

## INDEPENDENT REVIEW PANEL

In the matter of:

**Pro Construction & Renovation Works Ltd**

**(Applicant)**

**v/s**

**National Housing Development Company Limited**

**(Respondent)**

**(Cause No. 03/14/IRP)**

### **Dissenting Decision**

#### **A. Background**

1. The National Housing Development Company Limited using the Open Advertised Bidding Method invited bids on 11 November 2013 for the “*Construction of 28 Housing Units and Associated Infrastructure Works on Undeveloped Land on Existing NHDC Housing Estates at Chebel F2, Glen Park F1 and Henrietta*” (Contract No.: OAB No.: NHDC/0413/Lot3). The deadline for the submission of bids was Monday 16 December 2013 at 14.00 hours at the National Housing Development Company Limited and the public opening of bid received was scheduled for the same day at 14.30 hours.

The estimated cost of the project was MUR24,850,010.60 exclusive of VAT. A pre-bid meeting was held on 27 November 2013.

2. Bids were received from six bidders by the deadline for the submission of bids and the bid prices as read out at the public opening are as indicated below.

SN	<i>Read-out Bid Price(s)</i>	
	<i>Name</i>	<i>Amount(s) MUR</i>
A.	<i>Monesh Enterprises Ltd</i>	<i>22,733,780.00</i>
B.	<i>Power Contractors Ltd</i>	<i>27,416,300.00</i>
C.	<i>Pointe aux Piments Multi-Purpose and Agro-Mechanical Co-operative Society</i>	<i>29,284,435.00</i>
D.	<i>Ajmol Enterprise Ltd</i>	<i>26,680,000.00</i>
E.	<i>Safety Construction Company Ltd</i>	<i>26,872,389.00</i>
F.	<i>Pro Construction &amp; Renovation Works Ltd</i>	<i>21,858,521.65</i>

A three-member Bid Evaluation Committee was appointed by the Public Body to evaluate the six bids received and it held six meetings during the period 17 December 2013 to 06 January 2014.

- The Bid Evaluation Committee recommended the award of the contract to Ajmol Enterprises Ltd on 16 January 2014 in the amount of MUR 28,000,000.00 after negotiation. Pursuant to Section 40(3) of the Public Procurement Act 2006, the Public Body notified all bidders of the outcome of the evaluation exercise on 23 January 2014. Pro Construction & Renovation Works Ltd as an aggrieved bidder challenged the decision of the Public Body on 28 January 2014. On 30 January 2014, the Public replied to the challenge as follows:

*“You do not comply with ITB 6.3 (e) where a minimum amount of liquid assets and /or credit facilities net of other contractual commitments of MUR 5 million was not given in your offer”*

Pro Construction & Renovation Works Ltd still dissatisfied with the decision of the Public Body submitted an Application for Review to the Panel on 05 February 2014. The Panel pursuant to Section 45(4) of the Public Procurement Act 2006 suspended the procurement proceedings on 07 February 2014. On 17 February 2014, the Public Body submitted its comments on the Application for Review. A hearing scheduled for 20 February 2014 was postponed to 03 March 2014 at the request of the Public Body.

## **B. Grounds for Review**

The Grounds for Review are as follows:

- 1. The NHDC was wrong to have disqualified and ought not have disqualified Pro Construction & Renovation Works Ltd (the*

*Applicant) on the ground that it had allegedly not complied with ITB 6.3(e);*

2. *The NHDC has failed and neglected to award the contract to Pro Construction & Renovation Works Ltd which had submitted the lowest evaluated substantially responsive bid and this in contravention to Section 40 of the Act.”*

### **C. The Evaluation Process**

1. The National Housing Development Company Limited appointed a three-member Bid Evaluation Committee to evaluate the six bids received by the closing date of 16 December 2013. The Bid Evaluation Committee submitted its Bid Evaluation Report and Supplementary Bid Evaluation Report on 06 January 2014 and 16 January 2014 respectively.
2. The Bid Evaluation Committee queried from the Consultant, Desai & Associates Ltd, through a letter dated 19 December 2013 whether the Provisional Sums at items 1.11, 1.12 and 1.15 of the Bill of Quantities are included in the cost estimate of the project as it observed that the read-out bid prices varies between MUR 21,858,521.65 and MUR 29,284,435. The Consultant on 30 December 2013 confirmed that the estimated cost is inclusive of the Provisional Sums.
3. The Bid Evaluation Committee checked the eligibility of the bidders as per the requirements of the bidding documents and all bidders were considered to be eligible. The Bid Evaluation Committee then examined the completeness of each bid and all bids were retained for further evaluation.
4. The Bid Evaluation Committee then proceeded with a detailed examination of the bids, as per the provisions of the bidding documents, to determine the substantial responsiveness of the six bidders. The outcomes of the exercise are as follows:
  - (i) The following four bidders had no experience as prime contractor for at least two projects of similar nature, size and complexity over the last five years as required by ITB 6.3(b) of the Bidding Data Sheet and this shortcoming was considered to be a major deviation:
    - a. Monesh Enterprises Ltd
    - b. Power Contractors Ltd
    - c. Pointe aux Piments Multi-Purpose and Agro-Mechanical Co-operative Society
    - d. Safety Construction Company Ltd
  - (ii) Bidder, Pointe aux Piments Multi-Purpose and Agro-Mechanical Co-operative Society, did not submit a Bid

Submission Form as per the format of the bidding documents and this was considered as a major deviation by the Bid Evaluation Committee.

- (iii) Two bidders namely, Safety Construction Company Ltd and Pro Construction & Renovation Works Ltd, submitted minimum amount of MUR5 million of liquid assets and/or credit facilities but both bidders failed to indicate that this amount is net of other contractual commitments as required at ITB 6.3(e) of the Bidding Data Sheet. The Bid Evaluation Committee considered this as a major deviation.

Thus, the bids of the following bidders considered to be non-responsive to the commercial terms and were all rejected:

SN	Name
A.	Monesh Enterprises Ltd
B.	Power Contractors Ltd
C.	Pointe aux Piments Multi-Purpose and Agro-Mechanical Co-operative Society
E.	Safety Construction Company Ltd
F.	Pro Construction & Renovation Works Ltd

The bids of all the above bidders were rejected. The Bid Evaluation Committee considered that the bid of Ajmol Enterprise Ltd was the only substantially responsive one and was thus retained for technical evaluation.

5. The Bid Evaluation Committee having found that the bid of Ajmol Enterprise Ltd was compliant to the technical requirements then carried out an arithmetical check of the bid:

S/N	Bidder	Bid Amount (Rs)	Discount (Rs)	Corrected Bid Amount Inclusive of Discount (Rs)
1	Ajmol Enterprise Ltd	26,680,000.00	2,700,383.00	28,929,971.00

Following this exercise, the Bid Evaluation Committee observed that the Corrected Bid Amount Inclusive of Discount of Ajmol Enterprise Ltd is 16.4% higher than the estimated cost.

6. At Section 13 of the Evaluation Report dated 06 January 2014, the Bid Evaluation Committee concluded that *“the bid submitted by **Ajmol Enterprise Ltd** is the lowest substantially responsive evaluated bid. The price quoted by **Ajmol Enterprise Ltd** exceeds the updated estimated cost by more than 15%. No award can be recommended on the corrected Price MUR 28,929,971.00. However, an award can be made provided that a*

*negotiation exercise is carried out in accordance with Circular 7 of 2010 of the Procurement Policy Office”. The Bid Evaluation Committee in its report dated 06 January 2014 indicated that the bidder will have to submit the Letter of Acceptance and Letter of Completion for any two of the following projects:*

- (a) Construction of Social Security Service*
- (b) Office Building at Riche Terre for TNS Tobacco Company Ltd*
- (c) Residence for LLLMM*
- (d) Apartment at Flic en Flac For Societer Cenezoique*
- (e) Construction of Multi-Purpose Complex and Gymnasium at Paillotte for Municipal Council of Vacoas Phoenix*

7. On 14 January 2014, the Public Body in the presence of the Chairperson of the Bid Evaluation Committee held a negotiation meeting with the director of Ajmol Enterprise Ltd and the bidder agreed to reduce the corrected bid price to MUR28 million. By way of a letter dated 15 January 2014, Ajmol Enterprise Ltd confirmed same and submitted documentary evidence for the following two projects:

- a) Office Building at Riche Terre for TNS Tobacco Company Ltd
- b) Residence for LLLMM

8. On 16 January 2014, the Bid Evaluation Committee held a meeting to consider the outcome of the negotiation with Ajmol Enterprise Ltd and the clarifications received from the bidder in relation to ITB 6.3(b) of the bidding documents. The Bid Evaluation Committee submitted its Supplementary Bid Evaluation Report on 16 January 2014 and at page 2 of the report it is stated that *“The Bid Evaluation Committee found that the bid price after negotiation is within the accepted 15% updated estimated cost”*.

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

1. Clause ITB 6.3 of Section I – Instruction to Bidders specifies the criteria that a bidder shall meet to qualify for award of the contract and Clause ITB 6.3(e) is as follows:  
*“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”*

Neither the Applicant nor the successful bidder included the phrase “*exclusive of any advance payments which may be made under the Contract in their bidding documents*”. However this phrase was not included in the BDS.

At ITB 6.3(e) of the Bidding Data Sheet it is stated that:

*“The minimum amount of liquid assets and/or credit facilities net of other contractual commitments of the successful Bidder shall be MUR 5.0 Million.”*

2. Mr Y. Jean Louis, Senior State Counsel, for the Public Body explained that the document submitted by the aggrieved in its bid in relation to ITB 6.3(e) of the Bidding Data Sheet fall short to the requirements stipulated in the Instruction to Bidders as the following wordings were used in the document “*financial guarantee and resources up to **MUR 5, 000,000.00 (Mauritian Rupees Five Million Only)** for the proper execution of the said Contract.*”. He submitted that the document should have specified liquid assets and/or credit facilities of MUR 5,000,000.00 net of other contractual commitments for this project. According to him, the aggrieved bidder failed to meet the minimum qualifying criteria.
3. In his reply Mr Y. Fok of Counsel for the aggrieved bidder submitted that there is no prescribed form to fill with regard to Clause ITB 6.3(e). He argued that there is no material deviation in the bid of the aggrieved bidder as the bidder had submitted a document issued by a bank that indicates the bidder “*has the financial guarantee and resources up to **MUR 5,000,000.00 (Mauritian Rupees Five Million Only)** for the proper execution of the said Contract*” and thus the bid of the aggrieved bidder is substantially responsive. He referred to Clause ITB 29.2 of the Directive No. 3 of 30 April 2010 and submitted that the Public Body could have sought clarifications from the bidder if it had any doubt concerning the document submitted by the bidder. However, the Counsel conceded that the document does not mention that this amount is net of other contractual commitments and that it is exclusively for the Contract No: NHDC/0413/Lot 3. He argued that the use of different wordings in the document submitted by the bidder should be considered as Nonconformities as provided at paragraph 2 (v) of the Directive and he referred to ITB 30.2 wherein it is specified that “*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 requirements. Requesting information or 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*". According to him, the use of different wordings by the bidder should be considered as a minor omission and the Public Body should have requested clarifications from the bidder.

4. The document submitted by the aggrieved bidder admittedly does not use the exact wordings of ITB 6.3(e) of the Bidding Data Sheet. **The view of the Bid Evaluation Committee is that the Rs5 million is not net of other contractual commitments and is exclusively for use on Contract No: NHDC/0413/Lot 3.**

Clause (iv) under the *Guidelines for the determination of responsiveness of bids* of Directive No. 3 list the grounds for rejection of a bid and Clause (iv)(k) is as follows:

*“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...”*

In this particular case, the financial standing of the contractor has been provided by the Mauritius Post and Cooperative Bank Ltd in the form of a bank testimonial in the favour of Pro Construction & Renovation Works Ltd. It is stated that *the contractor namely Pro Construction & Renovation Works Ltd has the financial guarantee and resources up to MUR 5,000,000.00 for the proper execution of the **said contract***”

Further the letter continues to add that *this testimonial is based on available information and without in any way engaging the liability of the Bank and any of its Officers in case the information are found to be untrue, incorrect or erroneous*”.

Thus the fear of the Bid Evaluation Committee that the Rs 5 million is not net of other commitments would appear to be unfounded. If further clarification was required by the Bid Evaluation Committee this could have been obtained directly from the Bank without the intervention of the bidder.

5. Thus, the aggrieved bidder cannot be considered as failing to submit an appropriate document to fully comply with the mandatory requirement of ITB 6.3(e).

6. Based on the above, I find merit in the application and therefore recommend a review of the decision of the Public Body.

**E. Observations**

I wish however to highlight, to the competent authorities that in view of the importance of the evidence of adequacy of working capital in the light of Directive No. 3 a prescribed form for that requirement should be included in the bidding documents.

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

**Dated 11 March 2014**