Decision No. 18/15

INDEPENDENT REVIEW PANEL

In the matter of:

Onix Co. Ltd

(Applicant)

v/s

Wastewater Management Authority

(Respondent)

(Cause Nos. 34/14/IRP)

Decision

This is an application for review of the decision of the Wastewater Management Authority (the "Respondent") to award the contract for the design and construction for House Connections in Port Louis, Baie du Tombeau and Grand Baie to Square Deal Multi-Purpose Cooperative Society Limited (the "Successful Bidder").

The said contract was awarded after a bidding process which was initiated by the Respondent on the 09 May 2014 (the "Contract WW293W") and at which both the Successful Bidder and the Applicant had participated.

Following the challenge of the Applicant under section 43 of the Public Procurement Act 2006, the Respondent informed the Applicant on 06 October 2014 that the contract was awarded to the lowest substantially responsive Bidder being the Successful Bidder.

On 09 October 2014, the Applicant submitted its application for review before the Independent Review Panel. At the sitting of the Panel on 14 May 2015, the Applicant and Respondent were requested to file their written submissions by the 21 May 2015 and 28 May 2015 latest.

The written submissions have been duly received by the Panel.

Both Applicant and Respondent agree that the issues which fall to be determined by the Panel are twofold:

- Firstly, the Panel has to determine whether the bid of the Successful Bidder should have been rejected given that the Bid Submission Form was not compliant with section III of the Bidding Documents.

- Secondly, the Panel is also required to adjudicate on whether the bid of the Successful bidder should have been rejected given that it fails to meet the requirements of ITB 6.3 (d) of section II of the Bidding Documents.

1. Non-compliance with section III of the Bidding Documents

With regard to the first issue to be determined, it is submitted on behalf of the Applicant that the Successful Bidder has failed to satisfy the requirements of the bidding documents by failing to submit a proper Bid Submission Form as provided in Section III of the Bidding Documents. More specifically, it is contended by the Applicant that the omission in the Bid Submission Form of the Successful Bidder of paragraph (n) and (o) as provided for in the Bid Submission Form in Section III of the Bidding Documents was fatal to the Successful Bidder such that its bid could not constitute a legally binding contract between the Successful Bidder.

According to the Applicant, since the Bid Submission Form of the Successful Bidder was not identical to the template indicated in Section III of the Bidding Documents, it should have been rejected outright.

On the other hand, it is submitted that on behalf of the Respondent that the omission of paragraph (n) and (o) of Section III of the Bidding Documents was not fatal to the bid of the Successful Bidder.

The Respondent denies that the Bid Submission Form must be identical to the template indicated in the Section III of the Bidding Documents but instead contend that a bid remains legally binding if the Bid Submission Form is substantially identical to the format provided in the Bidding Document. According to the Respondent, the Bid Submission Form of the Successful Bidder was substantially identical to the format provided and did not alter the nature of the bid of the Successful Bidder which was a legal binding contract.

ITB 13.1 of section I of the Bidding Document provides as follows: -

"*The Bid shall comprise the following: -*

(a) Bid Submission Form (in the format indicated in Section III);
(b)
(c) …"

ITB 14.1 of section I of the Bidding Document further provides that "*the Bid Submission Form, Schedules, and all documents listed under ITB 13.1 shall be prepared using the relevant forms, if so provided*".

Directive No.4, which has been relied on by both Applicant and Respondent, was issued by the Procurement Policy Office under section 7 of the Public Procurement Act 2006 to confirm the format of the Bid Submission Document and the purpose of the forms contained in the Standard Bidding Documents.

As per the Directive, a Bid is legally binding only if accompanied by: -

(a) A duly signed Bid Submission Form; and

(b) The Bid Submission form that is substantially identical to the format provided in the bidding document, and filled in with all material information such as bid price, bid validity etc.

It is clear from Directive No.4 that the Bid Submission Form need not be identical to the format indicated but may be substantially identical.

We also need to refer to ITB 29.1 and 29.2 of Section I of the Bidding Documents which provides as follows: -

29.1 The Employer's determination of a bid's responsiveness is to be based on the contents of the Bid itself, as defined in ITB 13.

29.2 A substantially responsive bid is one that meets the requirements of the Bidding Document without material deviation, reservation or omission.

Furthermore, Directive No.3, issued by the Procurement Policy Office under section 7 of the Public Procurement Act, for the purposes of determining the responsiveness of bids, provides at paragraph 2(iv) that a material deviation or omission is one that, if accepted, "*would …limit in any substantial way, inconsistent with the Bidding Document, the Employer's rights or the Bidders obligations under the proposed Contract.*"

The real issue in dispute is therefore whether the omission of paragraph (n) and (o) in the Bid Submission Form of the Successful Bidder limit in a substantial way, the Respondent's rights or the Successful Bidder's obligations under the proposed Contract. Put

differently, the issue is whether notwithstanding the omission of paragraph (n), the bid of the Successful Bidder was a legally binding contract between the Successful Bidder and the Respondent. If the reply is in the affirmative, the omission of paragraph (n) would not be a material omission and hence, the Successful Bidder's bid was responsive.

Paragraph (n) and (o) of the Bid Submission Form in Section III of the Bidding Documents provided as follows: -

(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;

(o) We understand that you are not bound to accept the lowest evaluated bid or any other bid that you may receive;

It is no coincidence that Paragraph (n) starts with "*we understand*". In our opinion, paragraph (n) only exemplifies the binding nature of the bid and ensures that there is no misunderstanding, from the perspective of the Bidder, as to the legally binding nature of the bid.

The binding nature of the bid, in our opinion, stems from paragraph (e), (f) and (g) of the Bid Submission Form and from the Bid Securing Declaration as required by ITB 20.1 of section I of the Bidding Documents.

Under paragraph (e) and (g) of the Bid Submission Form, the Successful Bidder has: -

(a) Accepted the validity of the bid which shall **remain binding** upon it and which may be accepted at anytime before the expiration of that period;

(b) Has **committed** to obtain a Performance Security if its bid has been accepted.

Furthermore, under the Bid Securing Declaration, the Successful Bidder agrees any modification or withdrawal of the bid before the expiry of the validity period may result in its disqualification for any contract with any public body.

The above clearly illustrates binding obligations of the Successful Bidder which lead us to the conclusion that Bid Submission Form was substantially identical to the format provided, and that the bid of the Successful Bidder was, notwithstanding the omission of paragraph (n), valid and legally binding which, when accepted by the Respondent, created a legally binding contract.

Following the same reasoning, the omission of paragraph (o) would not constitute a material omission and would not affect the validity and biding effect of the contract.

For the above reasons, the challenge of the Applicant on this ground must fail.

2. Failure to meet the requirements of ITB 6.3 (d) of section II of the Bidding Documents

With regard to the second issue to be determined, it is submitted on behalf of the Applicant that the Successful Bidder has failed to satisfy the requirements of ITB 6.3 (d) of Section II of the Bidding Documents in as much as it failed the Personnel for the key positions. According to the Applicant's submission, the Contractor's Representative and Design Engineer proposed by the Successful Bidder do not have the required experience in this position for 5 years and experience in similar works for 3 years.

It is the contention of the Applicant that the above criteria is the minimum qualifying criteria pursuant to ITB 6.3-Section I-Instruction to Bidders-Page 8 and since the Successful Bidder did not meet this minimum qualifying criteria, its bid was non-responsive.

It is further submitted by the Applicant that the bid of the Successful Bidder was not responsive and relied on Circular 4 of 2010-Directive No. 3-Determination of Responsiveness of Bids-Page 4 paragraph (iv) (g), which provides that:

"[…]*Examples of nonconformance to commercial terms and conditions, which are justifiable gounds for rejection of a bid, are:*

> *(g) failure by manufacturer or supplier, or both, to comply with minimum experience criteria as specified in the bidding documents*." A copy of the said circular was provided to the Panel.

The Panel notes that the Applicant's ground for review to the effect the Contractor's Representative and Design Engineer proposed by the Successful Bidder do not have the required experience in this position for 5 years and experience in similar works for 3 years, is being put forward, without particularising the manner in which the Successful Bidder has failed to satisfy such requirements.

On the other hand, it is submitted on behalf of the Respondent that the Successful Bidder has Personnel for the key positions (contractor's representative and Design Engineer) who have the experience in this

position for at least 5 years and have done similar work for at least 3 years. The Respondent substantiated its claim by averring that Section 2.6 of the Substantive Responsiveness Examination Table of the Bid Evaluation Report demonstrates same.

The Panel has considered ITB 6.3(d) of Section II of the Bidding Documents which reads as follows:

ITB 6.3 (d)

Delete *"a Contract Manager/Supervisor with five years' experience in works of an equivalent nature and volume, including no less than three years as Manager or as otherwise* ***specified in the BDS****"*

and replace by:

The Bidder must demonstrate that it will have the personnel for the key positions that meet the following requirements:

No.	Position	Experience in this position (years)	In Similar Works Experience (years)
1	Contractor's Representative*	5	3
2	Design Engineer**	5	3
3	Site Agent	5	2
4	Foreman	5	2
5	Surveyor	5	2

**The Contractor's Representative shall be a Registered Professional Engineer(Civil)*

*** The Design Engineer shall be a Registered Professional Engineer (Civil) and could also cumulate the post of Contractor's Representative.*

The Panel has noted that the Contractor's Representative shall be a registered professional civil engineer and the Design Engineer shall be a registered professional civil engineer and could also cumulate the post of Contractor's Representative.

On the basis of the above, it is also no coincidence that items 1 and 2 of ITB 6.3(d) of Section II require the same number of years in respect of experience and similar work experience (i.e 5 years and 3 years respectively) covering the experience for both Contractor's Representative and Design Engineer, on the basis that the Design Engineer could cumulate the post of Contractor's Representative.

The Panel has considered Section 2.6 of the Substantive Responsiveness Examination Table (Table 3 of the Bid Evaluation Report).

The relevant part relating to the Successful Bidder is reproduced below:

Particulars	Square Deal Multi Purpose Cooperative Society Ltd
2.6 Qualification and experience of key site personnel and technical Person-	S
- Contractor's Representative {Exp. in position (5)/In Similar Wk (3)}	Joomun (21,15)
- Design Engineer {Exp. in position (5)/In Similar Wk (3)}	N. Joomun (21,15)

The Panel notes that the Bid Evaluation Committee has found that Mr. Joomun has been designated as Contractor's Representative having 21 years' experience in position and 15 years' experience in similar work.

The Panel further notes that the Bid Evaluation Committee has found that N. Joomun has been designated as Design Engineer having 21 years' experience in position and 15 years' experience in similar work.

The Panel has also reviewed a Form Tech-6- Curriculum Vitae (CV) for proposed Professional Staff relating to M S Nawaz Joomun (the "CV") submitted by the Successful Bidder in support of its bid for the purposes of ITB 6.3 (d).

According to the CV, Mr. Joomun is a professional engineer who has held the position of Design Engineer for well over 5 years and has experience in various sewerage scheme projects, also for a period well above 3 years.

The Panel is of view that the CV does not contradict the findings of the Bid Evaluation Committee and does not reflect any non-responsiveness from the part of the Successful Bidder, inasmuch as the Design Engineer holds the qualifying number years of experience, being in excess of 5 years in that position and in excess of 3 years in similar work experience and that a Design Engineer can also cumulate the position of a Contractor's Representative for that bid.

On the basis of the above and in absence of any particulars advanced by the Applicant in which the Successful Bidder has failed to satisfy such requirements, the challenge of the Applicant on this second ground must also fail.

The application is therefore set aside.

(G. Athaw)
Vice-Chairperson

(R. Ragnuth)
Member

(R. Rajanah)
Member

Dated 07 August 2015