Decision No. 25/15

INDEPENDENT REVIEW PANEL

In the matter of:

Como Construction Ltd

(Applicant)

v/s

Mauritius Institute of Education

(Respondent)

(Cause Nos. 04/15/IRP)

Decision

A. History of the case

The Mauritius Institute of Education (in collaboration with the Central Procurement Board) invited sealed bids from eligible and qualified local bidders for the project: "Extension to Existing MIE Buildings" situated at Réduit.

The project consists of the construction of a Ground + 3 floors building at Réduit to cater for additional classrooms blocks for the Mauritius Institute of Education complete with finishes, electrical works, mechanical works including plumbing, all other ancillary works to make the building functional and site works including landscaping and paving blocks .

According to documents before the Panel, advertisement for invitation of bids was through the Open Advertised Bidding in local newspapers and the public procurement website on 14 July 2014. The bidding documents

together with drawings were sold by the Mauritius Institute of Education to interested bidders upon payment of a non-refundable fee of Rs 2,500.

The Open National Bidding document for works of value Rs 100 M of the Public Procurement Office was used for the project of "Extension to Existing MIE Buildings" which was prepared by the Ministry of Public Infrastructure, National Development Unit, Land Transport & Shipping. The approval of the Central Procurement Board was obtained on 02 July 2014 for the launching of the bids.

Thirteen (13) bidders purchased the bidding documents at the Mauritius Institute of Education as listed hereunder:

- Como Construction Co Ltd
- Super Construction Co Ltd
- Safety Construction Co Ltd
- Rehm-Grinaker Construction Co Ltd
- Govindramen Construction & Sons Ltd
- SNB Construction Ltd
- Kisten Enterprise Co Ltd
- Ramloll Bhooshan Co Ltd
- Canakiah Associates Co Ltd
- Bolah Jeetun Co Ltd
- GAD Construction Ltd
- Keep Clean Ltd
- Coatpro Enterprise Ltd

During the tender period, addenda were issued as per Table 1 below. A pre-bid meeting was scheduled and carried out at the Mauritius Institute of Education, on Wednesday 30 July 2014. The notes of the pre-bid meeting were circulated to all the bidders.

Addenda	Date Issued	Date CPB Notified	Content of Addendum
Addendum No.1	25/07/14	21/08/14	Two drawings were issued as follows: 1. ED 590/SW/04 2. ED 590/17
Addendum No.2	08/08/14	21/08/14	1. Queries on HVAC/ Plumbing, concrete specifications and lift installation were replied. 2. The Closing date was not extended.
Addendum No.3	11/08/14	21/08/14	1. Drawing No: ED 590/SW/02A & 04A were amended by ED 590/SW/02B and ED 590/SW/ 04B. 2. New drawings were issued as follows: Sheet no. 351, 356 & 357

Table 1: Addenda

The closing date for the submission of bids was fixed for Wednesday 20 August 2014 at 13.30 hours (local time), at the Central Procurement Board. Nine (9) bids were received and Public Opening was carried out on the same day at 14.00 hours in the Conference Room of the Central Procurement Board. The bid prices as read out are listed in Table 2 below.

Bidder	Bid (MUR)
Bolah Jeetun Co Ltd	47,477,750
Kisten Enterprise Co. Ltd	62,020,995
Safety Construction Co. Ltd	43,188,649
Rehm Grinaker Construction Co Ltd	48,982,532
Como Construction Ltd	41,475,290
Joint Venture Govindramen Ltd/ Divine Builders Co Ltd	45,443 ,457
Canakiah Associates Co Ltd	49,955 ,000
Joint Venture SNB Construction Ltd/ Naw-Rang & Co Ltd	53 ,119,650
Super Construction Co Ltd	47,698,888

Table 2: Bids Received

B. Evaluation

The composition of the Bid Evaluation Committee (BEC) assigned for this exercise profession is set out below:

Mrs. B. Candassamy	Chief Architect, MPI, NDU, LT & S (Chairperson and Registered Evaluator)
Mr. B. Dabycharun	Civil Engineer, MPI, NDU, LT & S (Member and Registered Evaluator)
Mr. O. Saraye	Assistant Registrar, MIE (Member and Registered Evaluator)
Mr. A. Becceea	Senior Procurement & Supply Officer, MIE (Secretary)

The BEC submitted its first report on the 19th September 2014, and found that:

"Bidder No.5, Como Construction Ltd

The bidder has satisfied the minimum qualifying criteria as per Clause 6.3 of the ITB, except for the following:

(i) Experience as prime contractor with a minimum of 2 projects of similar nature and complexity (minimum value of Rs 30 million) each over a period of 5 years; one of which should be an extension works to an existing building while it was operational: the bidder has not shown experience in extension works to an existing building while it was operational This is considered to be a major deviation.

The BEC considers the bid to be substantially non-responsive."

As a result, it concluded that:

"Conclusion and Recommendation

The BEC recommends that the contract for "Extension to Existing MIE Buildings" be awarded to the lowest evaluated and complying bidder JV Govindramen Construction & Sons Co Ltd/Divine Builders Co Ltd for the corrected amount of Rs. 45,372,847.50 (Rupees Forty Five Million, Three hundred and Seventy Two Thousand, Eight Hundred and Forty Seven and

Cents Fifty only) inclusive of Contingency Sum of Rs 1,000, 000 and VAT at 15%."

At the end of this phase, the following had been eliminated for being *substantially non-responsive*:

- Bolah Jeetun Co Ltd
- Kistnen Enterprise co Ltd
- Safety Construction Co Ltd
- Como Construction Co Ltd
- JV SNB Construction/Naw-Rang Co Ltd

The list of Responsive Bidders was then as follows:

- Rehm Grinaker Co Ltd
- Govindram Construction and Sons/Divine Builders Co Ltd
- Canakiah Associates Co Ltd
- Super Construction Co Ltd

The BEC submitted a "**Supplementary Bid Evaluation Report"** on the 8th October 2014 at the request of the CPB for the following reasons:

"*However, the CPB had invited the BEC on 25 September 2014 and requested that the evaluation report be reviewed as follows:*

a) with respect to the lowest bid submitted by Bidder no.5, Como Construction Ltd which had been evaluated as non-responsive, the project of Slaughter House, Baie Diamants, Rodrigues which had been awarded by CPB for a contract value of Rs. 56,212,885.50 be reconsidered under sub-clause 6.3(b) of ITB that concerns "Experience as prime contractor in the construction of two projects of similar nature & complexity of minimum value of Rs30m. One of the projects should be an extension work while the building was operational (within last 5 years)"

b) with respect to the lowest responsive bid submitted by Bidder no.6, Govindramen Construction and Sons Ltd/Divine Builders Co Ltd, the financial standing submitted by the MPCB may not be acceptable on the grounds of the wording used in the testimonial. The document states: "Are of opinion that ... .. "instead of "Certifies that.. ....."""

Its new findings in respect of Como Construction was now that:

"The bid of bidder No.5, Como Construction Ltd is now considered to have satisfied qualification criteria of sub-clause 6.3(b) of ITB and is therefore responsive."

However, in respect of financial standing, it now found that:

"4.0 Re-examination of the bid with Reference to Financial Standing

4.1 Bidder No.5 Como Construction Ltd

The Financial Standing of the contractor as submitted by MCB has been verified in accordance with ITB sub clause 6.3 (e) and the following has been noted:

- *The bidder has submitted bank testimonial from MCB with respect to credit facilities of Rs 10 million mentioning the name of the project and CPB reference as per the Bidding Data Sheet requirement;*

- *However, the testimonial does not mention that the liquid asset and/or credit facilities are* ***net of other contractual commitments*** *as per the requirements of ITB sub clause 6.3 (e)"*

As a result of this supplementary evaluation, the BEC maintained its conclusion:

"Conclusion and Recommendation

*The BEC recommends that the contract for "**Extension to Existing MIE Buildings**" be awarded to the lowest evaluated and complying bidder JV Govindramen Construction & Sons Co Ltd/Divine Builders Co Ltd for the corrected amount of Rs. 45,372,847.50 (Rupees Forty Five Million, Three hundred and Seventy Two Thousand, Eight Hundred and Forty Seven and Cents Fifty only) inclusive of Contingency Sum of Rs 1,000, 000 and VAT at 15%."*

At the end of this phase, the list of bidders considered as follows:

- Rehm Grinaker Co Ltd
- Govindram Construction and Sons/Divine Builders Co Ltd
- Como Construction Co Ltd

- Canakiah Associates Co Ltd
- Super Construction Co Ltd

Matters, however, were not to rest there. After the submission of this supplementary report, "*the CPB invited the BEC on 20 October 2014 to reconsider the supplementary report in light of:*

- *the financial statements for Bidder No.6, Govindramen Construction and Sons Ltd/Divine Builders Co Ltd and Bidder no.5, Como Construction Ltd. which were obtained on request by the CPB from the Registrar of Companies. A Financial Reconciliation Statement prepared by CPB and copies of the financial information received from the Registrar of Companies were handed over to the BEC and are at Annex I and Annex II respectively.*

- *the liquid assets/credit facilities shall be net of other contractual commitments as stated in the ITB, is a mandatory requirement."*

The findings in respect of the bid from Como were that:

"Re-examination of the Liquid Assets/Credit Facilities of Bidder No.5 Como Construction Ltd

The liquid assets/credit facilities submitted by the bidder has been verified in accordance with ITB sub clause 6.3 (e) and the following had been noted:

- *The bidder had submitted bank testimonial from MCB with respect to credit facilities of Rs l0 million mentioning the name of the project and CPB reference as per the Bidding Data Sheet requirement;*

- *However, the testimonial does not mention that the liquid asset and/or credit facilities are net of other contractual commitments as per the requirements of ITB sub clause 6.3 (e)*

As informed by CPB the credit facilities "net of other contractual commitments as per the requirements of ITB sub clause 6.3 (e)" is a mandatory requirement, therefore, the BEC considers that the bid of Bidder No.5 Como Construction Ltd is also non-responsive."

The result of this second supplementary report was now a change in the committee's conclusion:

"Conclusion and Recommendation

The BEC recommends that the contract for the project "Extension to Existing MIE Buildings" be awarded to the lowest evaluated responsive bidder Super Construction Co Ltd for the corrected amount of Rs. 47,664,388.70 (Rupees Forty Seven Million, Six hundred and Sixty Four Thousand, Three Hundred and Eighty Eight and Cents Seventy only) inclusive of a discount of Rs. 236,703.09, a Contingency Sum of Rs 1,000, 000 and, VAT at 15%."

C. Notification of award

The Mauritius Institute of Education through a letter dated 02 February 2015, informed the Applicant of the particulars of the successful bidder as follows:

Item	***Name and Address of Bidder***	***Contract Price***
Extension to existing MIE buildings	***Super Construction Co. Ltd*** *– Industrial Zone, La Tour Koenig, Pointe aux Sables*	***Rs47,664,388.70*** *inclusive of a discount of Rs236,703.09, a contingency sum of Rs1,000,000.00 and 15% VAT*

D. The Challenge

On 04 February 2015, the Applicant challenged the award on the following grounds:

"(a) Failure to comply with the requirements of law more specifically Section 40 of the Public Procurement Act 2006 because award not made to the lowest responsive bidder, i.e. Como Construction Ltd."

E. The Reply to Challenge

On 10 February 2015, the Public Body made the following reply to the challenge:

"I am directed by the Central Procurement Board to inform you that the testimonial submitted by your company did not mention that the liquid asset and/or credit facilities are net of other contractual commitments as was required at sub-clause 6.3(e) of the Instructions to Bidders which reads 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". Consequently, your bid was not retained.

Besides, according to Directive No. 18 issued by the Procurement Policy Office, the concept of net in "liquid assets and/or credit facilities net of other contractual commitments" is an accountancy terminology introduced in Standard measure for assessing the adequacy of the bidder's cash flow and being a major document, no shortcoming therein, may be cured at the time of bid evaluation. Also, such inadequacy is considered as a material deviation."

F. Grounds for Review

On 18 February 2015, the Applicant seized the Independent Review Panel for review on the following grounds:

"1. The Public Body was wrong to have disqualified and ought not to have disqualified Como Construction 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 contract to Como Construction 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 Como Construction Ltd on the ground that it had allegedly not complied with Clause 6.5(e) of ITB.*

4. *Since the bid is substantially responsive, the Central Procurement Board 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. The Employer did ask for clarifications on 29.09.2014.*

5. *Before applying the decision delivered by the Independent Review Panel on 11 March 2014 in the matter 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 ought to have been published. If there was a prescribed form then same ought to be published and communicated to the bidders in all fairness. The Applicant cannot be blamed for failure of the employer to abide to the specific recommendations of IRP.*

6. *The Public Body should have given an opportunity to all bidders to be aware of any change in the wordings of their bank testimonials as highlighted by the Independent Review Panel in PCR Works v/s NHDC Ltd).*

7. *In any event after having accepted the bank testimonials with exactly the same wordings for the past 14 years for bids made by the Applicant which have been successful, the Public Body should have accepted the bank testimonial.*

8. *If ever this is considered as being a deviation reservation, or omission, the Applicant states that it is not 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 30.3 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)".

G. The Hearing

Hearings were held on 07 May, 02 June and 11 June. Written submissions were made on 15 June and 16 June 2015, by Applicant, Respondent and Successful Bidder respectively.

The Applicant was represented by Mr N. Malleck, Counsel, and Mr O. Bahemia, Attorney, whereas the Respondent was represented by Ms S. Gareeboo.

The Successful Bidder also attended hearings and was represented by Ms J. Konfortion.

The Applicant has argued that in the absence of any prescribed form, a Bank Testimonial conforming exactly to the wording of ITB 6.3 (e) of the Bid Data Sheet (Section III), but omitting the phrase "*net of any contractual commitment etc.…."* as required under 6.3 (e) of Section1, is a minor deviation, and the Applicant should have been given the opportunity to clarify the discrepancy. He has moreover stressed that the "employer" has failed to include in the bid documents a standard format for the Bank Testimonial.

The Applicant submitted two previous Decisions of the IRP, namely CN 10/14, Securiclean v/s Ministry of Local Government, and CN 11/14,

Securiclean v/s Ministry of Local Government, both of which concurred with this view.

The Respondent maintained his position as previously stated that the omission of the wording *"net of any contractual commitment etc...."* constitutes a major deviation, and no clarification may be sought from bidders in regard to this, nor the opportunity given to alter the wording of the Bank Testimonial as this would represent a change in the tender.

The Successful Bidder also made a written submission, basically supporting the Respondent. In his submission, the Successful Bidder also stressed that "*on similar facts, the Panel has in the past year rendered decisions with conflicting findings.*

On 11th March 2014, the Panel delivered a decision in the case of ***Pro Construction & Renovation Works Ltd*** *v/s* ***National Housing Development Company Limited*** *(Decision No.05/14) relied upon by the Respondent to the effect that the failure of the aggrieved bidder to submit an appropriate document fully compliant with the mandatory requirement of ITB 6.3(e) is an omission which cannot be cured through clarification at evaluation stage.*

On 5th September 2014, a differently constituted Panel to the one referred to at paragraph 3.1 above, delivered two decisions in the cases of ***Securiclean (Mtius) Ltd*** *v/s* ***Ministry of Local Government & Outer Islands*** *(Decision No.17/14) and* ***Securiclean (Mtius) Ltd*** *v/s* ***Ministry of Local Government & Outer Islands*** *(Decision No.19/14) to the effect that drafting/wording is more a question of form and cannot be interpreted as a major deviation from the bid requirement such that it constituted a non-material non conformity which the Applicant could have been given the opportunity to rectify."*

The Successful Bidder has also expressed the view (shared with the Respondent) that: "*since the publication of Directive No.18 issued on 22nd October 2014 (Annex G of Respondent's Reply), pursuant to s 7 (b) of the Public Procurement Act entitled "Explanatory Note to Directive No.3 ", there can be no doubt that the failure to specify that the liquid assets and/or credit facilities were "net of other contractual commitments" constitutes a material deviation which would render the bid not substantially responsive. Paragraphs 3, 4 & 5 of Directive No.18 directs that:*

3. The concept of net in "Liquid assets and/or credit facilities, net of other contractual commitments" is an accountancy terminology introduced in SBDs as a standard measure for assessing the adequacy of the bidder's cash flow to execute the specific contract as certified by his banker.

4. The banker's certificate establishing the bidder's cash flow adequacy is a major document for the purposes of Directive No.3.

5. No shortcoming in that major document from his banker with regards to the bidder's adequacy of financial capability may be cured at the time of bid evaluation for works/services as this is not a document of a factual nature or of public knowledge. This inadequacy is considered as a material deviation to that measure which limits in a substantial way the bidder's obligation under the proposed contract."

H. Issues

This case in fact revolves around the single issue of whether the omission of the words "***net of other contractual commitments…"*** is fatal to the Applicant's tender and whether awarding the contract to the non-lowest bidder breaches requirement of the Law.

I. Findings

The Panel wishes first of all to thank all counsels for their valuable assistance to help unravel the intricacies of this case.

It is clear that to qualify for award, a bidder has to conform to ITB sub clause 6.3 (e) of the bidding documents to the effect that:

"*6.3 To qualify for award of the Contract, bidders shall meet the following minimum qualifying criteria:*

…..

(e) 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."

However, this qualifying criterion only requires the bidder to show that he possesses liquid assets or has access to credit facilities of the required amount, net of any other contractual obligations. It does not say that the actual wording "*net of any other contractual commitments and exclusive of any advance payments which may be made under the Contract"* has to appear in any certificate to that effect, so long as the latter implies that no such attachment exists on the amount of liquid assets and/or credit facilities certified therein.

The BDS is complementary to the ITB, but in this case only specifies the amount of liquid assets and/or credit facilities. ITB 6.3 (e) does not say that the BDS shall specify the wording, and therefore the latter cannot be of any help here.

There would appear to be an undue emphasis on the form rather than the content of the Bank Certificate, when a little reflection would show that, short of ordering an audit of the Applicant's finances and obligations at the time of issuing the certificate, or accepting a self-declaration, there is no way that a bank can ascertain what are the total contractual commitments of the Applicant. It is clear that no bank would certify as available any amount to which its own books show that there is an attachment. So, any certificate issued by a bank to the effect that a tenderer has liquid assets and/or credit facilities to a certain amount for use in a specific contract, implies that this amount is free of any other contractual obligation of which the bank is aware. Moreover, the term "*liquid assets and/or credit facilities"* does not specify which proportion should be liquid assets and which should be credit facilities. All parties would agree that in respect of "*credit facilities"* for a specific purpose the phrase "*free of any contractual commitments"* is meaningless.

Moreover, the bank would be aware that there may be commitments and obligations outside its knowledge to which liquid funds in its own custody may be attached. But if the bank is nevertheless willing to certify that the tenderer has access to liquid assets and/or credit facilities free of any contractual commitments, that could only mean that the bank would be willing to supplement whatever liquid funds <u>are</u> available with credit facilities up to the required amount of 10 million rupees.

The Panel therefore submits that the phrase "*free of any contractual commitments"* is superfluous in a bank certificate/testimonial complying in all other respects to ITB 6.3 (e), and the corresponding BDS item.

Finally, the Panel has to draw attention to the fact that in spite of repeated requests, and at least one legal advice, no format had been prescribed at the time of this tender for a bank certificate/testimonial in respect of solvency and credit worthiness. The Panel recommends and is of the view that if it is a *sine qua non* condition that certain words have to appear in any certificate, then a specific format with mandatory wording has to be proposed in the bid documents. In its absence, any other wording implying the same intent and purport should be acceptable. This argument may be taken one step further to say that unless the contrary is explicitly stated, then a bank testimonial mentioning the specific tender, and bidder, certifying that the latter *has the necessary financial resources for the execution of the contract* with *a minimum amount of liquid assets and/or credit facilities of MUR 10 million* implies that this amount is net of any contractual commitment.

Furthermore, given the fluid nature of finances of any construction firm such a testimonial can only be valid for a limited period. There is therefore nothing sinister in the words "*at the present time"* in the testimonial given by the MCB to the Applicant. The testimonial is given as a result of the state of solvency of the Applicant at a point in time relevant to this specific tender, but under normal assumptions of the duration of the tender period. One year after the tender, it is submitted that all such testimonials/certificates/audit reports etc. would need to be renewed.

J. Decision

The omission of the words "*net of any contractual commitment"* from the bank testimonial submitted by the Applicant does not alter the meaning and intent of the instruction at ITB 6.3 (e), and the corresponding item in the BDS.

As this omission is more a matter of form rather than content, seeking a clarification thereon from the Applicant would not have altered the

substance of his tender, but would have comforted the Respondent in regard to any doubts he may have had.

The Panel therefore recommends that the decision to award the contract to the co-respondent be annulled, and further recommends a re-evaluation of the bids in the light of the above findings.

(R. Laulloo)
Chairperson

(Mrs C. Sohun)
Member

(V. Mulloo)
Member

Dated September 2015