Decision No. 35/15

INDEPENDENT REVIEW PANEL

In the matter of:

Chemical & Technical Suppliers (I.O.) Ltd

(Applicant)

v/s

Ministry of Health & Quality of Life

(Respondent)

(Cause No. 08/15/IRP)

Decision

A. History of the case

On 23 December 2014 bids were invited through open advertised bidding (National) method, for the procurement of disposable medical gloves. The closing date and time for submission of bids was 4 Feb 2015 at 1330hrs (local time) at the Ministry of Health and Quality of Life. The items for which the bidding exercise was launched are listed at pages 53-56 of the Bidding Documents.

On 2 April 2015, following evaluation of bids, notifications were issued to selected and unsuccessful bidders for items 1 to 10.

On 6 April 2015, the Applicant requested the Respondent to submit the make, model and country of origin for items 1 to 5 quoted by the successful bidder.

On 7 April 2015, the Respondent informed the Applicant that in accordance with s40 (3) of the Public Procurement Act 2006, only the name and address of the selected bidder and the price of the contract are disseminated to unsuccessful bidders.

By letter dated 7 April 2015 and received by the Respondent on 8 April 2015, the Applicant challenged the decision of the Ministry to select the successful bidder for items 1 to 5.

On 10 April 2015, the Respondent informed the Applicant that the challenge was under consideration and a reply would be made in due course.

On 16 April 2015, the Applicant was informed that the Respondent was seeking additional information and a reply would be communicated to it in due course.

On 22 April 2015, the Respondent replied to the Applicant that according to the documents, product specification, certificate of analysis and declaration of conformity submitted by the selected bidder, the samples of Advanced Healthcare Ltd for items 1-5 meet specifications and that additional information had been sought from the principal of the selected bidder and no reply had been communicated to the Ministry up to that time.

B. Evaluation

The Bid Evaluation Committee was composed of:

Dr. M. N. Hosany	Consultant General Surgery, Victoria Hospital- (Chairperson)
Dr. S. K. Chukowry	Specialist Orthopaedics, Victoria Hospital - (Member)
Mr. G. Hurbissoon	Ward Manager, 1. Nehru Hospital - (Member)
Mr. 1. Nazeerally	Ward Manager, Dr. A. G. Jeetoo - (Member)

In its report dated 11th March 2015, the committee established the following:

List of Bidders and Prices read out as in Public Opening

Bid No.	Bidder Bid	Amount (Rs)
1.	David & Men Co Ltd	29,898,874.00
2.	PNL	23,265,235.00
3.	VNS Diagnostics	13,522,203.00
4.	Ax Trading Ltd	6,200,992.00
5.	Y &S Trading Co Ltd	19,844,471.00
6.	Trionex Development Ltd	17,484,359.00
7.	Ducray Lenoir Ltd	25,977,435.00
8.	Worldwide Marketing & Services	9,970,132.00
9.	FTM (Mauritius) Ltd	14,663,657.00
10.	Ennar Healthcare Ltd	22,993,382.00
11.	Advanced Healthcare Ltd – Offer1	31,700,772.00

11.	Advanced Healthcare Ltd - Offer 2	30,498,292.00
12.	NEOlab Supplies	8,843,260.00
l3.	Chemical & Technical Suppliers (1.0.) Ltd	48, 406,670.00
14.	PHBusiness Ltd	8, 779,980.00
15.	Editions de L'Ocean Indien	30, 018,085.00
16.	SOS Medical & Laboratoire (Mauritius Ltd)	3, 622,995.00
17.	Supramed Ltd- Offer 1	22,943,440.00
17.	Supramed Ltd - Offer 2	9,939,600.00
18.	Unilab Ltd	27,958,565.00
19.	Malekula & Co Ltd	30,105,110.00
20.	Oraj Food Safety and Consultancy Services Ltd	27,325,428.00
21.	A VS Healthcare Ltd	15,310,110.00
22.	Meditrade Ltd - Offer 1	23 ,238,147.00
22.	Meditrade Ltd - Offer 2	9,276,960.00

List of Technically Responsive Bids (items 1 to 10 only reproduced below)

List of technically responsive bids	
Item No	**Bidder Nos. and Names**
1.	Bidder 11 : Advanced Healthcare Ltd – Offer 1 Bidder 13 : Chemical & Technical Suppliers (I.O.) Ltd
2.	Bidder 11 : Advanced Healthcare Ltd – Offer 1 Bidder 13 : Chemical & Technical Suppliers (I.O.) Ltd
3.	Bidder 11 : Advanced Healthcare Ltd – Offer 1 Bidder 13 : Chemical & Technical Suppliers (I.O.) Ltd
4.	Bidder 11 : Advanced Healthcare Ltd – Offer 1 Bidder 13 : Chemical & Technical Suppliers (I.O.) Ltd
5.	Bidder 11 : Advanced Healthcare Ltd – Offer 1 Bidder 13 : Chemical & Technical Suppliers (I.O.) Ltd
6.	Bidder 11 : Advanced Healthcare Ltd – Offer 1 Bidder 11 : Advanced Healthcare Ltd – Offer 2 Bidder 13 : Chemical & Technical Suppliers (I.O.) Ltd
7.	Bidder 11 : Advanced Healthcare Ltd – Offer 1 Bidder 11 : Advanced Healthcare Ltd – Offer 2 Bidder 13 : Chemical & Technical Suppliers (I.O.) Ltd
8.	Bidder 11 : Advanced Healthcare Ltd – Offer 1 Bidder 11 : Advanced Healthcare Ltd – Offer 2 Bidder 13 : Chemical & Technical Suppliers (I.O.) Ltd
9.	Bidder 11 : Advanced Healthcare Ltd – Offer 1 Bidder 11 : Advanced Healthcare Ltd – Offer 2 Bidder 13 : Chemical & Technical Suppliers (I.O.) Ltd
10.	Bidder 11 : Advanced Healthcare Ltd – Offer 1 Bidder 11 : Advanced Healthcare Ltd – Offer 2 Bidder 13 : Chemical & Technical Suppliers (I.O.) Ltd

The report concluded that the lowest evaluated bids were as follows (only items 1-5 reproduced below):

Item No	Bid No	Bidder	Amount (Rs)	Remarks
1.	11	Advanced Healthcare Ltd – Offer 1	144,100.00	Lowest evaluated responsive bid
2.	11	Advanced Healthcare Ltd – Offer 1	1,670,250.00	Lowest evaluated responsive bid
3.	11	Advanced Healthcare Ltd – Offer 1	2,327,870.00	Lowest evaluated responsive bid
4.	11	Advanced Healthcare Ltd – Offer 1	2,174,600.00	Lowest evaluated responsive bid
5.	11	Advanced Healthcare Ltd – Offer 1	1,310,000.00	Lowest evaluated responsive bid

C. Notification of award

The Ministry of Health& Quality of Life through a letter dated 02 April 2015, informed the Applicant of the particulars of the successful bidder as follows:

Item No.	***Bidder***	***Address***	***Contract Price (Rs)***
1	*Advanced Healthcare Ltd*	*CTR Lane, Mesnil, Phoenix*	*144,100.00*
2			*1,670,250.00*
3			*2,327,870.00*
4			*2,174,600.00*
5			*1,310,000.00*
6			*96,450.00*
7			*2,074,961.00*
8			*2,552,710.00*
9			*3,593,727.00*
10			*2,334,090.00*

D. The Challenge

On 07 April 2015, the Applicant challenged the award on the following grounds:

"We suspect that these gloves are not compliant to the mandatory tender specifications (refer to attached catalogue from the Mocare Health website) as per below:

(i) Thickness not according to requested specifications

(ii) Force at break after ageing >18N

(iii) No evidence of compliance to ASTM F1671 (standardized test method used to assess the ability of gloves to resist viral penetration)

(iv) No evidence of compliance to EN 455-2 and EN455-3

We contest the intention of the Ministry of Health & Quality of Life to award items 1 to 5 to advanced Healthcare on the ground that their offer is non-compliant to the mandatory tender specifications."

E. The Reply to Challenge

On 22 April 2015, the Public Body made the following reply to the challenge:

"We wish to inform you that following your challenge, the members of the Bid Evaluation Committee were convened at this Ministry and they have stated that according to the documents, product specification, certificate of analysis and declaration of conformity submitted by the selected bidder, the samples of Advanced Healthcare Ltd for items 1-5 meet specifications.

"Moreover, following the advice of the Bid Evaluation Committee, additional information has been sought from the principal of the selected bidder, and no reply has been communicated to this Ministry up to now."

F. Grounds for Review

On 22 April 2015, the Applicant seized the Independent Review Panel for review on the following grounds:

"We suspect that these gloves are not compliant to the mandatory tender specifications (refer to attached catalogue from the Mocare Health website) as per below:

(i) Thickness (minimum thickness requested for finger, palm and cuff 0.2 mm). Motex gloves not according to requested specifications.

(ii) Force at break before and after ageing should be strictly >18N. Motex gloves not according to requested specifications.

(iii) Minimum length should be 280 mm. Motex gloves not according to requested specifications for all sizes except size 8.0.

(iv) Cuff should be straight. Motex gloves offer beaded cuff.

(v) Elongation at break should be greater than 750%. Motex gloves offer only 750%.

(vi) No evidence that Motex gloves have passed ASTM F1671 for viral penetration (standardized test method used to assess the ability of gloves to resist viral penetration).

(vii) No evidence of compliance to EN 455-2 and EN455-3.

Different versions of the catalogue have been downloaded from the Mocare Health website on 07/04/2015 and 22/04/2015.

We contest the intention of the Ministry of Health & Quality of Life to award items 1 to 5 to advanced Healthcare on the ground that their offer is non-compliant to the mandatory tender specifications."

G. The Hearing

Hearings were held on 17 August, 04 September, 11 September and 30 September 2015.

Written submissions were made as follows:

By Applicant on: 21 August 2015, 11 September 2015 and 13 October 2015

By the Respondent on: 03 September and 21 September

By the Successful Bidder on: 29 September and 29 October 2015

The Applicant was represented by Mr M.R Uteem together with Mr T. Joomaye both of Counsel whereas the Respondent was represented by Ms R.S Appanna, together with Mr N. Meetook, State Counsel. The Successful was represented by Mr J. Peeroo, of Counsel.

H. Issues

The Panel first has to decide on the preliminary objection of the Respondent as to whether the Panel has jurisdiction to hear this case, which, according to Counsel for the Respondent, *does not fall within either s45 (1) (a) or s45 (1) (b) of the Public Procurement Act 2008 as amply explained during oral submissions on the Preliminary objections. The law is precise in this matter that the right of review only exists where the chief*

executive officer of the public body does not issue a decision (to the challenge) within the time specified in section 43(4) or the unsuccessful bidder is not satisfied with the decision of the challenge. In the present case, the Applicant's case does not fall within either limb and this is a matter which cannot be inferred by the IRP as it goes to its jurisdiction and the law is very precise in this regard.

2. The Respondent maintains also its preliminary objections that the application should be dismissed as it does not set forth any legal basis by virtue of Regulation 56 (b). The basis in law of the case for the Applicant cannot be inferred by the Independent Review Panel nor by the Respondent.

The preliminary objection raised by the Respondent was worded thus:

(1) It is submitted that the application for review together with the grounds for review should be dismissed with costs by virtue of Regulation 56(a) and (b) of the Public Procurement Regulations 2008.

(2) It is further submitted that the application for review together with the grounds for review is frivolous and does not disclose a prima facie case for review.

Barring the preliminary objections of the Respondent, the Panel is called upon to decide whether the products offered by the Successful Bidder for items 1 to 5 conformed to specifications.

I. Findings

The Challenge was made on the 7th April 2015. On 10 April 2015, the Respondent informed the Applicant that the challenge was under consideration and a reply would be made in due course.

On 16 April 2015, the Applicant was informed that the Respondent was seeking additional information and a reply would be communicated to it in due course.

On 22 April 2015, the Respondent replied to the Applicant that according to the documents, product specification, certificate of analysis and declaration of conformity submitted by the selected bidder, the samples of Advanced Healthcare Ltd for items 1-5 meet specifications and that additional information had been sought from the principal of the selected

bidder and no reply had been communicated to the Ministry up to that time. The Application for Review was made on the same day.

It is evident that on the 10th and 16th of April, the Public Body had requested for an extension of time to reply to the Challenge. The Applicant could have considered that there was no reply from the Respondent, and file his Application for Review within 7 days when such reply was due. However, he chose to grant additional time to the Public Body to reply to the Challenge. This could hardly be held against the Applicant. His Application for Review was made within 7 days of the receipt of the reply of the Public Body to the Challenge, and was therefore made within the limits set out in s 45 (1)(b), and s45 (1)(c) of the Public Procurement Act.

45. Right of review

(1) An unsatisfied bidder shall be entitled to ask the Review Panel to review the procurement proceedings where -

(a) the Chief Executive Officer of the public body does not issue a decision within the time specified in section 43(4);

(b) he is not satisfied with the decision; or

(c) before or after the entry into force of a procurement contract the value of which is above the prescribed threshold, he is not satisfied with the procurement proceedings on a ground specified in section 43(1).

There is otherwise nothing in the Public Procurement Act or the Public Procurement Regulations (2008) that would preclude examination by the Panel of this Application for Review.

Proceeding therefore to the merits of the Application for Review, the latter is based mainly on the quality of products offered by the Successful Bidder for items 1 to 5, on the grounds that, according to information in the possession of the Applicant, these products do not conform to specifications laid out in the Bidding Documents.

Specifications in the Bidding Documents set out a number of physical characteristics relating to dimensions, shape, elasticity and strength, and conformity to European and American Standards (CE markings and certificates, ASTM etc.)

In his reply to the Challenge, the Public Body declared (emphasis added):

We wish to inform you that following your challenge, the members of the Bid Evaluation Committee were convened at this Ministry and they have stated that according to the documents, product specification, certificate of analysis and declaration of conformity submitted by the selected bidder, the ***samples of Advanced Healthcare Ltd for items 1-5 meet specifications****.*

Moreover, following the advice of the Bid Evaluation Committee, additional information has been sought from the principal of the selected bidder, and no reply has been communicated to this Ministry up to now.

There is no indication as to how the BEC ascertained the physical characteristics mentioned above. There is no way that they could have ascertained dimensions with an accuracy of one tenth of a millimetre, or other physical characteristics of the sample from visual inspection alone. They did not even seek the assistance of the Mauritius Standards Bureau, for example, to carry our laboratory tests on the sample. Although to be significant, tests would have to be carried out on a number of random samples, in this case, tests on the sample available would have validated certificates submitted by the Manufacturer.

To declare the products conforming, the BEC have relied exclusively on test results and certificates of conformity given by the manufacturer from tests carried out in-house. In another exercise, the Ministry of Health derided such "self-evaluation", and yet, in the present case, the Public Body seems satisfied with the self-evaluation of the manufacturers of chosen products for items 1-5.

Also, certificates of conformity with international standards are not self-awarded. Conformity certificates with national or international standards and the right to use markings representing these standards are given by accredited laboratories or institutions. The supplier could have sought equivalent ISO certification, but again would have to obtain those from accredited organisations. The only test and conformity certificates present in the Bid of the Successful Bidder are those emitted by the manufacturer's laboratory.

Also, the Panel views with concern the attitude of the Ministry of Health Management in dealing with this exercise: "*the members of the Bid*

Evaluation Committee were convened at this Ministry and they have stated that according to the documents, product specification, certificate of analysis and declaration of conformity submitted by the selected bidder, the samples of Advanced Healthcare Ltd for items 1-5 meet specifications." The Chief Executive of the Public Body is ultimately responsible for decisions regarding any procurement exercise, and seeking to pass on the responsibility entirely to the BEC constitutes a refusal to accept responsibility.

Moreover, of still greater concern is the statement that *following the advice of the Bid Evaluation Committee, additional information has been sought from the principal of the selected bidder, and no reply has been communicated to this Ministry up to now.*

If additional information is needed to justify the choice of the products of the Successful Bidder, then on what basis was that choice made? And on what basis did the management of the Public Body approve the findings of the BEC, and maintain their approval after the Challenge of the Applicant?

J. Decision

For the above reasons, therefore, the Panel finds that there is merit in the Application, and that the products of the Successful Bidder proposed for items 1 to 5 do not conform to the specifications laid out in the Bidding Documents.

The Panel therefore orders annulment of the decision of the Public Body to award items 1 to 5 to the Successful Bidder. The Panel further orders a re-evaluation of bids for items 1 to 5 taking into consideration the Findings above.

(R. Laulloo)

Chairperson

(Mr R Rajanah)

Member

(Mr R Ragnath)

Member

Dated 12 November 2015