

INDEPENDENT REVIEW PANEL

In the matter of:

Avacor Ltd

(Applicant)

v/s

Central Electricity Board

(Respondent)

(Cause No. 43/14/IRP)

Decision

A. History of the case

The Central Electricity Board launched tenders through the local press on 29 August 2014 for the “**Provision of Security Services for 50 critical sites over a period of 24 months.**” Bids were received on 08 October 2014 and opened the same day. Ten bids were received from the following:

1. Quick Security Guards Ltd.
2. Premier Security Solutions ltd.
3. Reliance Security Services ltd.
4. Avacor Ltd.
5. New Security Guard Ltd.
6. JMR Co. Ltd
7. Proguard
8. Brinks (Mauritius) Ltd.
9. Defence HiTech Security Services Ltd.
10. RSL Security Services Ltd.

After the notification of Award issued by the Public Body, the Applicant made a challenge on 05 December 2014. The challenge was rejected by the Public Body on 15 December 2014, following which the Applicant submitted a request for review to the Independent Review Panel on 22 December. The request for suspension was only faxed to the Public Body by the Independent Review Panel on 30 December, by which time the Public Body had already issued the letter of award to the selected bidder.

B. Evaluation

The bids have been evaluated by the Tender Evaluation Committee which was composed of the following members:-

B. Sewpal, Ag. Principal Engineer (Project & Construction) - Chairman

R. Gopaul, Senior Engineer (F. Georges PS) - Member

S. Mowlaboccus, Ag. Senior Engineer (DSM) - Member

O.K. Yerukunaidu, Principal Administrative Assistant – Member

The Bid Evaluation Committee gave its report on 19 November 2014 and concluded as follows:

“It is proposed to award the contract to Brinks (Mauritius) Ltd. for all the 50 sites for a period of 24 months for the total price of MUR 68,344,944 excluding VAT.”

C. Notification of award

The notification to unsuccessful bidders under section 40(3) of the Public Procurement Act was made on 4th of December 2014, through a letter from the Independent Review Panel. The particulars of the successful bidders was as follows:-

Name of bidder	Address	Contract Price
Brinks (Mauritius) Ltd	Solitude Industrial Zone, Triolet	MUR 68,344,944 Exclusive of VAT

D. The Challenge

A challenge under Section 43 of the Public Procurement Act was made by Avacor Ltd on 05 December 2014 on the grounds that “*Lower bid not respected*”. The Public Body responded to this challenge on 15 December 2014, informing the Applicant that “*the evaluation of bids has been carried out in line with the evaluation criteria and methodology specified in the bidding documents*” and that Avacor’s bid was found non-responsive on the ground that it did not have the required experience.

E. Request for Review

Following the Public Body’s reply to the challenge, the Applicant made a request for review to the Panel on 22 December 2014, which was accepted by the latter as previously constituted. No explanation has been offered as to why the Public Body was informed of the request for review and asked to suspend proceedings only on 30 December 2014, after an award had been made.

The grounds for review as stated by the Applicant were:

- “1. *The bid requirements were drafted in such a way so as to favour one specific bidder.*
2. *In evaluating the bid, the Respondent failed to exercise its discretion by rendering a permissive requirement into a mandatory one.*
3. *The Respondent failed to apply the general principle that with equivalent experience, the bid ought to have been awarded to the lowest bidder.*”

F. The Issues

The Applicant has further argued as follows:

“*On the award of the Tender on the 24th December 2014: It is respectfully submitted that the award of the contract on the 24th December 2014 on the alleged ground that the effective date was the 1st January 2015 is a colourable device to favour one bidder in as much as:*

- *The respondent became aware of the present appeal on the 29th December i.e. at a date prior to the coming into operation of the contract.*
- *It was common knowledge, and the Panel is invited to take judicial notice of the fact the Civil Service and most businesses in Mauritius work half day on the 24th December the more so that in 2014, the 24th December was a Wednesday, Thursday the 25th a Bank Holiday. The week was thus a short one followed by a further short one taking into account that again civil service works half day on the 31st, followed by the bank holidays of the 1st and 2nd January and thereafter the 1Neek end resulting in the 1st effective date of a normal working day being the 6th January in 2015.*
- *There was no real urgency to award the tender in as much as the "winning" bidder had been providing the services to the CEB since 2009. The previous contract could have been renewed on a month to month basis until such time that the present appeal would have been determined as the CEB was aware that the Appellant was not satisfied with the award. It ought to have informed the appellant that it was lifting the suspension and proceeding to award the tender.*

*On the bid evaluation: At the sitting of the 9th February last, the Chairperson of the CEB's Evaluation Committee gave evidence to the effect that the Appellant's bid did not pass the preliminary selection as it was not responsive in as much as it did not comply with the condition set out, in the bid document regarding the fact that a bidder had to have " experience in services of similar nature and of similar size **as far as possible**".*

It is submitted that:

- *This condition was not mandatory and that the evaluation committee had a discretion that it failed to exercised and/or exercised in a non-judicious manner.*
- *Admittedly, there is no other operator that have the same size AND nature as the CEB in terms of investment and national importance.*
- *By imposing such a qualifying requirement, the CEB was clearly favouring its existing service provider i.e. Brinks (Mauritius) Ltd.*

- *In the teeth of the evidence of the chair of the evaluation committee that it did not consider the previous experience that the Appellant had inter alia at T &T International Foods ltd (pp25 of the Appellant's Technical Proposal) rendered the whole evaluation null and void in as much as the Appellant had provided security services to T &T international Foods ltd since 2005 to date therefore more than 5 years and at 3 different sites (Coromandel, La Tour Koenig and Rose Hill). The Panel's attention is drawn to the Appellant's experience in providing guarding services to Lee Luen Man Bros at Pailles and Riche Terre sites from 2008 to date, and that it had previous experience in providing guarding services to various business operations and not solely "alarm monitoring services"*
- *Had the evaluation committee made a proper examination of the Appellant's submission, it would have reached the conclusion that the latter's bid was responsive and would have enabled it to exercise its discretion judiciously in as much as the required experience was a qualified one " as far as possible"*
- *This condition of experience in each of the five preceding years in concerns of similar size and nature seems to be a fairly standard one used by the CEB in all in its invitations irrespective of sites concerned.*

.....”

G. The Hearings

Hearings were held by the new Panel on 27 April, 12 May and 11 June 2015. Written submissions were received from the Respondent and Applicant respectively on 21 May and 20 May 2015.

The Applicant was represented by Ms N. Bundhun, while the Respondent was represented by Ms S. Carrim. The successful bidder attended hearings in the person Mr J. Noel Cornette but was not represented by Counsel.

At the first Hearing, the Chairman of the Panel informed all parties of his contractual relationship with the successful bidder, namely that Brinks were providing alarm security services to his company. Counsel for the Applicant promptly challenged the chairman for conflict of interest.

After consideration, the Panel issued a Ruling rejecting this challenge on the grounds that the contractual relationship disclosed by the chairman was no different from that of all parties with the Respondent.

H. Findings

H.1 On the validity of the Request for Review:

On this count, the Central Electricity Board has argued as follows: *“Under Regulation 48(5) of the Public Procurement Regulations 2008, the bidder who is not satisfied with the decision of the public body must submit an application for review to the Review Panel within 7 days of the decision. The last day to submit an application for review to the Independent Review Panel is the 21st December 2014. The Appellant submitted same on the next day, i.e. Monday the 22nd December 2014. The CEB had to award the Contract due to start in January 2015. The CEB did not take any steps on the 23rd December 2014. As the delay for appeal had lapsed, it, in all good faith, awarded the contract to Brinks on the 24th December 2014, which is a business day (i.e. a Wednesday). It is submitted that the CEB does not have any obligation to enquire whether an appeal has been lodged prior to awarding the contract. It is the duty of the Appellant to communicate the appeal to the CEB (Schedule 3 talks about "A copy to be sent to the public body" and is signed by the Appellant). Surely, this does not impose a duty on the IRP to send the appeal to the party whose decision is being appealed against but the person who signs the document should send the copy of the application to all "interested parties", and there it talks specifically about the public body. 4. The IRP sent a letter asking the CEB to suspend the proceedings on the 30th December 2014. The next day, i.e. on the 31st December 2014, the CEB replied back informing it that it had already awarded the contract, which it was perfectly entitled to. It could not renege on its decision to award the contract to Brinks. Had it done so, it would then have been liable to damages to Brinks. Once the contract was awarded to Brinks on the 24th December 2014, this constituted a valid and binding contract with Brinks.”*

Going solely by the dates on record, there is no doubt that the Applicant did submit its Application within the time allowed. It is common practice when the delay expires on a Sunday, to accept Applications on the next working day.

The Panel is therefore of the opinion that the Application for review has been correctly entertained as it was submitted within permissible delay.

H.2 On the Award made by Central Electricity Board to Brinks

Quite unexplainably, the previous Panel decided to withhold the information that an Application for review has been received from the Respondent until 31 December 2014.

On 22 December, the delay for submission of an Application for review lapsed without notification to the parties that such an Application had been received.

Section 45 (4 & 5) of the Public Procurement Act provides that:

(4) Subject to subsection (5), where an application for review is made in accordance with this section, the Review Panel shall, on being satisfied ex-facie the application that there is a prima facie case for review, order the suspension of the procurement proceedings until the appeal is determined by the Review Panel.

(5) The suspension provided by subsection (4) shall not apply where the public body certifies that urgent public interest considerations require the procurement proceedings to proceed.

By inference, therefore, any other suspension following the challenge lapses with the disposal of the challenge, and there is no impediment to the continuation of the procurement proceedings unless another suspension is ordered by the Panel following an Application for review.

It is also not incumbent on any Public Body to enquire whether or not there has been an Application for review once the delay for filing such Application has lapsed, before proceeding to an award.

The Panel finds therefore that the decision to award to Brinks at the time the award was made was legitimate and did not represent any colourable device to cause prejudice to the Applicant.

H.3 On the specifications, qualifying criteria and responsiveness of the bid from the Applicant.

This tender concerns ostensibly “critical sites” of the Central Electricity Board, but the only relevant description given in the bid documents is that they are sites of strategic importance where “*the required security measures are of the highest order*”. A comparison between requirements for security measures on critical and non-critical sites reveal only a difference in the number of guards.

Under ITB 5.1(d) of the bid documents, the Public Body has specified the qualifying criteria of the bidder:

“experience in services of similar nature and of similar size as far as possible, in each of the last five years, and details of services under way or contractually committed; and names and address of clients who may be contacted for further information on those contracts;”

The Public Body, as the procurer of services, is entitled to specify the level of services that it requires, and the qualification of potential providers of such services that it considers adequate. In regard to the latter, however, it has to ensure that the required criteria would not give undue advantage to any bidder.

Previous experience in similar contracts is a normal requirement for all tenders, and it would be quite normal for the Central Electricity Board to require that any would be service provider should have a number of years of similar experience. However, what is “similar nature”? And what is the criterion to determine “size”? The latter could be variously described as the area or perimeter of the site, the value of goods and equipment at the site, the number of guards required etc. This requirement is hazy at best, and leaves much room for subjective interpretation.

To make matters worse, the Central Electricity Board adds to the requirement of past experience the term “as far as possible”. It is open for each and every tenderer to come up with his own interpretation of how far is it possible to depart from that particular requirement.

The Central Electricity Board argues that at no time did the Applicant challenge the specifications before the date of tender. It has always been the view of this Panel that the proper procedure when specifications are

faulty is to draw the attention of the Employer before the date of tender. However, in this case, the requirements have been made so vague and open to so many different interpretations that it is only during tender analysis that the intent of the Central Electricity Board became obvious.

Finally, on this score, we wish to add that a criterion cannot at the same time be considered as pass/fail criterion during analysis and be the subject of marking for comparison of tenders. The Bid Evaluation Committee considers that the requirement “*experience in services of similar nature and of similar size as far as possible, in each of the last five years*” means that experience of an identical nature is a *sine qua non* condition for further analysis, and failure of one tenderer to show that he has such experience leads inevitably to his elimination (forgetting the term “as far as possible”). Yet, at the same time this same criterion is listed in the evaluation criteria for marking of bids at Section VI of the bid document.

There is no doubt that the “Qualifying Criteria” was wrongly drafted, was open to a variety of subjective interpretations, and has been wrongly applied during analysis. While the Panel does not have any evidence that this was done purposefully to favour any one tenderer, it is quite obvious from the tender analysis that those who had previous experience of Central Electricity Board work would be advantaged.

The statement from the Central Electricity Board that three bidders passed the initial qualifying test is misleading, as at the end of the technical analysis, only one bidder was found responsive.

I. Decision

The Panel is of the view, therefore, that there is merit in this Application and orders compensation to the Applicant as per Section 45 (9) of the Public Procurement Act as reproduced below.

Where the procurement proceedings have not been suspended under subsection (5), and the application for review of an unsatisfied bidder is determined in his favour, the Review Panel shall award him compensation limited to the recovery of the costs of bid preparation and participation in the procurement proceedings.

(M. Reshad Lauloo)
Chairperson

(R. Rajanah)
Member

(R. Ragnuth)
Member

Dated 14 July 2015