

## **INDEPENDENT REVIEW PANEL**

**In the matter of:**

**FTM (Mauritius) Ltd**

**(Applicant)**

**v/s**

**Ministry of Health & Quality of Life**

**(Respondent)**

**(Cause No. 22/15/IRP)**

### **Decision**

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

In February 2015, the Ministry of Health and Quality of Life launched a tender through Open Advertised Bidding for the Supply of Orthopaedic Implants (Annual Requirements 2015-2016) under Procurement reference No: OAB MHPQ/MDIS/2014/Q21, CPB reference CPB/52/2014. Tenders were received on the 8<sup>th</sup> April 2015, when 8 bids were received and opened. The main dates in the history of this case were as follows:

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<b>DATE</b>	<b>EVENTS</b>
18/02/15	Tender launched through open advertised bidding
11/03/15	Letter of clarification from FTM (Mauritius) Ltd
16/03/15	Letter of clarification from Chemical & Technical Suppliers Ltd (ChemTech)
17/03/15	Letter of clarification from Chemical & Technical Suppliers Ltd
25/03/15	Addendum No.1 sent to all potential bidders/participants and uploaded on website of the PPO (following requests for clarifications)
7/08/15	CPB approval of notification of bids
14/08/15	Letter of notification from the Ministry to the selected bidder- ChemTech
14/08/15	Letter of notification from the Ministry to all unsuccessful bidders including FTM (Mauritius) Ltd
17/08/15	Challenge from FTM (Mauritius)Ltd to the Ministry
20/08/15	Reply from the Ministry to FTM's challenge stating the reason why their bid was not accepted
26/08/15	Application for review from FTM to the IRP stating their grounds of review
27/08/15	Letter from the IRP to the Ministry informing that the procurement proceedings have been suspended and requesting for all relevant information and documents
28/08/15	Letter to the CPB informing it of the application for review to the IRP by FTM and requesting the CPB to forward the relevant documents to the IRP

The following eight bids were received and opened:

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Bidder Identification:			Read-out Bid Price(s)	
Name	Address	Country	Currency	Amount
(a)	(b)	(c)	(d)	(e)
1. Chemical & Technical Suppliers (I.O. Ltd	1-10 Sainte Marie Road Riche Terre	Mauritius	MUR	Offer 1: 153,561,397.00 Offer 2: 4,821,440.00
2. Ireland Biotech Limited Healthactiv	15, Reserves Street, Les Salines, Port Louis	Mauritius	MUR	14,717,210.00
3. Ducray Lenoir Ltd	19, Poivre Street, Port Louis	Mauritius	MUR	11,714,950.00
4. FTM (Mauritius) Ltd	Janoo Lane, Pailles	Mauritius	MUR	52,299,055.00
5. Ennar Healthcare Ltd	C/n 6, Swan Street & 26, Volcy Pougnet Street Opposite Jeetoo Hospital Port Louis	Mauritius	MUR	28,657,617.00
6. Supramed Ltd	Bon Air, Moka	Mauritius	MUR	76,910,395.33
7. Xenobiotic Medical Ltd	Royal Road, New Grove	Mauritius	MUR	13,627,072.48
8. Supra Latex (Pty) Ltd t/a Supra Healthcare Johannesburg	8, Skiedloot Street, Isando 1600 Johannesburg, PO Box 178	South Africa	MUR	32,406,094.51

**B. Evaluation**

The Evaluation Committee set up by the CPB was composed as follows:

- Dr. R. Munbodh - Ex-WHO Representative (Retired) – (Chairperson and registered evaluator)
- Dr. D. Gopal - Consultant in Charge Orthopaedics – (Member and registered evaluator)
- Dr. D. Conhyea - Orthopaedic Specialist – (Member and registered evaluator)
- Dr. P. Oree - Orthopaedic Specialist – (Member and registered evaluator)
- Mr. Y. Seeruttun - Assistant Permanent Secretary (Acting as Secretary until 21 May 2015)
- Mr. D. Callychurn - Procurement & Supply Officer / Senior Procurement & Supply Officer (Acting as Secretary as from 29 June 2015)

The committee made a preliminary remark upon examination of bids, namely that the Applicant's bid was not signed by an authorised signatory, and that the eligibility of goods proposed was not established.

- (b) Bidder 4: FTM (Mauritius) Ltd has not submitted the written confirmation authorizing the signatory of the bid to commit the bidder. However, the bid has been signed by the Bio-Medical Engineer for the company. Moreover, this bidder has not established the eligibility of the goods, as it has not completed the country of origin declaration in the Price Schedule.

More importantly, in the determination of substantial responsiveness, the committee found that *Bidder 4: FTM (Mauritius) Ltd has not complied with the terms of payment at GCC 16.3. The bidder has laid one condition that payment should be effected within 30 days after closing of Store Form 1, failing which, interest will be claimed at the rate of 0.5% of the order per week. However, according to GCC 16.3 of the bidding documents, "payment shall be made promptly by the purchaser, but in no case later than 60 days after submission of an invoice or request for payment by the supplier, and after the purchaser has accepted it".*

As a result, the Applicant was not retained for further evaluation, and only the following out of the original 8 bidders participated in the detailed technical evaluation:

<b>Bid No.</b>	<b>Bidder</b>
1.	Chemical & Technical Suppliers (I.O.) Ltd
2.	Ireland Blyth Limited Healthactiv
5.	Ennar Healthcare Ltd
6.	Supramed Ltd
8.	Supra Latex (Pty) Ltd t/a Supra Healthcare Johannesburg

### **C. Notification of award**

The Ministry of Health & Quality of Life through a letter dated 14 August 2015, informed the Applicant that its bid has not been retained and the successful bidder is Chemical & Technical Suppliers (I.O) Ltd.

### **D. The Challenge**

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

- *"Prices offered for items 1, 2, 3, 6, 7, 10, 11, 13, 14, 15, 17, 25, 26, 27, 29, 34, 91, 92, 93 are much cheaper to what have been selected for award amounting to a total difference of Rs20,885,200.00.*

- *“No quote” has been stated for items 16, 17, 43, 72, 80 while we have bid for same.”*

#### **E. The Reply to Challenge**

On 20 August 2015, the Public Body made the following reply to the challenge:

*“We wish to inform you that the evaluation has been carried out at the level of the Central Procurement Board. The latter has informed this Ministry that your company has not complied with the terms of payment specified at GCC 16.3 of the bidding document, a mandatory condition which stipulates that “payment shall be made promptly by the purchaser, but in no case later than 60 days after submission of an invoice or request for payment by the supplier, and after the purchaser has accepted it”. However, you have laid one condition that payment should be effected within 30 days after closing of Store Form 1, failing which, interest will be claimed at the rate of 0.5% of the order per week.*

*In view of the foregoing, the sole quotes stated by your company for items 16, 17, 43, 72 and 80 have not been considered during evaluation due to the bid being not responsive.”*

#### **F. Grounds for Review**

On 05 January 2015, the Applicant seized the Independent Review Panel for review on the following grounds:

- 1. The decision of the Central Procurement Board and the Ministry of Health & Quality of Life to consider Chemical & Technical Suppliers (I.O) Ltd as the successful bidder and to award the tender for the procurement of orthopaedic implants to the latter, is manifestly wrong, unfair, unreasonable and untenable inasmuch as:*
  - (a) The bid value of FTM (Mauritius) Ltd on the awarded items was Rs36,914,500.00 as compared to that of Chemical & Technical Suppliers (I.O) Ltd which amounted to Rs57,799,700.00;*
  - (b) The bid of FTM (Mauritius) Ltd was in circumstances the lowest bid;*
  - (c) The bid of FTM (Mauritius) Ltd was substantially responsive.*

2. *The Central Procurement Board and the Ministry of Health & Quality of Life were wrong to conclude that the bid of FTM (Mauritius) Ltd was not substantially responsive for the following reasons:*
  - (a) *The terms of payment as per GCC 16.3 of the Bid Documents is to the effect that “payment shall be made promptly by the purchaser, but in no case later than 60 days after submission of an invoice or request for payment by the supplier, and after the purchaser has accepted it’.*
  - (b) *The condition of payment as per FTM (Mauritius) Ltd’s bid is that “payment should be effected within 30 days after closing of Store Form 1”.*
  - (c) *The above condition of payment as set out in FTM (Mauritius) Ltd.’s bid does not constitute a “material deviation or reservation” within the meaning and intendment of ITB 31.2;*
  - (d) *Nowhere is it stipulated in the Bid Documents that compliance with GCC 16.3 is a mandatory condition of the tender process, and that failure to comply with same will result in non-responsiveness of a bid.*
  - (e) *To all intents and purposes, and more particularly in view of the substantial difference between the bid value quoted by FTM (Mauritius) Ltd and the successful bidder, amounting to some Rs20,885,200.00, the decision to discard FTM (Mauritius) Ltd’s bid as being non-responsive on the sole account that it failed to comply with the terms of payment specified in GCC 16.3 of the Bid Documents is manifestly wrong, unreasonable, unfair, untenable and disproportionate.*
3. *The Central Procurement Board and the Ministry of Health and Quality of Life were therefore wrong not to consider the bid of FTM (Mauritius) Ltd for items 16, 18, 43, 72 and 80.*
4. *To all intents and purposes, the bid of FTM (Mauritius) Ltd was substantially and technically responsive and was the lowest in the circumstances.”*

## **G. The Hearing**

Hearings were held on 10 and 29 September and 08 October 2015. Written submissions were made on 15 September 2015 and 22 September, by Applicant and Respondent respectively.

The Applicant was represented by Mr N. Vencadasmy, Counsel whereas the Respondent was represented by Mrs A. Pillay Nababsing together with Mrs S. Hajee Abdoula, both State Counsel. The Successful Bidder was represented by its Director, Ms N Adam and other staff, but was not assisted by Counsel.

## **H. Issues**

The Respondent having dropped two grounds for rejection of the Applicant's bid, namely that the Applicant's bid was not signed by an authorised signatory, and that the eligibility of goods proposed was not established, the sole remaining issue to be determined by the Panel is whether the Respondent was right in rejecting the bid of the Applicant for the sole reason that the latter had inserted in his bid a condition whereby *"payment should be effected within 30 days after closing of Store Form 1, failing which, interest will be claimed at the rate of 0,5% of the order per week."*

## **I. Findings**

To understand fully the import of the issue under discussion, it is necessary to summarise the administrative procedures between the instant of supply until payment is effected.

(a) Once a supplier is awarded a contract for the supply of orthopaedic implants, the delivery of a particular item is made at the time of surgery following a request from the hospital;

(b) The exact Size of the orthopaedic implant to be used may only be ascertained at the time of surgery so in practice the supplier would bring along different sizes of implants and the orthopaedic surgeon would choose the right size during surgery;

(c) Therefore, it is only following surgery, that the Supplier, being aware of the exact size of the implant used, is able to issue his invoice which is delivered a few days later to the operating theatre;

(d) The Invoice is signed by the Ward Manager of the hospital and then by the Orthopaedic Consultant confirming that the implant of a particular size was used in the surgery; (*Milestone A*)

(e) The invoice is then sent to the Procurement Department of the hospital for issuance of a Store Form;

(f) The Store Form is then signed by a representative of the supplier and a store officer at the hospital confirming that the said implant has been received and used; (*Milestone B*)

(g) The Store Form is then sent for payment by the Ministry.

The bidding documents have proposed in GCC 16.3 a maximum delay of 60 days between the time of submission and acceptance of invoice (*Milestone A*) and the time when payment is actually effected.

In his bid, the Applicant has imposed a condition which, if accepted, would override GCC 16.3 and impose a new time table whereby payment should be effected 30 days after “*closing of Store Form 1*” or 30 days after *Milestone B*.

It is a general rule of procurement that the Client or Employer proposes conditions of contract under which the contract will eventually operate. These are usually in the form of General Conditions proposed or published by a competent body such as the Fédération Internationale des Ingénieurs Conseils, the Institution of Civil Engineers, or the Public Procurement Office, and adopted by the Client or Employer. These general conditions may be assorted with specific conditions which amend, clarify, or complement certain sections of the general conditions to adapt the latter to the specific requirements of the tender. In the case under discussion, General Condition of Contract (GCC) 16.3 was not amended by any specific condition.

By submitting a tender, the tenderer implicitly agrees to the conditions stipulated, so that thereafter, analysis of tenders is facilitated.

The Applicant had ample opportunity to clarify, before submitting a tender, whether the Public Body would agree to a change in the conditions of payment. He did not do so, although he did clarify certain technical matters.



During hearings, and in his submissions, the Applicant has argued that in effect:

1. According to his past experience, the condition he has added to his tender would have the same effect, **except in a few cases**, as condition 16.3 of the GCC.
2. In the few cases when payment would be effected outside the delay he has imposed, the effect in terms of interest payment by the Public Body would be minimal, such that even after adding this interest his tender would still be cheapest.

In regard to 1 above, the question arises as to why the Applicant felt it necessary to impose a condition to override GCC 16.3. He must have found important advantages to himself to go to that length. At any rate, past experience may not be a correct reflection of future performance. Whatever be the amount eventually payable as interest, the condition introduced by the Applicant is unacceptable to the Client. It may also involve a substantial advantage to the Applicant, if, contrary to what he would wish the Panel to believe, the Applicant intended to shorten the period between the time of invoicing and issue of the store form by arrangement with low level public officers (while not breaking the Law), so that if payment is effected 30 days after the latter date, the overall time would be much less than the standard 60 days. Finally, according to the proposed GCC16.3, the Public Body is only committing itself to an overall delay of 60 days from invoice until payment, while by imposing another condition, the Applicant seeks to impose his own terms regarding payment, which involves a period of 30 days from another event (Milestone B), to which the Public Body is unwilling and/or unable to commit.

Moreover, whatever be the amount payable as interest in case of delay according to the Applicant's condition, interest payment due to delays is anathema to any Public Body, and the latter would therefore have to stretch its resources to compress the administrative procedures involved in effecting payment.

By imposing a new condition more advantageous to him than GCC 16.3, the Applicant has in effect submitted only a conditional bid, without any accompanying conforming bid. The new method of payment that the Applicant intended to impose would represent a major deviation, as, if he

was given the opportunity to withdraw this condition, thereby making his tender at par in this respect as other tenders, that would represent a substantial change in his tender.

To address an issue raised by the Applicant, the general conditions of contract, the specific or special conditions, together with the various bid forms constitute the contract format. Compliance thereto is mandatory, unless the bidder wishes to submit a conditional bid. This is procurement 101.

**J. Decision**

The Applicant qualified his tender in specifying a condition which is contradictory with that proposed by the Respondent. The latter had no obligation to give any consideration to a conditional tender. The question of price differential with the chosen tenderers does not arise.

For these reasons, the Panel finds that there is no merit in this Application.

**(R. Lalloo)**  
***Chairperson***

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

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

**Dated 26 October 2015**