

INDEPENDENT REVIEW PANEL

In the matter of:

Oxymac Ltd

(Applicant)

v/s

Ministry of Health & Quality of Life

(Respondent)

(Cause No. 44/14/IRP)

Decision

A. History of the case

The exercise consists of the Supply of Medical Gases for Financial Years 2015 and 2016 to the Ministry of Health & Quality of life.

The Bidding documents were issued on 19 September 2014 through Open International Bidding (open to local and overseas suppliers).

The closing date for submission of bids was fixed to 06 November 2014. Three bids were received from the following firms: Oxymac Ltd, Medical Gases JV and Compagnie Mauricienne de Commerce Ltee.

B. Evaluation

The Bid Evaluation Committee constituted of Dr J. A. Rajarai, Retired Medical Superintendent (Chairperson and Registered Evaluator), Dr R. Goordoyal, Consultant in Charge and Mr S. Nuckchadee, Retired Superintendent, submitted its report on 24 November 2014.

The Bid Evaluation Committee recommended that the two lowest bidders namely: Compagnie Mauricienne de Commerce Ltee and Medical Gases JV be awarded the contract for the supply of medical gases as follows:

- Compagnie Mauricienne de Commerce Ltee for items 1-9, 11-13 and 22 which is the lowest responsive bidder
- Medical Gases JV for items 10,14-121 which is the sole bidder.

C. Notification of award

The Ministry of Health & Quality of Life through a letter dated 02 December 2014, informed the Applicant of the particulars of the successful bidders.

D. The Challenge

On 09 December 2014, the Applicant challenged the award on the following grounds:

“1. Reference is made to page 32 of the Bidding Documents and to Paragraph 1(b)(v) of the Evaluation Methodology which reads as follows:

(v) Valid manufacturing license issued by the competent authorities where the bidder is an established manufacturer of Medical Gases.

The Bidder (Oxymac Ltd) avers that the successful bidder, i.e. Compagnie Mauricienne De Commerce Ltee (hereinafter referred to as “CMC”) is a new player on the market and does not hold a valid manufacturing license as is required under paragraph 1(b)(v) as reproduced above. Furthermore, CMC does not even have a factory to produce medical oxygen gas.

On the other hand, the Bidder (Oxymac Ltd) is a player on the market for at least one year and is the holder of a valid manufacturing license and, as such, fully satisfied paragraph 1(b)(v) of the Evaluation Methodology at Page 32 of the Bidding Documents as reproduced above. The Bidder (Oxymac Ltd) has a track record and has even produced references from four private clinics which happen to be its clients.

2. Reference is made to page 32 of the Bidding Documents and to paragraph 1(b)(vi) of the Evaluation Methodology which reads as follows:

(vi) Evidence of bidder’s technical capability in the field, experienced workforce, adequate gas cylinders for delivery and reserve storage, and available logistics for distribution and supply.

The Bidder (Oxymac Ltd) avers that the successful bidder, i.e. CMC, does not comply with the requirements as reproduced above. CMC has only been on the market for a period of about one month delivering industrial oxygen to metal workshops. For all intents and purposes, CMC does not have the expertise experience, workforce, generator machines as backups in case of any breakdown of oxygen generator. As such, CMC does not comply with the above mentioned requirement.

On the other hand, the Bidder (Oxymac Ltd), fully complies with the above-mentioned criteria.

3. There has been non-compliance with paragraph 1(b)(c) of the Bidding Documents at page 32 of the Bidding Documents and which reads as follows:

Technical evaluation as per Evaluation Criteria at page 33.

The Bidder (Oxymac Ltd) avers that there has been no proper evaluation of the bid made by CMC.

Reference is made to page 33 of the Bidding Documents which in essence provides the evaluation criteria. Factor (a) at page 33 provides as follows:

(a) Specifications: Type of gas offered and Cylinder capacity as spelt out at page 50.

CMC has bid for Item 13 which reads as follows: “Nitrous Oxide Gas 3700 Gallons Cylinder (pin index)”.

However, the bidder (Oxymac Ltd) avers that the tender in respect of the above mentioned item is found at page 50 of the Bidding Documents and which item is described as follows: “Nitrous Oxide gas”.

The bidder (Oxymac Ltd), avers that the tender documents did not make mention of “pin index” next to the item 13 “Nitrous Oxide Gas”. Where “pin index” is required, same is fully mentioned next to the items. Hence, CMC has made a material and substantial deviation

in the product offered “Nitrous Oxide Gas 3700 Gallons Cylinder (pin index)” and which product has wrongly been accepted.

There is a major difference between “Nitrous Oxide Gas cylinders 3700 gallons” and “Nitrous Oxide Gas cylinders 3700 gallons pin index”.

Furthermore, the Bidder, Oxymac Ltd, avers that no proper evaluation as required under the Evaluation Criteria at page 33 of the Bidding documents have been made. No such reports have been communicated to show the appreciation of any site visits which may have been conducted at CMC premises.

On the other hand, Oxymac Ltd invites the technical evaluation committee to call at its factory for a site visit.”

E. The Reply to challenge

On 16 December 2014, the Public Body made the following reply to the challenge:

“As you are aware, this tender has been processed by the central Procurement Board, which has informed the Ministry that your challenge cannot be entertained as it has been received after the statutory period of seven days”.

F. Grounds for Review

On 22 December 2014, the Applicant seized the Independent Review Panel for review on the following grounds:

- “1. Because the Ministry of Health & Quality of Life (hereinafter referred to as “the Respondent”) failed to comply with the specific time frame under Section 48(4) of the Public Procurement Regulations 2008.
The Applicant, Oxymac Ltd, (hereinafter referred to as “the Appellant” under the grounds for review) filed a challenge on 09 December 2014 after receiving the notification of award dated 02 December 2014 which he received on 03 December 2014 by registered post. The Respondent only replied to the challenge of the Appellant on 19 December 2014 which is outside the prescribed delay of 7 days under Section 48(4) of the Public Procurement Regulations 2008.*

2. *Because the Respondent has erred by failing to ensure that there is compliance with Paragraph 1(b)(v) of the Evaluation Methodology under the Bidding Documents which reads as follows and under which there is a requirement that the Bidder submits the following document:
“(v) Valid manufacturing license issued by the competent authorities where the bidder is an established manufacturer of Medical Gases”.
The Respondent has awarded the bid to Compagnie Mauricienne De Commerce Ltee which is, for all intents and purposes, the bidder and which does not hold a valid manufacturing license and medical oxygen gas generators at their premises.*
3. *Because the Respondent has erred is awarding the bid to Compagnie Mauricienne De Commerce Ltee by simply accepting that the latter has submitted a valid manufacturing license for its overseas supplier, Sharjah Oxygen Company, issued by the Government of Sharjah, Economic Development Department, United Arab Emirates, which is a deviation from the requirement laid down at Paragraph 1(b)(v) of the Bidding Documents under the heading “Section 3: Evaluation and Qualification Criteria” – Page 32 of the Bidding documents.*
4. *Because the Respondent has erred by failing to ensure that there is compliance with Paragraph 1(b)(vi) of the Evaluation Methodology under the Bidding Documents which reads as follows:
(vi) Evidence of bidder’s technical capability in the field, experienced workforce, adequate gas cylinders for delivery and reserve storage, and available logistics for distribution and supply.*
5. *Because the Respondent has erred in awarding the tender to Compagnie Mauricienne De Commerce Ltee when the latter has only recently diversified in the industrial gas business. For all intents and purposes, the tender is for the provision medical gases and not industrial gases (Items and 9 and 13 as per the tender documents).*
6. *Because the Respondent has erred in assuming that Compagnie Mauricienne De Commerce Ltee benefits from international expertise of Sharjah Oxygen Company. For all intents and purposes, the Appellant has expertise in medical gases and has provided references from four private clinics which are the customers of the Appellant. On the other hand, Compagnie Mauricienne De Commerce Ltee, by the very own admission of the Respondent, has only recently diversified in the industrial gas business.*
7. *Because the Respondent has erred in reaching the conclusion that Compagnie Mauricienne De Commerce Ltee has adequate Gas*

Cylinders for delivery and reserve storage. The Respondent gave the following examples:

*“2 x 48 cuft Medical Oxygen Cylinders (104 weeks supply)
300 x 3,700 gallons Nitrous Oxide Cylinders (44 weeks supply)”.*

The above examples are erroneous.

Furthermore, when consider Items 9 of the Bidding Documents “Medical Oxygen Gas 300 cuft cylinder”, the Respondent failed to evaluate the physical stock and/or storage and/or capability of Compagnie Mauricienne De Commerce Ltee as compared to the physical stock and/or storage and/or capability of the Appellant.

8. *Because the Respondent has erred in taking into account that Compagnie Mauricienne De Commerce Ltee “has one bulk Liquid Medical Oxygen storage tank of approximately 52,800 litres and will be refilled by 16,000 litres isotanks over by their overseas supplier to ensure a comfortable medical oxygen buffer”.
The Appellant avers that the tender in relation to “Liquid Oxygen” (Item 10) was never awarded to Compagnie Mauricienne De Commerce Ltee.*
9. *Because, in the absence of any track records and references (which the Appellant has), the Respondent has erred in assuming that Compagnie Mauricienne De Commerce Ltee has adequate logistics for distribution and supply.*
10. *Because the Respondent has erred in assuming that Compagnie Mauricienne De Commerce Ltee will be able to smoothly supply all products given that the latter relies completely on its foreign partner in Sharjah, United Arab Emirates, to import its products and has thus failed to consider delay, force majeure, and unforeseen circumstances when importing by sea which will cause prejudice to the Respondent.*
11. *Because there has been non-compliance with Paragraph 1(b)(c) of the Bidding Documents at Page 32 of the Bidding Documents and which reads as follows:
Technical evaluation as per Evaluation Criteria at page 33.
The Bidder (Oxymac Ltd) avers that there has been no proper evaluation (including proper physical and viable technical evaluation) of the bid made by CMC.
Reference is made to page 33 of the Bidding Documents which in essence provides the evaluation criteria. Factor (a) at page 33 provides as follows:
(a) Specifications: Type of gas offered and Cylinder capacity as spelt out at page 50.*

Compagnie Mauricienne De Commerce Ltee has bid for Item 13 which reads as follows: “Nitrous Oxide Gas 3700 Gallons Cylinder (pin index)”.

However, the bidder (Oxymac Ltd) avers that the tender in respect of the above mentioned item is found at page 50 of the Bidding Documents and which item is described as follows: “Nitrous Oxide gas”.

The bidder, Oxymac Ltd, avers that the tender documents did not make mention of “pin index” next to the item 13 “Nitrous Oxide Gas”. Where “pin index” is required, same is fully mentioned next to the items. Hence, CMC has made a material and substantial deviation in the product offered “Nitrous Oxide Gas 3700 Gallons Cylinder (pin index)” and which product has wrongly been accepted.

There is a major difference between “Nitrous Oxide Gas cylinders 3700 gallons” and “Nitrous Oxide Gas cylinders 3700 gallons pin index”.

12. *Because no proper evaluation as required under the Evaluation Criteria at page 33 of the Bidding Documents have been made. No such reports have been communicated to show the appreciation of any site visit which may have been conducted at Compagnie Mauricienne De Commerce Ltee premises.*
13. *Because the Respondent has failed to fully make a proper technical evaluation by making a proper site visit at the factory of Compagnie Mauricienne De Commerce Ltee and hence also failed to appreciate that Compagnie Mauricienne De Commerce Ltee is not the holder of a valid Manufacturer’s license whilst the Appellant is the holder of a valid Manufacturer’s license.”*

G. The Hearing

The Applicant has raised various grounds and Counsel appearing for both the Applicant and the Respondent has favoured the Panel with their arguments and written submissions.

The representative of the Central Procurement Board in the course of the hearing stated that the technical evaluation was made strictly in accordance with the clauses of the Bidding Documents and its Bidding Data Sheet.

A preliminary point as regards the statutory delay to lodge the challenge was raised by the Public Body. Counsel appearing for the latter subsequently dropped it.

The Panel has given due consideration to all the materials placed before it.

One among the main contentions of the Applicant is that the Central Procurement Board cannot just accept manufacturer's licence without any proper physical and technical inspection specially when the subject matter of the bid is "medical gases" which is a health and safety commodity. The Central Procurement Board replied that the bidding documents do not make it a requirement to perform any site visit, given the clear wording of Qualification Information of the bidding documents.

The Central Procurement Board has indicated that the successful bidder is fully experienced and has satisfied all the requirements. The first page of the bidding documents refers to "Open International Bidding", thus overseas suppliers could bid. Notwithstanding that, there were no special clause in the bidding documents which mention to a particular assessment of overseas bidders other than by official documentation.

H. Findings

Following the technical evaluation, the Central Procurement Board concluded that all the bidders were substantially responsive. It then proceeded with the financial evaluation, and, thereafter, recommended the two lowest bidders, namely CMC Ltée and Medical Gases JV for the award of the contract. The Panel finds no reason to disturb the decision of the Central Procurement Board, and this application for review is accordingly dismissed.

(Said Toorbuth)
Chairperson

(Siv Potayya)
Member

(Jacques C. Nauvel)
Member

Dated 11 February 2015