

INDEPENDENT REVIEW PANEL

In the matter of:

Securiclean (Mtius) Ltd

(Applicant)

v/s

Ministry of Local Government & Outer Islands

(Respondent)

(Cause No. 10/14/IRP - CPB/56/2013)

Decision

A. History of the case

1.0 On 08 January 2014, the Ministry of Local Government & Outer Islands invited sealed bids through National Open Advertised Bidding method from qualified bidders for the purpose of a contract pertaining to scavenging services, including carting away of post cyclonic waste, for the following villages:

Lot 1 – Mahebourg Village, excluding housing estates

Lot 2 – Coastal Village Trou d'Eau Douce Village

Lot 3 – Flacq Village

1.1 The closing date for the submission of bids was 19 February 2014 at 13.30 hrs (local time) at the Central Procurement Board. Four bids were received and a Public Opening was carried out on the same day at 14.00 hrs, in the conference room of the Central Procurement Board.

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1.2 Bids were received from four bidders namely:

- Maxiclean Co. Ltd
- Securiclean (Mauritius) Ltd
- Atics Ltd
- Compagnie Regionale de Services et de L'Environnement Ltee (CRSE Ltee)

1.3 The bid prices were read out as follows:

SN	Bidders	Lot 1		Lot 2		Lot 3		Total for SWM 1
		Discount	Bid Price (Inc. VAT) Rs	Discount	Bid Price (Inc. VAT) Rs	Discount	Bid Price (Inc. VAT) Rs	
1	Maxiclean Co. Ltd	Nil	77,077,600	Nil	27,107,800	Nil	30,833,800	135,019,200
2	Securiclean (Mtius) Ltd	Nil	78,942,500	Nil	38,175,000	Nil	37,586,890	154,704,390
3	Atics Ltd	Nil	71,999,890	Nil	27,450,500	Nil	33,028,000	132,478,390
4	CRSE Ltee	Nil	78,867,000	Nil	24,437,500	Nil	35,362,500	138,667,000

1.4 After correction of an arithmetical error in the of Applicant's bid, the corrected price is as follows:

Lot 1 - Mahebourg Village			
S.N	Bidder	Bid Price as read out (inc VAT)	Corrected Bid Price (inc VAT)
1	Maxiclean Co. Ltd	77,077,600.00	77,077,600.00
2	Securiclean (Mauritius) Ltd	78,942,500.00	68,942,500.00
3	Atics Ltd	71,999,890.00	71,999,890.00
4	CRSE Ltee	78,867,000.00	78,867,000.00

Lot 3 - Flacq Village			
S.N	Bidder	Bid Price as read out (inc VAT)	Corrected Bid Price (inc VAT)
1	Maxiclean Co. Ltd	30,833,800.00	30,833,800.00
2	Securiclean (Mauritius) Ltd	37,586,890.00	27,586,890.00
3	Atics Ltd	33,028,000.00	33,028,000.00
4	CRSE Ltee	35,362,500.00	35,362,500.00

B. Notification of Award

The Ministry of Local Government & Outer Islands, through a letter dated 16 April 2014, informed the Applicant of the particulars of the successful bidders as follows:

Lot No.	Villages	Bidders	Address	Bid Amount for 36 months inclusive of VAT
1	Mahebourg Village	Atics Ltd	Allee des Manguiers ,Pailles	71,999,890
2	Coastal Village of Trou d’Eau Douce	CRSE Ltee	Montagne Jacquot, Pointe aux Sables P.O Box 726 Bell Village	24,437,500
3	Flacq Village	Maxiclean Co. Ltd	Grande Rosalie, D’Epinay	30,833,800

C. The Challenge

By letter dated 21 April 2014, the Applicant challenged the award on the following grounds:

“1. Having submitted the lowest bid, and in the absence of any valid reason, the Bidder should have been awarded the contract straight away for:

- (a) Lot No. 1 – Mahebourg Village amounting to Rs68,942,500
- (b) Lot No. 3 – Flacq Village amounting to Rs27,586,890

Atics Ltd has been awarded for Lot No. 1 whereas its bid is higher and amounts to Rs71,999,980.

Maxiclean Co. Ltd has been awarded for Lot No. 3 whereas its bid is higher and amounts to Rs30,833,800.

2. *In the circumstances, the Bidder has reasons to believe that its bid has not been retained on the ground that it had allegedly not complied with Clause ITB 6.5(e). Clause ITB 6.5(e) of Section 1 “Instructions to Bidder” requires the bidder to submit evidence in the form of a Bank Testimonial of its liquid assets and/or credit facilities net of other contractual commitments as per the amount stated for each lot in the Bidding Data Sheet in respect of the lots for which the Bidder is selected for award of the contract. The Bidder has submitted the Bank Testimonial issued by the Mauritius Post and Cooperative Bank Limited (the MPCB Ltd).*

Should this be the case, the Bidder contests this ground for the following reasons:

- (i) It has been using a similar format as issued by MPCB Ltd since years and has been successful in numerous bids. The Bank Testimonials of the Bidder has never been questioned in the past though the bids were successful. The bidder believes that the MPCB Ltd issues similar Bank Testimonials for its other clients who participate in tenders;*
- (ii) There is no prescribed form or wordings for such Bank Testimonials.*
- (iii) Even if the Bank Testimonial did not comply fully with ITB 6.5(e), and in the absence of any prescribed form or wording, and having accepted the Bank Testimonials in the past for numerous bids, the Central Procurement Board should have sought clarifications under section 37(1) of the Public Procurement Act 2006 during the examination of the bid, as this document does not in any way change the price for substance of its bid.*

D. The Reply to Challenge

By letter dated 25 April 2014, the Respondent replied to the challenge on the following grounds:

“ITB 6.5(e) of the bidding document stipulates that “to qualify for award of Contract, bidders shall meet the following qualifying criteria: liquid assets and/or credit facilities, net of other contractual commitments as per the amount stated for each lot in the BDS in respect of lots for which the bidder is selected for award of contract.”

In the Bidding Data Sheet (BDS) ITB 6.5(e) stipulates that inter alia that:

“The bidder should have secured a credit facilities and/or liquid assets net of other contractual commitments for at least the amount as indicated for the lot(s) in Section VI – Table 2 to be qualified for award of contract”.

Evidence in the form of Original Bank Testimonial dated not more than 1 month from date of submission of bids shall be submitted. The Bank Testimonial shall be on the letter head of the Bank, clearly mentioning the name of the Bidder, refer to the present procurement exercise and stipulate the amount of financial resources/credit facilities that can be made available to the Bidder”.

Securiclean (Mauritius) Ltd has submitted an original bank testimonial in which the bank opines that the company has the credit facilities and liquid assets for the proper execution of the above contract for a minimum liquid asset and/or credit facilities of MUR 3,600,000, MUR 1,200,000 and MUR 1,500,000 for Lot 1, Lot 2 and Lot 3 respectively. However, it did not specify whether the amounts are net of other contractual commitments. Moreover, the fact that the Bank has only given its opinion instead of certifying or testifying that the amount of financial resources/credit facilities that can be made available to the bidder is a major departure from the requirements of ITB 6.5(e); and

You may further note that Clause (iv) under the Guidelines for the determination of responsiveness of bids of directive No. 3 from the Procurement Policy Office dated 30 April 2010 list the grounds for rejection of a bid and Clause (iv)(k) reads as follows:

“failure to submit major supporting documents required by the bidding documents to determine substantial responsiveness of a bid (e.g. evidence of adequacy of working capital if so required in the bidding document)”.

The Bank Testimonial submitted by Securiclean (Mauritius) Ltd fell short of meeting the requirements of the bidding process, thus not being acceptable as presently drawn. This omission on the part of the bidder being a major deviation cannot be cured through clarification at the evaluation stage.”

E. Grounds for Review

On 02 May 2014, the Applicant seized the Independent Review Panel for review on the following grounds:

- “1. The Ministry of Local Government and Outer Islands (hereinafter referred to as the Public Body) was wrong to have disqualified and ought not to have disqualified Securiclean (Mtius) Ltd on the ground that it had allegedly not complied with Clause 6.5(e) of Instruction to Bidders (ITB).*
- 2. The Public Body has failed and neglected to award the contracts concerning Lot 1 and Lot 3 to Securiclean (Mtius) Ltd which has submitted the lowest evaluated substantially responsive bid, and this, in contravention of Section 45 of the Public Procurement Act.*
- 3. The Bid Evaluation Committee having been satisfied after verification of all bid documents including the Bank Testimonials submitted by Applicant, the Public Body could not or ought not to have disqualified Securiclean (Mtius) Ltd on the ground that it had allegedly not complied with Clause 6.5(e) of ITB.*

4. *Before applying the decision delivered by the Independent Review Panel on the 11th March 2014 in the matter of Pro Construction & Renovation Works Ltd v/s National Housing Company Ltd (hereinafter referred to as PCR Works v/s NHDC Ltd) to any bid, the prescribed wordings for adequacy of working capital ought to have been published.*
5. *For all tenders closed prior to 11th March 2014 (the closing date of tender CPB/56/2013 was the 19th February 2014 or to the publication of the prescribed wordings for adequacy of working capital, the Public Body should have given an opportunity to all bidders to rectify the wordings of their bank testimonials as highlighted by the Independent Review Panel in PCR Works v/s NHDC Ltd).*
6. *In any event after having accepted the bank testimonials with exactly the same wordings for the past seven years for bids made by the Applicant which have been successful, the Public Body should have accepted the bank testimonial.”*

F. The main issue

- 1.0 The main issue which arises in this case relates to the interpretation of Clause ITB 6.5(e), which is reproduced hereunder:

“To qualify for award of Contract, bidders shall meet the following qualifying criteria: liquid assets and/or credit facilities, net of other contractual commitments as per the amount stated for each lot in the BDS in respect of lots for which the bidder is selected for award of contract.”

- 1.1 The Applicant submitted an original Bank Testimonial dated 04 February 2014 under the letter head of the bank (MPCB), mentioning the name of the bidder (Securiclean (Mauritius) Ltd). This testimonial, as worded refers specifically to the contract under consideration, and indicates expressly that the credit facilities and liquid assets are meant for the proper execution of the said contract, as particularised hereunder (the underlining is ours):

Lot 1	MUR 3,600,000
Lot 2	MUR 1,200,000
Lot 3	MUR 1,500,000

- 1.2 However, the expression “net of other contractual commitments” did not appear on the testimonial submitted by the Applicant.

G. The First Evaluation Report submitted on 05 March 2014

After scrutinizing the respective bids, in the light of the documents submitted, the Bid Evaluation Committee under the Chairmanship of Mrs R. Ramrukheea, concluded on 05 March 2014 that Applicant was the lowest responsive bidder for Lots No. 1 and 3. The Bid Evaluation Committee came to that conclusion after the correction of an arithmetical error in the price quoted by the Applicant.

H. The Intervening Decision in the case of Pro-Construction & Renovation Works Ltd v/s NHDC (Dec. No. 05/14)

- 1.0 On 11 March 2014, by a majority of 2 to 1, the Independent Review Panel, as it was then constituted, issued its decision in the case of Pro-Construction & Renovation Works Ltd v/s NHDC (Dec. No. 05/14), the operative part of which is reproduced hereunder:

“The document submitted by the aggrieved bidder admittedly does not use the exact wording of ITB 6.3(e) of the Bidding Data Sheet”.

Thus, it is considered that the aggrieved bidder has failed to submit an appropriate document to fully comply with the mandatory requirement of ITB 6.3(e). This omission on the part of the aggrieved bidder cannot be cured with clarification at the evaluation stage.”

- 1.1 In fact, the Applicant, in case Pro-Construction & Renovation Works Ltd v/s NHDC (Dec. No. 05/14) did not use the expression “net of other contractual commitments”, and the Applicant was accordingly eliminated for this omission.
- 1.2 However, it was a unanimous recommendation of the three members of the Independent Review Panel, as it was then constituted, that a prescribed form should henceforth be included in the bidding documents.

I. The Second Evaluation (First Supplementary Evaluation Report)

1.0 On 22 March 2014, the Evaluation Committee was invited to take into consideration the majority decision of the Independent Review Panel in the case of Pro-Construction & Renovation Works Ltd v/s NHDC (Decision No. 05/14).

1.1 After going through the majority decision, the Evaluation Committee maintained its initial decision, grounded as follows:

“Although the words “net of other contractual commitment” do not appear on the testimonial, the Committee was of the opinion that the credit facilities and liquid assets were exclusively for the execution of the said contract, i.e. net of other contractual commitment” (the underlining is ours).

1.2 The Bid Evaluation Committee accordingly maintained its recommendation submitted in its first report dated 05 March 2014.

J. Legal Advice

1.0 In the light of the second recommendation of the Evaluation Committee, maintaining its initial decision, the Central Procurement Board sought legal opinion from two different sources.

1.1 The first legal opinion dated 28 March 2014 reads as follows: “In the light of the decision reached by the Independent Review Panel, it may be concluded that the impugned Bank Testimonial fell short of meeting the requirements of the bidding process, thus being not acceptable as presently drawn” (the underlining is ours).

1.2 This decision was, however, accompanied by an important recommendation worded as follows “You may wish to consider the necessity of having a standard format for such requirements so as to ensure uniformity. This would avoid rendering otherwise responsive and competitive bids inadmissible (the underlining is ours).

1.3 The second legal opinion dated 14 April 2014 is concluded as follows: “..... a bank testimonial furnished by a bidder wherein it is not expressly specified that the credit facilities and/or liquid assets are “net of other contractual commitments” should be

considered to have fallen short of meeting the requirements of ITB 6.5(e)” (underlining is ours).

K. Third Evaluation submitted on 02 April 2014

In their third report, the Evaluation Committee reversed their original decision, which was maintained in the second evaluation, by declaring Securiclean (Mauritius) Ltd, non-responsive, hence the present application.

L. Hearing

- 1.0 The hearing started on 12 June 2014 and all the parties were represented by Counsel.
- 1.1 In the course of the hearing, oral evidence was adduced and relevant documents were produced by the Parties, including a copy of Directive No. 3.
- 1.2 The hearing was characterised by an enlightening exchange of views between the Parties, as well as between the Parties and the Panel.
- 1.3 The Panel was subsequently favoured with written submissions in support of the respective cases of the Parties.
- 1.4 Given that the appeal was lodged before constitution of the present Panel, which became effective only on 29 May 2014, all the parties agreed to waive the statutory requirement for the hearing and decision in this case. Furthermore, in view of the history of this case, we have taken more than usual time to look into all its aspects, scrutinizing documents and oral evidence, without neglecting the various views expressed in the course of the exchange and in the written submissions.

M. Discussions and Findings

- 1.0 As assessed by the Evaluation Committee in their first and second evaluation reports, Applicant passed successfully the eligibility and responsive test. Thereafter, following the correction of an arithmetical error in the bid price of the Applicant, the Evaluation Committee, comprising of experts in their respective fields,

recommended the Applicant as the “lowest evaluated responsive bidder”.

- 1.1 Subsequently, based on the majority decision of the Independent Review Panel, as it was then constituted in the case of Pro-Construction & Renovation Works Ltd v/s NHDC (Decision No. 05/14), and on the basis of the two converging legal opinions, the Evaluation Committee reversed its initial decision and declared Applicant non-responsive.
- 2.0 In the discharge of its functions under the law, the Central Procurement Board is assisted by a Bid Evaluation Committee, composed of members who, besides being expert in their respective fields, are also knowledgeable about public procurement procedures.
- 2.1 The law empowers the Central Procurement Board to review the recommendation of a Bid Evaluation Committee or to require the Evaluation Committee to make a fresh or further evaluation on specified grounds.
- 2.2 It is therefore quite understandable that in the present case the Central Procurement Board did ask the Bid Evaluation Committee to have a fresh look at its first evaluation in the light of a previous decision of the Independent Review Panel. The Central Procurement Board was however ill advised to seek legal opinion, subsequent to the second report of the Evaluation Committee. We are of the view that a legal advice, however sound and attractive it may be, cannot be a valid substitute for expert opinion. It is to be observed that in its second report, the Committee maintained its original decision, in spite of the majority decision of the Independent Review Panel, in case Pro-Construction & Renovation Works Ltd v/s NHDC (Decision No. 05/14). Had the Central Procurement Board stopped at the second report of the Evaluation Committee, the Independent Review Panel would not have been saddled with the present application.
- 3.0 We have carefully examined the majority decision in the case of Pro-Construction & Renovation Works Ltd v/s NHDC (Decision No. 05/14), and note that the Independent Review Panel quite rightly referred to Directive No. 3, material extracts of which, are reproduced hereunder.

“ITB 29.2 A substantially responsive bid is one that meets the requirements of the Bidding Document without material deviation, reservation, or omission. A material deviation reservation, or omission is one that,

(a) If accepted, would:

(i) Affect in any substantial way the scope, quality, or performance of the Works specified in the Contract; or

(ii) Limit in any substantial way, inconsistent with the Bidding Document, the Employer’s rights or the Bidder’s obligation under the proposed Contract; or

(b) If rectified, would unfairly affect the competitive position of other Bidders presenting substantially responsive bids.”

ITB 30.2 Provided that a bid is substantially responsive, the Employer may request that the Bidder submit the necessary information or documentation, within a reasonable period of time, to rectify nonmaterial nonconformities in the bid related to documentation on such nonconformities shall not be related to any aspect of the price of the bid. Failure of the Bidder to comply with the request may result in the rejection of its bid.

ITB 30.3 Provided that a bid is substantially responsive, the Employer shall rectify quantifiable nonmaterial nonconformities related to the Bid Price. To this effect, the Bid Price may be adjusted, for comparison purposes only, to reflect the price of a missing or non-conforming item or component. The adjustment shall be made using the methods indicated in Section III (Evaluation and Qualification Criteria).

5. Legal advice obtained by the Procurement Policy Office has confirmed that non-submission of factual documents and information like trade license or contractor’s permit that is, documents and information which cannot be tampered with, are non-material omissions. Accordingly, and in-keeping with the provisions under ITB 29.2(b), it becomes equally important to establish what are those missing documents that, if

rectified, “would unfairly affect the competitive position of other Bidders presenting substantially responsive bids.”

- 3.1 We can therefore safely assume that the members of the Independent Review Panel who issued the majority decision in the case of Pro-Construction & Renovation Works Ltd v/s NHDC (Decision No. 05/14), must have been aware of the test laid down in Directive No. 3, in so far as the assessment of responsiveness of bids is concerned. It is unfortunate, therefore, that they limited themselves to a question of drafting/wording of the impugned testimonial, instead of applying the appropriate test.
- 3.2 We are of the view that drafting/wording, which is more a question of form than anything else, cannot per se be interpreted as a major deviation from the bid requirement, moreso, as in this case, no prescribed form is available. With due respect, therefore, to the members who issued the majority decision, we are unable to agree with them.
- 3.3 Likewise, we are not prepared to follow the converging legal advice, it is noted that in so far as the legal opinions are concerned, no reference is made to any interpretation aid, as for example, Directive No. 3 or the guidelines for the assessment of Responsiveness issued by the Public Procurement Office. We are therefore left to assume that the legal advisers were not in presence of the relevant interpretation tool.
- 4.0 We are therefore of the view that the Evaluation Committee, in revising their original decision on the basis of the converging legal opinions, abdicated their responsibility to the detriment of their independence and expertise.
- 5.0 On the other hand, we agree with the submission of Counsel appearing for the Applicant to the effect that there is no difference in meaning between the wording (the said contract) used in the testimonial and the expression “net of other contractual commitments”. The member of the Independent Review Panel who issued the minority decision in the case of Pro-Construction & Renovation Works Ltd v/s NHDC (Decision No. 05/14) is of the same view.
- 5.1 Even if we were to assume that the wording in the testimonial does not convey the same meaning as the expression “net of other contractual commitments”, we are of the view that this apparent non-conformity, if rectified, would not have any bearing on “the

competitive position of other bidders presenting substantially responsive bids”.

- 5.2 In the circumstances, the non-conformity, if any, with ITB 6.5(e), can, in our opinion, be only a minor non conformity, and the Applicant ought to have been given the opportunity to rectify the wording of the testimonial, moreso, as per the unchallenged evidence, the Applicant has been, for a number of years, submitting testimonials similarly drafted.
- 6.0 We therefore conclude that the Applicant, which was originally assessed as a substantially responsive bidder, had been improperly eliminated.

N. Decision

In the light of our findings, as hereinabove discussed, we find merit in the application and accordingly recommend a revision of the decision in relation to the award for Lots No 1 and 3, as particularised under para A (1.0) herein.

(Said Toorbuth)
Chairperson

(Siv D. M. Potayya)
Member

(Jacques C. Nauvel)
Member

Dated: 05 September 2014