Decision No. 19/14

INDEPENDENT REVIEW PANEL

In the matter of:

Securiclean (Mtius) Ltd

(Applicant)

v/s

Ministry of Local Government & Outer Islands

(Respondent)

(Cause No. 11/14/IRP- CPB/57/14/IRP)

Decision

A. History of the case

1.0 On 07 January 2014, the Ministry of Local Government & Outer Islands invited sealed bids through National Open Advertised Bidding method for the procurement of Solid Waste Scavenging Services for villages, grouped in two lots.

- Lot 1 – All coastal villages from Anse La Raie to the road linking Chemin Vingt Pieds to Grand Bay Police Station including Sottise (covering all the Village Council Areas in that stretch)

- Lot 2 – All coastal villages from Le Goulet to the road linking Chemin Vingt Pieds to Grand Bay Police Station excluding Sottise (including all the Village Council Areas in that stretch)

1.1 The closing date for the submission of bids was 18 February 2014 at 13.30 hrs (local time) at the Central Procurement Board.

1.2 The bid prices were read out as follows:

SN	*Bidder*	*Lot 1*		*Lot 2*		*Total for SWM 2*
		Discount (Rs)	*Bid Amount after discount Inclusive of VAT for 36 months (Rs)*	*Discount (Rs)*	*Bid Amount after discount Inclusive of VAT for 36 months (Rs)*	
1	*Securiclean (Mauritius) Ltd*	*Nil*	*73,480,000*	*Nil*	*68,655,000*	*142,135,000*
2	*MaxiClean Co. Ltd*	*Nil*	*66,148,000*	*Nil*	*69,575,000*	*135,723,000*
3	*Atics Ltd*	*Nil*	*67,390,000*	*Nil*	*70,897,500*	*138,287,500*

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.	*Coastal Villages*	*Bidder*	*Address*	*Bid Amount for 36 months inclusive of Provisional Sum of Rs1,000,000 and VAT*
1	*All coastal villages from Anse La Raie to the road linking Chemin Vingh Pieds to Grand Bay Police Station*	*Maxiclean Co. Ltd*	*Grande Rosalie D'Epinay*	*66,148,000*
2	*All coastal villages from Le Goulet tot he road linking Chemin Vingt Pieds to Grand Bay Police Station*	*Maxiclean Co. Ltd*	*Grande Rosalie D'Epinay*	*69,575,000*

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 – All Coastal Villages from Anse La Raie to the road linking Chemin Vingt Pieds to Grand Bay Police Station, amounting to Rs63,480,000

(b) Lot No. 2 – All Coastal Villages from Le Goulet to the road linking Chemin Vingt Pieds to Grand Bay Police Station, amounting to Rs68,655,000

Maxiclean Co. Ltd has been awarded for Lot No. 1 whereas its bid is higher and amounts to Rs66,148,000.

Maxiclean Co. Ltd has been awarded for Lot No. 2 whereas its bid is higher and amounts to Rs69,575,000.

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 Public Body made the following reply to the challenge:

"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 3,500,000, MUR 3,400,000 for Lot 1, and Lot 2 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:

"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 r 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/57/2013 was the 18th 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 and scope 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), and referring to the present procurement exercise to the effect that the Applicant has the credit facilities and liquid assets for the proper execution of the said contract as particularised hereunder:

Lot 1	MUR 3,500,000
Lot 2	MUR 3,400,000

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

1.0 The Bid Evaluation Committee comprised of Mr J. Peeroo as Chairman. The Committee met on 21 February 2014 and submitted its bid evaluation report on 05 March 2014.

1.1 At para 5.0 – Examination of bids – The Committee noted that all bidders have submitted all the documents required as per the bidding documents including SN16 – Bank Testimonials of credit facility dated not more than one month.

1.2 At para 7.0 (i) – Technical Evaluation – The Bid Evaluation Committee noted that all three bidders namely Securiclean (Mauritius) Limited, Maxiclean Ltd and Atics Ltd had provided satisfactory service of same nature from at least two clients for the last three years.

1.3 At para 11.0, reasonableness of bid price, the Committee noted that the lowest corrected bid price for Lot 1 and 2 made by the substantially responsive bidder Securiclean (Mauritius) Limited are 9% and 11% above the cost estimates respectively.

1.4 Bid prices for Lots No. 1 and 2 are given hereunder

Lot 1 – All coastal villages from Anse la Raie to the road linking Chemin Vingt Pieds to Grand Bay Police Station including Sottise (covering all the Village Council Areas in that stretch)			
SN	*Bidders*	*Bid Price as read out after discount including VAT for 36 months (Rs)*	*Corrected Price after discount including Vat for 36 months (Rs)*
1	*Securiclean (Mauritius) Ltd*	*73,480,000*	*63,480,000*
2	*Maxiclean Co. Ltd*	*66,148,000*	*66,148,000*
3	*Atics Ltd*	*67,390,000*	*67,390,000*

Lot 2 – All coastal villages from LeGoulet to the road linking Chemin Vingt Pieds to Grand Bay Police Station excluding Sottise (including all the Village Council Areas in that stretch)			
SN	*Bidders*	*Bid Price as read out after discount including VAT for 36 months (Rs)*	*Corrected Price after discount including Vat for 36 months (Rs)*
1	*Securiclean (Mauritius) Ltd*	*68,655,000*	*68,655,000*
2	*Maxiclean Co. Ltd*	*69,575,000*	*69,575,000*
3	*Atics Ltd*	*70,897,500*	*70,897,500*

H. The Intervening Decision in case 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 wordings 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 The application was set aside because the testimonial submitted by the Applicant did not mention "net of other contractual commitments".

1.2 However, it was a unanimous recommendation of the three members of the Independent Review Panel, as then constituted that a prescribed form should henceforth be included in the bidding documents.

I. The Second Evaluation (First Supplementary Evaluation Report)

1.0 At para 1.0 of the Report, the Chairperson of the Bid Evaluation Committee was informed by the Central Procurement Board that there were new elements to be considered during evaluation exercise, following a decision taken by the Independent Review Panel on 11 March 2014.

1.2 The Bid Evaluation Committee met on 22 March and were handed a copy of the decision of the Independent Review Panel dated 11 March 2014.

1.3 At para 3.0, in the light of the decision of the Independent Review Panel, the Bid Evaluation Committee reviewed the responsiveness of the three bids received.

1.4 At para 3.3, the Bid Evaluation Committee considered that the bids submitted by Securiclean (Mauritius) Limited were technically non-responsive and rejected the bids for lots 1 and 2, hence the present application.

J. 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.

K. Discussions and Findings

1.0 The Applicant passed successfully the eligibility and responsive test and, after proceeding with the correction of an arithmetical error in the price of the Applicant's bid, 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), the Evaluation Committee reversed its decision and declared the Applicant as being 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 experts in their relevant fields, and 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. 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 the decision of the Independent Review Panel, in the case of Pro-Construction & Renovation Works Ltd v/s NHDC (Decision No. 05/14) which was issued on 11 March 2014.

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 We are of the view that the Evaluation Committee, which is a Committee of experts on technical issues, in allowing themselves to be influenced by the majority decision in the case of Pro-Construction & Renovation Works Ltd v/s NHDC (Decision No. 05/14), abdicated their responsibility to the detriment of their independence and expertise.

4.0 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 case Pro-Construction & Renovation Works Ltd v/s NHDC (Decision No. 05/14) is of the same view.

4.1 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".

4.2 In the circumstances, the non-conformity if any, with ITB 6.5(e), can in our opinion, be only a non-material 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.

5.0 We therefore conclude that the Applicant which was initially assessed as the lowest substantially responsive bidder has been improperly eliminated.

L. 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 2, as particularised under para A (1.0) herein above.

(Said Toorbuth)
Chairperson

(Siv D. M. Potayya)
Member

(Jacques C. Nauvel)
Member

Dated: 05 September 2014