

## INDEPENDENT REVIEW PANEL

**In the matter of:**

**JV Albanna Engineering LLC/Pad & Co. Ltd**

**(Applicant)**

**v/s**

**Central Electricity Board**

**(Respondent)**

**(Cause Nos. 05/15/IRP)**

### **Decision**

#### **A. History of the case**

The project *in lite* consists of the Design of 6 x 6500 m<sup>3</sup> HFO Storage Tanks and Construction of 3 x 6500 m<sup>3</sup> HFO Storage Tanks at Les Grandes Salines.

Tenders were invited through International IFB and the responsive bidders are:

- (i) Arun Fabricators
- (ii) Joint Venture PT Istana Karang Laut/Forges Tardieu Ltd
- (iii) Joint Venture Albanna Engineering LLC/PAD & Co. Ltd

The Bid Evaluation Committee was composed of Mr D. Chinasamy, Chief Engineer (Civil) as Chairperson, Mr K. Tarsoo, Mechanical Engineer and Mr R. Gopaul, Senior Mechanical Engineer as Members.

## B. Evaluation

The Bid Evaluation Committee submitted its report on 21 October 2014. It concluded *“that Bidder No. 1, Arun Fabricators be awarded the contract for the Design of 6 x 6500 m<sup>3</sup> HFO Storage Tanks and Construction of 3 x 6500 m<sup>3</sup> HFO Storage Tanks at Les Grandes Salines subject to negotiation with the bidder to bring down its bid price of MUR 549,000,000 (excluding VAT) within 15% of the estimated project cost.*

*Arun Fabricators has proposed pipeline of DN 200 for hot water pipeline instead of the requested DN 100. This minor deviation may be utilised during negotiation to bring down the bid price.”*

## C. Notification of award

The notification to unsuccessful bidders under Section 40(3) of the Public Procurement Act was made on 12 February 2015 through a letter from the Central Electricity Board. The particulars of the successful bidder were as follows:

<i>Name of Bidder</i>	<i>Address</i>	<i>Contract Price</i>
<i>Arun Fabricators</i>	<i>6<sup>th</sup> Floor, Newton Tower, Sir William Newton Street, Port Louis</i>	<i>MUR 540,000,000 excluding VAT</i>

## D. The Challenge

On 17 February 2015, the Applicant challenged the award on the following grounds:

- “(i) The Applicant confirmed in its letter dated 10 October 2014 in reply to the CPB’s letter dated 08 October 2014, that there was no arithmetical error but a clerical error in that the schedules have been wrongly included in the tender submission. The Applicant has submitted the correct schedules I, II and III.*
- (ii) In the same letter dated 10 October 2014, the Applicant confirmed that the Applicant confirmed that the project total cost remains as per the Grand Summary that is MUR 542,545,670 and as per the Form of Bid and the commercial schedules of Appendix B, therefore it was the lowest bidder.*
- (iii) Since the bid of the Applicant was the lowest substantially responsive bid, the Applicant should have been awarded the contract.*

- (iv) *The Public Body was wrong to have negotiated the price with the selected bidder given that it was not the lowest bidder.”*

## **E. The Reply to challenge**

By letter dated 20 February 2015, the Public Body made the following reply to the challenge:

We wish to inform you that we have been advised by the Central Procurement Board that the bid of Joint Venture Albanna Engineering LLC/Pad & Co. Ltd has been considered to be non-responsive by the Bid Evaluation Committee (BEC) on the following grounds:

### **1. HFO pipeline DN 400**

At Section 4.5 of the Employer's Requirements, it is mentioned that the temperature of the fuel will be 50 ° C with a pumping rate of 600 m<sup>3</sup>/h for the design flow of the DN 400 pipeline. However Bidder Albanna Engineering LLC/Pad & Co has mentioned an operating temperature of 35° C for the pipeline of DN 400 from Fort William to Les Grandes Salines. With reference to Section 3.2.7 of the Employer's Requirements, it is mentioned that the steels shall be suitable to withstand the temperature and pressure involved in the operation of the plant. In this case, the fuel is Heavy Fuel Oil of viscosity 380 cst at 54° C. The viscosity of the fuel varies with temperature. As mentioned at Section 4.5 of the Employer's Requirements, at a temperature of 34 ° C the viscosity is 700 cst. At this temperature and viscosity, the fuel is not pumpable. The usual practice for handling of fuel 380 cst is to heat the fuel and also the pipeline to a temperature above 50° C for ease of transfer of the fluid from tanker to storage tanks.

Therefore, the BEC considers that the proposal of DN 400 pipeline operating at a temperature of 35° C instead of 50° C is a major deviation.

### **2. Fire Fighting System**

The BEC noted that for the Fire Fighting System, Bidder Albanna Engineering LLC/Pad & Co has proposed a foam tank of 8 m<sup>3</sup> which deviates from the Employer's Requirements which has requested a foam tank of 40 m<sup>3</sup>.

The BEC has also noted an inconsistency regarding the capacity of the firefighting pump. Bidder Albanna Engineering LLC/Pad & Co has proposed a pump capacity of 400 m<sup>3</sup>/h in the evaluation table of Section 9 of the bidding document whereas, in Schedule 2.18 of the performance guarantee, a capacity of 681 m<sup>3</sup>/h is given. The BEC notes that at Section 7.11 of the Employer's Requirements, it is stated that the capacity is to be at least 500 m<sup>3</sup>/h.

This is not in line with Schedule 2.18: Performance Guarantees of the Schedules where it is stated that:

*'There shall be no discrepancy between the values given in this schedule and those provided for the evaluation criteria in the Standard Bidding Document'.*

### **3. Hot Water System**

The BEC has noted another inconsistency regarding the capacity of the hot water pump circulating water. Bidder Albanna Engineering LLC/Pad & Co has mentioned 77.4 m<sup>3</sup>/h at 10 bar as per table in Section 9 of the bidding document whereas in the performance guarantees, it is mentioned 55 m<sup>3</sup>/h at 3 bar.

This is not in line with Schedule 2.18: Performance Guarantees of the Schedules where it is stated that:

*'There shall be no discrepancy between the values given in this schedule and those provided for the evaluation criteria in the Standard Bidding Document'.*

### **4. Pigging System**

The pipeline pigging system is used to empty the pipeline after every transfer of fuel oil. Bidder Albanna Engineering LLC/Pad & Co has mentioned the type to be provided as "normal" and has not submitted any catalogue on its proposed pipeline pigging system. Moreover, it has mentioned that the pigging system operating temperature will be 38° C for DN 250 pipeline instead of 50° C according to the Employer's Requirements. Using this equipment at a working temperature of 38° C will not be appropriate as it will cause inefficient emptying of the pipeline and affect the good operation of the tank farm.

## **F. Grounds for Review**

On 25 February 2015, the Applicant seized the Independent Review Panel for review on the following grounds:

- (i) By letter dated 20<sup>th</sup> February 2015, the Public Body informed the Applicant that its bid has been considered non-responsive by the BEC on four grounds. It is to be noted that when the Public Body issued the notification of award on the 12<sup>th</sup> February 2015, it did not inform the Applicant that its bid was not responsive but only stated that an evaluation of the bids received has been carried out and its bid has not been retained for award.
- (ii) The Applicant has submitted a bid, which complies with all mandatory requirements of the Bidding Documents and the grounds under the four items, namely 1. HFO pipeline DN 400, 2. Fire Fighting System and 3. Hot Water System and 4. Pigging System are not major deviations, reservations, which rendered the Applicant's bid non-responsive, but are simply errors and/or inconsistencies.
- (iii) The Public Body/CPB was wrong to declare the Applicant's bid non-responsive for the following reasons:

**1. HFO pipeline D**

As per schedule 3.10, the operating temperature of the HFO is mentioned as 35°C instead of 50°C, which is a genuine typing error. When one looks at the specifications provided for DI pipes, the working temperature of the pipes is between -10°C to 120°C. And as per the requirements of CEB, the system needs to be operating at 50°C, which has been correctly mentioned for the DN 250 pipe in the same schedule 3.10 and which system is also connected to the DN400 piping system. Therefore the operating temperature of the DN400 pipeline could only be 50°C and should be read as 50°C, which is the same as for the DN250 pipeline, that is 50°C and conforms to the pipe specifications provided. In view of the inconsistencies between the temperatures for the DN 400 and DN 250, the Public Body/ CPB should have sought for clarifications from the Applicant pursuant to Section 29 of the Instruction to Bidders.

It cannot be said that this error is a major deviation or reservation, which rendered the Applicant's bid non-responsive. Furthermore, as per **Section 30.2 of the ITB**, this rectification does not affect unfairly the competitive position of other bidders given that this information is already available in the offer.

## **2. Fire Fighting System**

The Applicant has taken into consideration the technical documentation provided in **section 3.2** of the offer and calculated the foam requirement

and an 8m<sup>3</sup> foam tank would have been sufficient so that it proposed an 8m<sup>3</sup> foam tank. However, this cannot be regarded as a major deviation in as much as the Public Body/CPB could have sought clarification from the Applicant on the proposal made.

As per **Section 2.18 of the Performance Guarantee**, a capacity of 681m<sup>3</sup>/hr is mentioned whilst in **Section 9 of the Bidding Document**, the pump capacity, which has been inserted in the evaluation table is 400m<sup>3</sup>/hr. The value of 400m<sup>3</sup>/hr is clearly a genuine typing error and in view of the inconsistency between the two values, the Public Body/CPB should have sought clarification from the Applicant. This cannot amount to a major deviation or reservation, which rendered the Applicant's bid non-responsive. The Applicant has complied with the requirements for a pump capacity of at least 500m<sup>3</sup>/hr.

## **3. Hot Water System**

As per **Section 2.18 of the Performance Guarantee**, the flow rate of the hot water pump circulating water from Fort Victoria is mentioned as 55m<sup>3</sup>/hr, whilst in **Section 9 of the Bidding Document**, the hot water pump circulating water from Fort Victoria, which has been inserted in

the evaluation table is 77.4m<sup>3</sup>/hr. The value of 77.4m<sup>3</sup>/hr is clearly a genuine typing error and in view of the inconsistency between the two values, the Public Body/CPB should have sought clarification from the Applicant. This cannot amount to a major deviation or reservation, which rendered the Applicant's bid non-responsive.

#### **4. Pigging System**

As per **schedule 3.11**, the operating temperature of the pigging system is mentioned as 35°C instead of 50°C, which is a genuine typing error. Also, as per **Section 9 of the Bidding Document**, the operating temperature for the pigging system 250mm is mentioned 38°C, whilst it should be read as 50°C. When one looks at the drawing ABE-Q2900-PI-PID-004, all the PLR- Pig Launcher/Receiver, are connected to the piping system of both insulated DN250 and DN400 pipelines operating at a temperature of 50°C. Ultimately, the whole Pigging system is operating

at the same Pipeline temperature of 50°C. Consequently, the operating temperature of the pigging System has to be read as 50°C, being the same temperature of the complete HFO piping system of the Tank farm. In view of the inconsistency of temperatures, the Public Body/CPB should have sought clarification from the Applicant. This cannot amount to a major deviation or reservation, which rendered the Applicant's bid non-responsive.

- (iv) In view of the complexity of the project which is a design and build project and a major contract with a cost estimate of about Rs.540M, the CPB could have sought clarification during the examination of the Applicant's bid to clear up the inconsistencies and/or errors instead of considering the Applicant's bid non-responsive outright inasmuch as

Section 29 of Instruction to Bidders provides that to assist in the examination, evaluation and comparison of bids, the Employer may, at its discretion, ask any bidder for clarification of its bid. Furthermore, Section 37 of the Public Procurement Act 2006 provides that: *“The Board, in the case of a major contract, or a public body may seek clarification during the examination of bids from any bidder to facilitate evaluation, but it shall neither ask nor permit any bidder to change the price or substance of his bid.”*

- (v) Since the bid of the Applicant was the lowest substantial responsive bid, the Applicant should have been awarded the contract.
- (vi) The Public Body erred in law when it negotiated the price with the selected bidder since the latter was not the lowest bidder.

### **G. The Hearings**

Hearings were held on 02 April, 17 April, 21 May and 09 June 2015.

At the first hearing, the Applicant raised the following preliminary point: “whether the Public Body can at Application for Review stage, add reasons which were not invoked when the challenge was set aside by the same Public Body”. The matter was then fixed for arguments on this point and arguments were heard at the second hearing of the 17<sup>th</sup> April 2015. Ruling was reserved. However before the Panel delivered its Ruling, Counsel for Applicant informed the Panel that the Applicant will not “press on the preliminary objection raised”. This stand was confirmed at the third hearing of the 21<sup>st</sup> May 2015 and at that hearing, both Parties agreed to proceed by written submissions.

Each party’s submissions to the panel were copied to each other so that each had an opportunity to react to the other party’s submissions. Thus, the first wave of submissions were received by the Panel on 02 June 2015, and the replies to these first submissions were received on 12 June 2015. The Panel also received two documents from the BEC; the first one titled “Comments to written submissions from Applicant” and the second one “written submissions from the Bid Evaluation Committee”.



## **H. The Issue**

The Applicant does not dispute the fact that there are significant discrepancies between the different sections in his tender, and between some sections of his tender and the required specifications. Rather, he relies heavily on “clerical errors” to explain these discrepancies.

The Respondent denies that these discrepancies could have been mere mistakes, and further argues that the number of discrepancies would also indicate a general level of sloppiness that would make it hazardous to award to such a tenderer.

## **I. Findings**

### **General Observations**

The Applicant’s tender contained a number of discrepancies. These discrepancies represent major deviations from the required specifications.

In regard to the discrepancy between the price schedules and the grand summary of his tender, if the former should be considered as the correct tendered prices, then that would make the Applicant’s tender higher than that of the selected bidder.

The Applicant has argued that these discrepancies arose out of a clerical mistake when intermediate “working documents” were inserted in his tender in place of final documents, but that the figure appearing in the “Grand Summary” and in the “Performance Guarantees” are the correct intended figures, and should have prevalence of consideration over any other figures appearing elsewhere in the tender.

The issue of “prevalence” is therefore central to the determination of this Challenge.

### **Hierarchy of Documents**

Sub-Clause 1.5 of Section 3, Part II defines a “Priority of Documents” for an eventual Contract. There is no specific provision in the tender documents as to the hierarchy of documents in the tender. However,

there is a natural hierarchy that can be deduced from the nature of the documents themselves, and from the prescribed methods of evaluation.

In any Civil Engineering Contract of the “Measure and Value” type (commonly called “re-measure” contracts), which constitute the vast majority of Civil Engineering Contracts, the final Contract Price at the end of the contract is almost never the tendered price. That is because quantities of the different items of works are expected to vary, and payments, including the final payment, are made by multiplying the tendered unit rates by quantities of the different items of work and adding up the resulting amounts. Thus the real tender is represented by the unit rates and not the figures inserted in the Grand Summary or the Form of Tender. Should there be a discrepancy between the unit rates and any of the corresponding figures in the Grand Summary or the Form of Tender, the former shall govern and the tender corrected for arithmetical mistakes accordingly.

If the figure appearing in the Form of Tender should be considered as final, and an attempt was made to correct unit rates, there would be no indication as to which rates to change to reach the final figure in the Form of Tender.

Therefore, it is a *universal* practice in an evaluation for such contracts, to effect arithmetical checks and corrections in the same direction as the natural order of preparation of tenders, i.e. Rates (fixed) → Amounts → Totals of pages or schedules → Grand Summary → Form of Tender.

Admittedly, the case under consideration is not a re-measure Civil Engineering Contract, but the principles outlined above remain valid. Schedules have been provided in lieu of Bills of Quantities, and serve basically the same purpose. Page 74 of the Request for Proposals, Section 7 is relevant and reproduced below:

### Notes on Schedules (continued)

For each item, bidder shall complete each appropriate column in the respective Schedules, giving the price breakdown as indicated in the Schedules.

Prices given in the Schedules against each item shall be for the scope covered by that item as detailed in the Employer's Requirements, Drawings or elsewhere in the bidding documents.

5. Items left blank will be deemed to have been included in other items. The TOTAL for each Schedule and TOTAL of the Grand Summary shall be deemed to be the total price for executing the facilities and sections thereof in complete accordance with the Contract.

6. These Schedules are intended primarily to provide information for bid evaluation but not intended to be used for the evaluation of work done for the purpose of interim payment. They may, however, be used as a reference for the adjustment of the Schedule of Payment should the need arise.

7. These Schedules can be used as a basis to value variations of work done under the Provisional Sum.

Thus the Schedules cannot be taken as mere working documents nor can they be considered redundant. They are essential in the valuation of variations as are bound to occur in a contract of this size and complexity.

### **Technical Discrepancies**

By the same token, the wording in Schedule 2.18 to the effect that "*there shall be no discrepancy between the values given below and those provided for the evaluation criteria in the Standard Bidding Document*" strongly suggests that figures in the Performance Guarantees at Schedule 2.18 should be **copied from figures provided for the evaluation criteria, whilst ensuring that they are identical**. This natural order cannot be reversed.

## J. Decision

There were undisputed discrepancies between prices entered in the Schedules and the corresponding totals in the Grand Summary.

In such cases, the discrepancies should be considered as arithmetical mistakes, and the figures in the Grand Summary should be corrected. If this had been done, the Tender from the Applicant would no longer have been the lowest evaluated bid.

The refusal of the tenderer to have these corrections made should result in the rejection of his tender. The proposal of the tenderer to amend the schedules would, if accepted, amount to a change in his tender.

For whatever reason there were discrepancies between values representing specifications of certain items entered at various sections of the tender, and the corresponding values at Section **2.18 Performance Guarantees** of the tender. The former have prevalence over the latter, and the intent of the tenderer cannot be deduced from section 2.18.

The Bid Evaluation Committee cannot be said to have erred in its evaluation which was done strictly according to prescribed rules.

This therefore also deals with another point raised by the Applicant as to whether the Respondent should have sought clarifications from the Applicant. It is the view of the Panel that in the light of the above, the CPB and was right to have found the Applicant a non-Responsive bidder and therefore need not to have sought clarifications from the Applicant. It is apposite here to refer to section 37 of the Public Procurement Act 2006, the Board, in the case of a major contract, **may** seek clarification during the examination of bids from any bidder to facilitate evaluation, but it **shall** neither ask nor permit any bidder to **change the price or substance of his bid**".

The Applicant also raised the point that "the Public Body erred in law when it negotiated the price with the selected bidder since the latter was not the lowest bidder". It is the view of the Panel that firstly, there is nothing on record to show that there was indeed negotiation between the Public Body and the successful bidder and secondly, in the light of the above findings, given that the successful bidder was the lowest bidder, the question does not arise.

We therefore find that there is no merit in this Application.

**(R. Lauloo)**  
***Chairperson***

**(Mrs C. Sohun)**  
***Member***

**(V. Mulloo)**  
***Member***

**Dated 02 July 2015**