

## **INDEPENDENT REVIEW PANEL**

**In the matter of:**

**H. Padiachy Contractor Ltd**

**(Applicant)**

**v/s**

**Wastewater Management Authority**

**(Respondent)**

**(Cause No. 33/14/IRP)**

### **Decision**

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

The Wastewater Management Authority (WMA), on behalf of the Ministry of Energy and Public Utilities (MEPU) invited sealed bids through Open Advertised Bidding for Contract WW294 W - Design and Construction of House Connections - Plaines Wilhems. Contract WW294 W is a unit price contract with an estimated budget of MUR 25 million, inclusive of VAT. Works under the Contract will consist of the design and construction of sewerage connection works in the regions of Plaines Wilhems.

The invitation for bids was launched on 09 May 2014. The closing date for the receipt of bids was set for 09 June 2014.

Further to a query raised by prospective Bidders, Addendum No1 was issued to all the potential Bidders on 29 May 2014.

Fourteen (14) firms purchased the bidding documents. The closing date and time for submission of bids in the Bidding Document was set as not later than 13h00 on 09 June 2014 at the WMA. Bids were opened on the same date and seat at 13h30 and the following 8(Eight) bids were received:

SN	Name of Bidder	Amount (Rs) Inclusive of VAT
1.	Sotravic Ltee	13,610,783.49
2.	H.Padiachy Contractor Ltd	10,872,991.83
3.	Best Construct Co. Ltd	10,884,646.33
4.	PAD & Co. Ltd	15,632,440.19
5.	Square Deal Multi Purpose Cooperative Society Ltd	6,999,474.00(not indicated whether incl. Of VAT)

SN	Name of Bidder	Amount (Rs) Inclusive of VAT
6.	Trivan & Co. Ltd	13,258,939.95
7.	Kisten Enterprise Co. Ltd	26,041,750.00
8.	ONIX Co. Ltd	12,403,290.50

Bidders were not required to submit a Bid Security. However a Bid Securing Declaration, as per the format provided in the bidding document, had to be submitted by all the bidders

## **B. Evaluation**

The Bid Evaluation committee was composed of:

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Mr. H. Gopaul	Chairperson – Senior Civil Engineer
Mr. H. Kalisaran	Member – Senior Civil Engineer
Mrs. J. Ah Choon	Member – Senior Accountant
Mr. I. Lahoaree	Member – Civil Engineer

The committee submitted its first report on 9<sup>th</sup> September 2014 and made the following general comments:

*1) All bidders have submitted respective Bid Submission Form and Bid Security Declaration Form as required by the Bidding Document.*

*2) Apart from the Bid of Onix Co Ltd, which is valid for 120 days, all the other Bids submitted were valid for a period of ninety (90) days as required by the Bidding Document, that is, up to 07 September 2014.*

*It is to be noted that Bidders were requested to extend the validity of their respective bid up to 31 October 2014, through letter dated 05 August 2014. All bidders have complied with this requirement apart from the following:*

- Kisten Enterprise Co. Ltd did not reply to the request of the Authority for the extension of its bid validity but confirmed over the phone that it would not extend the validity of its bid.*

*3) Only one bid, received from Messrs PAD & Co Ltd, is complete as per the requirements of the Bidding Document.*

In regard to the Applicant, the BEC made the following remarks:

*The bidding document contains the format and the wordings of the Bid Submission Form. Bidders were required to submit their respective filled in submission form as per the said format and wordings. Item (e) of the BSF requires that the Bidder states the following: "Our Bid shall be valid for a period of \_ [insert validity period as specified in ITB 19.1] days from the date fixed for the bid submission deadline in accordance with the Bidding Documents, and it shall remain binding upon us and may be accepted at any time before the expiration of that period"*

*Perusal of its BSF has revealed that the Bidder has missed out the following phrase: ..... "and it shall remain binding upon us and may be accepted at any time before the expiration of that period"*

*In accordance Clause 29 of the Bidding Document, Determination of Responsiveness of a bid is to be based on the contents of the Bid itself, as defined in Clause 13. Moreover, a substantially responsive Bid is one that meets the requirements of the Bidding Documents without material deviation, reservation and omission.*

*Clause 13 requires, amongst others, that the Bid shall comprise the Bid Submission Form in the format indicated in Section III of the Bidding Document.*

*Moreover, the evaluation guidelines of the Public Procurement Office provide examples of non-conformance of commercial terms and conditions which are justifiable grounds for rejection of a bid, including but not limited to the following:*

- *Failure to submit substantially responsive Bid Forms and Price Schedules signed by the authorised person or persons*
- *Failure to satisfy the bid validity period*
- *Conditional bids viz. bids which limit the bidder's responsibility to accept an award*
- *Refusing to bear important responsibilities and liabilities allocated in the bidding documents.*

*In light of the above, the BEC is of the stand that Bid Submission Form of a Bidder should be in strict compliance with the format and wording included in the Bidding Document. Failure to meet this mandatory requirement, renders the Bid Submission Form and, by extension, the Bid non-responsive.*

*In regard to Messrs Square Deal, the Successful Bidder, the BEC had this to say:*

*The bidding document contains the format and the wordings of the Bid Submission Form. Bidders were required to submit their respective filled in submission form as per the said format and*

*wordings. The Bidder has omitted the following items of the Bid Submission Form:*

*1) Item (n) : 'We understand that this bid, together with your written acceptance shall constitute a binding contract between us, until a formal contract is prepared and executed'*

*2) Item (0): 'We understand that you are not bound to accept the lowest evaluated bid or any other bid that you may receive .... '*

*In accordance Clause 29 of the Bidding Document, Determination of Responsiveness of a bid is to be based on the contents of the Bid itself, as defined in Clause 13. Moreover, a substantially responsive Bid is one that meets the requirements of the Bidding Documents without material deviation, reservation and omission.*

*Clause 13 requires, amongst others, that the Bid shall comprise the Bid Submission Form in the format indicated in Section III of the Bidding Document.*

*Being given that any Bidder is not required to amend any format and wording of the BSF, the BEC is of the stand that these omissions render the Bid Submission Form and, by extension, the Bid non-responsive. Thus, the Bid, although being the lowest read out bid at opening, has not been retained for further analysis.*

*This evaluation concluded that only the following bids were responsive:*

Name of Bidder	Amount (Rs) Inclusive of VAT
Sotravic Ltee	13,610,783.49
PAD & Co. Ltd	15,632,440.19
ONIX Co. Ltd	12,403,290.50

The BEC therefore made the following recommendation at the end of this first evaluation:

*Further to the evaluation of the bids, the Bid Evaluation Committee recommends that award of Contract WW 294 W be made to the Lowest Evaluated Responsive Bid submitted by ONIX Co Ltd, in the corrected sum of MUR 12,265,290.50, including VAT.*

*It is to be noted that the Bid Price on which this evaluation was carried out was meant for the purpose of this evaluation only. Accordingly, award shall be made on the rates quoted by ONIX Co Ltd.*

The Board of the WMA, not being satisfied with this recommendation, referred the matter to its legal adviser, as a result of which the BEC was required to make a supplementary report on 23<sup>rd</sup> September 2014:

### **1.0 Introduction**

*The Bid Evaluation Reports (BER) for Contract WW 293 W and Contract WW 294 W, signed by the four members of the Bid Evaluation Committee(BEC) on 09 September 2014, were submitted to the Finance and Tender Committee under cover of two memoranda dated 09 September 2014.*

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*Through memorandum dated 22 September 2014, the Chairman of the BEC was informed of a legal opinion dated 18 September 2014, sought on the two aforesaid BERs for the said Contracts, based on the recommendation of the Finance and Tender Committee. (Annex 1). The BEC, through the said memo addressed to its Chairman, has been requested to review its evaluation reports in light of the legal opinion received for submission to the WMA Board.*

*This report summarises the key issues addressed in the legal opinion and sets out the comments of the 'BEC with regard to same, as well as a concluding note from the BEC.*

**2.0 Legal Opinion and Comments of the BEC**

*The table hereunder summarises the key issues addressed in the legal opinion dated 18 September 2014 and the comments of the BEC on each key issue:*

SN	Paragraph in Legal Opinion	BEC Comments & Observations	Remarks
1	BEC Observation and conclusion :  1.7 Item (i) : Three (3) Bidders were responsive to the bids and had no adverse remarks but the Bid Amount appears to be on the high side	The BEC has not mentioned that the Bid Amount appears to be on the high side.	BER states that the rates of the three responsive bidders viz Onix Co Ltd, PAD & CO Ltd and Sotravac Ltee are comparable. Rates quoted by lowest evaluated responsive bid are fair and reasonable when benchmarked against previous House Connection Contracts
2	Paragraph 3.2 : Case of Islands Chemicals v/s Central Water Authority should not be taken as a precedent	The BEC did not refer to this decision of the IRP in the BERs.	As per Circular No 5 of 2011, same cannot be taken as precedence
3	Paragraphs 3.3 & 3.4: Directives from PPO	Agreed	Emanates from PPO through Circular No 4 of 2011

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4	Paragraph 3.6 : Meaning of substantially: of real importance	<p>The BEC agrees with the definition.</p> <p>However, by omitting Items (n) &amp; (o) of the Bid Submission Form, the lowest bidder(Square Deal Multi Purpose Cooperative Society Ltd has <u>omitted two key issues of real importance as follows:</u></p> <ol style="list-style-type: none"> <li>1. Has failed to provide an undertaking that its <u>Bid and WMA's letter of acceptance shall constitute a binding Contract</u> between the bidder and the WMA until a formal Contract is prepared and executed.</li> <li>2. Has failed to provide an undertaking that the <u>WMA is not bound to accept the lowest evaluated bid</u> or any other bid it may receive.</li> </ol> <p>By omitting these important issues, the said bidder has failed to bear important responsibilities and liabilities in the bidding document. It constitutes a reservation and/or omission on the Bid Submission Form. Therefore it is a valid ground for rejection of its bid.</p> <ul style="list-style-type: none"> <li>• Similarly for the bid of H.Padiachy Contractor Ltd for Contract WW 294 W, the Bidder has omitted the phrase '<u>and it shall remain binding upon us and may be accepted at any time before the expiration of that period</u>' which relates to <u>Bid Validity</u> which is <u>an important aspect of the bidding exercise</u>. Therefore, this reservation and/or omission is also a valid ground for the rejection of the said Bid.</li> </ul>	<p>The BEC has had recourse to the following during the evaluation exercise :</p> <ul style="list-style-type: none"> <li>• Clauses 13 &amp; 29 of the Bidding Document as well as Directive No 4 of 2011 and experience of members in bid evaluation both in house and external procurement.</li> <li>• Evaluation guidelines for Works from the Procurement Policy Office(PPO)</li> <li>• Interpretation of BEC and that of the legal advisor on the PPO circular/directives differs</li> <li>• BEC may have recourse to the guidance of the Procurement Policy Office on this matter.</li> </ul>
5	Paragraphs 3.7-3.9	Comments of the BEC same as on Item 4 of this table	Same as Item 4 of this table
6	Paragraph 3.10 : Omission can only be to the detriment of the bidders and not otherwise	The BEC is of the stand that omissions with regard to Items(e), (n) and (o) viz. offer and acceptance & bid validity of the Bid Submission Form undermines also the position of the WMA as the procurement entity in this procurement exercise.	
7	Paragraph 4.1	Same as Item 4 of this table	Same as Item 4 of this table
8	Paragraph 4.2 : Maximise on the number of connections	Viewed from a <u>financial perspective</u> , this paragraph is not disputed. But evaluation of bids and award of Contract should be done <u>within the procurement framework</u> in force and under the stipulations of the Public Procurement Act whereby a Contract shall be awarded to the lowest evaluated responsive bidder.	The BEC has appraised the bids based on the procurement framework in force.

The above report and table are reproduced *in toto* to show that nowhere does the BEC change its recommendation.



**C. Notification of award**

The Wastewater Management Authority through a letter dated 30 September 2014, informed the Applicant of the particulars of the successful bidder as follows:

<b>Name of Bidder</b>	<b>Address</b>
<i>Square Deal Multi-purpose Cooperative Society Limited</i>	<i>CEB Road, Goodlands</i>

**D. The Challenge**

On 03 October 2014, the Applicant challenged the award on the following grounds:

*“Having submitted the lowest responsive bid, and in the absence of any valid reason, the bidder should have been awarded the contract straight away for the design and house connections – Plaines Wilhems.*

*Square Deal Multi-Purpose Cooperative Society Limited which has been retained for the award of the Contract has submitted an incomplete and non-responsive bid in that:*

- a. It has no required experience as stipulated in ITB 6.3 (b) and*
- b. It has no required and qualified personnel as is required in ITB 6.2(e) and ITB 6.3(d).”*

**E. The Reply to Challenge**

On 06 October 2014, the Wastewater Management Authority made the following reply to the challenge:

*“The Authority wishes to inform you that the Wastewater Management Authority Board decided to award the contract to the lowest substantially responsive bidder.”*

## **F. Grounds for Review**

On 07 October 2014, the Applicant seized the Independent Review Panel for review on the following grounds:

*“Having submitted the lowest responsive bid, and in the absence of any valid reason, the bidder should have been awarded the contract straight away for the design and house connections – Plaines Wilhems.*

*Square Deal Multi-Purpose Cooperative Society Limited which has been retained for the award of the Contract:*

- (a) has submitted an incomplete and non-responsive bid*
- (b) has no required experience as stipulated in ITB 6.3 (b)*
- (c) has no required and qualified personnel as is required in ITB 6.2 (e) and ITB 6.3 (d).”*

## **G. The Hearings**

Hearings were held on 14 April, 11 May and 25 May 2015. Written submissions were made on 05 June 2015 and 15 June 2015 by Applicant and Respondent respectively.

The Applicant was represented by Counsel Mr L. Servansingh, and the Respondent by Mr Bheeroo, replaced during the course of the hearings by Mr R. Daureeawoo. The Successful Bidder was not present at hearings and was not represented by Counsel.

It is of interest to note that on 10<sup>th</sup> October 2014, the Panel was informed by the then General Manager of the WMA that:

Pursuant to Section 45(5) and 45(6) of the Public Procurement Act 2006, I am directed by the WMA Board to certify that urgent public interest considerations require the procurement proceedings for contract WW294W to proceed on the following ground:-

- (ii) The previous house connection contract in the region of Plaines Wilhems has been closed on 31 August 2014. As at date some 240 outstanding applications for house connections are registered and upon award of the new contract the households would be connected to the public sewer.

In light of the above, the Authority is therefore proceeding with the award of Contract WW294W to Square Deal Multi Purpose Cooperative Society Ltd.

## **H. Findings**

In regard to the 3 grounds for review as stated by the Applicant:

*(a) That the Successful Bidder has submitted an incomplete and non-responsive bid*

The Respondent has shown that in fact both the Applicant and the Successful Bidder had submitted bid forms with certain omissions, which the Respondent considers to be minor deviations. The Panel concurs with the view of the Respondent.

*(b) That the Successful Bidder has no required experience as stipulated in ITB 6.3 (b)*

The Successful Bidder has submitted an impressive list of past similar projects along with annexes giving details of these projects. However, the Panel could not help but notice that dates do not appear in any of these documents. Some letters of acceptance with dates have been submitted in lieu of evidence of contract performance, but do not appear to be relevant in view of their dates and/or content.

The Panel also wishes to state that while it agrees that “similar experience” does not necessarily mean previous work for the WMA, the term does imply pipe laying works along rectilinear horizontal and vertical alignments, and manhole and other appurtenance construction.

*(c) The Successful Bidder has no required and qualified personnel as is required in ITB 6.2 (e) and ITB 6.3 (d).*

The Panel is satisfied that the Successful Bidder did provide details of qualified personnel as required in the relevant ITB. However, the Panel would wish the Public Body to check whether none of the listed personnel are full time employees of other construction or consulting firms.

## **I. Decision**

The Panel therefore recommends a re-evaluation of the bids within one month of this decision, by an independent committee on the grounds

mentioned above. Should the conclusion of the re-evaluation be different, the Respondent should propose solutions to the Panel, taking into account that the contract has been awarded and bid validities have expired.

**(R. Laulloo)**  
***Chairperson***

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

**(R. Ragnuth)**  
***Member***

**Dated 23 September 2015**