27 September 2012.

#### **D. Submissions and Findings**

1. Following the challenge of Safety Construction Co. Ltd on 26 October 2012 the Public Body sought material for reply from the Central Procurement Board on 29 October 2012. The Central Procurement Board provided the following reply to the Public Body on 30 October 2012 *“The bidder has been suspended from participating in procurement exercises by the Procurement Policy Office. Until further notice, Public bodies have been requested not to enter into contract with Safety Construction Co. Ltd. PPO Circular No. 10 of 2012 is enclosed herewith for ease of reference”*.
2. The Public Body once again sought material for reply from the Central Procurement Board following the application for review made by Safety Construction Co. Ltd on 15 November 2012. The Central Procurement Board provided the following information to the Public Body *“following proposal for disqualification made by your Ministry, the Procurement Policy Office had issued Circular No. 10 of 2010 dated 23 October 2012, requesting Public Bodies not to invite bids nor to accept bids or enter into contract with Safety Construction Co. Ltd. At the material time, Safety Construction Co. Ltd was suspended by the Procurement Policy Office.”*
3. The Panel notes that on 18 October 2012 the Procurement Policy Office informed Safety Construction Co. Ltd of the proposal made by the Ministry of Public Infrastructure, National Development Unit, Land Transport & Shipping (NDU Division) to disqualify it from participating in the bidding exercises for a period of six months. The company was also informed that it had been suspended with immediate effect from participating in procurement proceedings pending the completion of disqualification proceedings. The Procurement Policy Office then went on to issue Circular No. 10 of 2012 where at paragraph 2 it is stated that *“until further notice, public bodies are hereby requested not to invite bids nor to accept bids or enter into contract with Safety Construction Co. Ltd. Any existing contract entered into by Safety Construction Co. Ltd with a public body shall not be affected by this decision”*.

4. **In Law**

Mr M. Gobin, Counsel for the aggrieved bidder referred to circular no. 10 from the Procurement Policy Office dated 23 October 2012, under the heading “Suspension of Safety Construction Co. Ltd”. He submitted in Law that the Public Procurement (Disqualification) Regulations 2009 do not contain any provision empowering the Procurement Policy Office to suspend a bidder. He added that the power to suspend is provided in Regulation 11 of the Public Procurement (Suspension and Debarment) Regulations.

In her reply, Mrs K. Gunesh-Balaghee submitted that the Procurement Policy Office could issue such circular and (referred to Regulation 6(1) of the Public Procurement (Disqualification) Regulations 2009).

We have heard submission on both sides and reached the following conclusion:

- (a) Indeed, Regulation 6(1) of the Public Procurement (Disqualification) Regulations of 2009 provides specifically that *“a proposal for disqualification may include a recommendation that the supplier, contractor or consultant be suspended from participating in procurement proceedings pending the completion of disqualification proceedings”*. Moreover, according to Regulation 6(2) a proposal by a public body for the disqualification of a supplier, contractor or consultant shall be referred to the Director of Procurement Policy Office for action.
- (b) It is also significant to note that Section 53(1) of the Public Procurement Act reads as follows *“subject to subsection (2), the Policy Office may, under such conditions as may be prescribed, suspend or debar a potential bidder or supplier from participation in procurement on the following grounds”*.
- (c) As rightly pointed out by Mrs K. Gunesh-Balaghee, for the Public Body, Regulation 4 of the Public Procurement (Disqualification) Regulations 2009 provides that:

*“No public body shall –*

- (a) solicit or accept bids, proposals or quotations from a suspended or disqualified bidder;*
- (b) consider bids, proposals or quotations submitted by a suspended or disqualified bidder prior to its suspension or disqualification”*.

In accordance with these provisions, she rightly submitted that the Procurement Policy Office was empowered to issue circular no. 10 of 2012.

- (d) Furthermore, the Panel concludes that pursuant to Section 7 of the Public Procurement Act 2006 the Procurement Policy Office was empowered to issue Circular No. 10 of 2012, dated 23 October 2012 and it was mandatory for all Public Bodies to abide to the contents of the circular. Thus, the Panel considers that Safety Construction Co. Ltd was under suspension while the procurement proceedings were ongoing and as such could not have been considered for an award.

The Panel finds that the submission in law of Mr M. Gobin to the effect that the suspension of Safety Construction Co. Ltd was ultra vires, is misconceived and does not stand in law.

5. **On the merits**

Mr M. Gobin also stressed on the fact that strangely enough the suspension was effective on 24 October 2012 on the very day when the contract was awarded. He added that the suspension was unwarranted and resulted in the award of the contract to another bidder with a higher price of 15 millions. It might be so, but the record reveals also that the Notice of Proposed Suspension and Disqualification was issued on 18 October 2012 and therefore the decision to terminate suspension was reached some 20 days within the 50 days delay albeit one day after the hearing.

The Panel feels that though the suspension of the aggrieved bidder has been waived some weeks after, there is no evidence to suggest that the suspension was prompted by improper motives.

We therefore find no merits in the application which is accordingly set aside.

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

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

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

**Dated 25 January 2013**