

INDEPENDENT REVIEW PANEL

In the matter of:

Super Builders Company Limited

(Applicant)

v/s

National Development Unit (Prime Minister's Office)

(Respondent)

(Cause No. 27/15/IRP)

Decision

A. History of the case

The National Development Unit invited bids from eligible and qualified bidders for the Framework Agreement for Construction and Upgrading of Roads and Associated Works for the Year 2015-2017, on 12 August 2015 through Open international Advertised Bidding method in local newspapers and through the Public Procurement office's website.

Name of Project: **Framework Agreement for Construction and Upgrading of Roads and Associated Works for the Year 2015-2017**

Public Body Ref: **CPB/B/NDU/ROADS/12/15**

CPB Ref. Number: **CPB/24/2015**

The objective of the procurement exercise is to select framework contractors having the required qualifications for the construction and upgrading of roads and associated works for the year 2015-2017 for the National Development Unit. The works consist of, but not limited to construction of new roads, upgrading and resurfacing of existing roads (including local repairs, patching and resurfacing over partial road width) and associated works such as construction of footpath, provision of hand railing, raising of manholes, line marking, etc... over a period of 2 Years

The Selection would be on a zone wise basis with no limits on the number of zones quoted by a contractor and is subject to satisfying corresponding qualification criteria given in the bidding document. The zoning system has been constituted as follows:

- Zone 1- Six Constituencies (Constituencies 1, 2, 3, 4, 19 & 20)
- Zone 2- Four Constituencies (Constituencies 5, 6, 7 & 9)
- Zone 3- Five Constituencies (Constituencies 8, 10, 15, 16 & 17)
- Zone 4 Five Constituencies (Constituencies 11, 12, 13, 14 & 18)

Works will be allocated through Call Offs, as and when required for values not exceeding Rs 5M, based on the lowest evaluated price using the quoted rates of each contractor selected for a particular zone under the terms and conditions of the framework agreement. The aggregate amount of expenditure for the National Development Unit, for the period

2015-2017, for all the 4 zones under the Framework Agreement is estimated to be to the tune of Rs 325M

For works from Rs 5M to Rs 10M the National Development Unit shall conduct a mini competition among contractors having the capacity to undertake works for the respective Zone.

One Addendum and a set of clarifications were issued on 09 September 2015 regarding amendments to the Bill of Quantities, Particular Conditions of Contract and Framework Agreement clause 8.1 and queries on the bidding document.

The closing date for the submission of bids was fixed for 22 September 2015 at 13.30 at the Central Procurement Board (CPB). Nine (9) bids were received and Public Opening was carried out on the same day at 14.00 hours in the Conference Room at the CPB.

B. Evaluation

The Bid Evaluation Committee was composed of:

- Mr. D. Nathoo- Chief Engineer - Ministry of Public Infrastructure, Land Transport & Shipping- TMRSU (Chairperson & Registered Evaluator)
- Mr. N. Mowlabaccus- Divisional Manager- Road Development Authority (Member & Registered Evaluator)
- Mr. J. Peeroo- Deputy Permanent Secretary- National Development Unit (Member & Registered Evaluator)
- Mr. G. Dubarry- Project Assistant- National Development Unit (Acting as Secretary)

In its report dated 19th October 2015, the Bid Evaluation Committee mentioned what amounts to interpretations of the ITB:

During this process, BEC noted that the Clause 32-Sub Clause 32.3, third line, of the Instructions to Contractors regarding '30% higher than the lowest quoted price' mentions the term 'Contractors'. It was argued whether the 'lowest quoted price' should be attributed to bidders who submitted bids or to qualified and substantially responsive bidder who submitted the lowest quoted price.

It was further argued that since there was a logical sequence whereby, Clause 32.3 comes after the technical and financial evaluation clause, i.e. Clause 28, 32.2 & 32.2; BEC concluded that the “30% higher than the lowest quoted price” should be applied with respect to the lowest responsive and qualified bidder.

The second point which was argued and discussed by BEC was on Section II, sub factor 2.3.1, which at the first paragraph mentions ‘audited financial statement for the last three years’ to demonstrate soundness of the contractor’s financial position, whereas in the second paragraph of the same clause, it mentions ‘the net worth should be positive for the bidder’s latest financial year’.

Since the foregoing information is taken from a single form (FIN-3.1), BEC considers that the application of this Clause relates to audited account for the last 3 years (2012, 2013 & 2014).

The third point which was argued was how the selection of the number of zones will be determined in case a contractor having quoted for a higher number of zones qualifies for a lower number of zones in terms of technical capacity. This argument was made since Section II –Evaluation and Qualification Criteria Clause 1 (c), states that for the allocation for a lower number of zones, the configuration that yield most economical value shall be selected based on average annual turnover for the last three years. It does not mention what happens if the bidder does not satisfy technical capacity to mobilize key equipment and personnel for higher number zones quoted initially.

In this circumstance BEC considered that the guiding criteria should be the most economical value for the selection for lower number of zones, so that a contractor performs the work satisfactorily as stated at ITC 34.

As will be seen below, these interpretations/assumptions affect the final outcome of this exercise, and it is important for the Panel therefore to decide whether the Bid Evaluation Committee was justified in these interpretations/assumptions in the light of the provisions of the Bidding Documents.

In respect of the Applicant, the Bid Evaluation Committee found that “As can be seen from Table 7, Super Builders has failed to satisfy the criteria of Net Worth for the latest financial year which was submitted

with his bid for the year ending June 2014. This is in line with the conclusion which the BEC made in Paragraph 3 in Section 3 of this report.”

After technical analysis, and assessment of financial and technical ability for the framework agreement, the Bid Evaluation Committee concluded in Table 14 of the Evaluation Report:

Bidder	Historical Contract Non-Performance	Qualification based on Financial Capacity	Qualification based on personnel capacity	Qualification based on Equipment availability	No of Zones quoted by Bidder	No of zones Qualified for
Gencon	Passed	Passed	Passed	Passed	4	4
Colas	Passed	Passed	Passed	Passed	4	4
Gamma	Passed	Passed	Partial Refer to Table 12	Passed	4	4
Rehm Grinaker	Passed	Passed	Passed	Passed for 1 zone only	1	1
Safety	Passed	Passed	Passed for 2 zones	Passed for 2 zones	4	2

Safety Construction had bid for all 4 zones, but is technically qualified for not more than 2 zones. The Bid Evaluation Committee had this to say:

As can be seen on Table 14 above, bidders Gencon, Colas, Gamma & Rehm Grinaker qualify for the number of zones they have quoted for. As for Safety it quoted for 4 zones, but is however qualified for only 2 zones, as the number of key personnel and equipment proposed satisfy only for 2 zones. In this circumstance as highlighted in Section 3 Para 4 of this report the two zones should be based on the configuration that yields the most economical value. Accordingly as can be seen from Table 10, the two zones where Safety is lowest are Zone 3 and Zone 4.

C. Notification of award

The National Development Unit through a letter dated 30 October 2015, informed the Applicant of the particulars of the successful bidders as follows:

Selected Contractor	Number and Description of Zones	Limit of Awards (Rs)
<i>General Construction Co. Ltd</i>	<i>Four Zones (Zones 1, 2, 3 and 4)</i>	<i>1,462,500,000</i>
<i>Colas (Maurice) Ltee</i>	<i>Four Zones (Zones 1, 2, 3 and 4)</i>	<i>1,584,589,614</i>
<i>Gamma Construction Ltd</i>	<i>Four Zones (Zones 1, 2, 3 and 4)</i>	<i>900,000,000</i>
<i>Rehm Grinaker Construction Co. Ltd</i>	<i>One Zones (Zone 2)</i>	<i>465,750,000</i>
<i>Safety Construction Co. Ltd</i>	<i>Two Zones (Zones 3 and 4)</i>	<i>114,375,000</i>

D. The Challenge

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

“(1) Super Builders Fully Responsive

Having submitted a complete bid, in strict accordance with the bidding documents, Super Builders Co. Ltd cannot be found unresponsive to the terms of reference. It should be noted that on other concurrent tender exercises for the same Employer (NDU) and on similar works (asphaltic concrete), Super Builders Co. Ltd submissions have been retained, contracts have been awarded and are running. It is worth highlighting here that for the latter bid exercise, our submission was similar, and CPB took the precaution of requesting our latest financial statements, the non-submission of which is considered as a minor omission, all in accordance with item (v) of the guidelines for the responsiveness of bids, as stipulated in Circular No. 4 of 2010, (Annex 1), from the Policy Procurement Office, and our bid was found responsive thereafter.

(1) Super Builders Co. Ltd being Lowest Bidders in All Zones

The most important basis which supersedes all other considerations is the cost element – Super Builders Co. Ltd being the lowest bidder in all zones and satisfying all criteria, morefully so, as a current operating contractor with outstanding track records with the NDU should automatically have been selected for award.

By selecting the highest bidders, it will cost some Rs300 Million more to government for the coming two years which is a waste of public money.

(2) Super Builders Co. Ltd credentials as opposed to few selected contractors

The selection of some contractors is doubtful in the case of Rehm Grinaker and Safety as they are known not to possess any Asphalt Plant and therefore must have submitted letters from Suppliers.

The asphalt concrete plants from these would be suppliers are not actually operational and cannot produce asphalt concrete and this has misled the board. To produce asphalt one must have their EIA licence from Ministry of Environment. By virtue of Clause 2.7 any supplier should be a qualified supplier, with EIA coverage and licensed as such at the time of tender.

In this tender exercise the major component is Roadworks.”

E. The Reply to Challenge

On 06 November 2015, the Public Body made the following reply to the challenge:

“(i) Contention 1 – Super Builders Co. Ltd Being fully responsive

Financial Situation – Sub factor 2.3.1 (2nd paragraph) - Historical Financial Performance reads as follows:

“To qualify for award, the bidders’ net worth calculated as the difference between total assets and total liabilities should be positive for the bidder’s latest financial year”

As per the Audited Financial Statements submitted by your firm, the Net Worth (Rs) calculated as the difference between total assets and total liabilities as computed below for year ending 30 June 2014 is negative:

Total Assets: Rs 205,662,815

Total Liabilities: Rs 240,889,586

Net Worth: Rs 35,226,771

(ii) Contention 2 – Super Builders being the lowest bidder: This fact is not disputed.

- (iii) *Contention 3 – Super Builders Credentials as opposed to few selected Contractors:*

The evaluation and qualification criteria, at paragraph 2.6 (Equipment) and 2.7 (Undertaking for Procurement of Asphaltic Concrete Material and Asphaltic Concrete Paver Equipment) reproduced below refer:

Clause 2.6 – “To qualify for one or more zones, the Contractor shall submit evidence of ownership or undertaking from suppliers/hirers of the availability of the minimum equipment”.

Clause 2.7 – “Contractors shall submit the name(s) of local suppliers(s) where asphaltic concrete material will be procured together with a written undertaking from the supplier(s) that the material will be supplied to the Contractor if selected”.

In addition, “Contractors shall submit the name of the supplier for hire of asphaltic concrete paver equipment, in case same is not available in his ownership, together with an undertaking from the supplier that the equipment will be provided to the Contractor, if selected.”

Rehm Grinaker Construction Co. Ltd and Safety Construction Co. Ltd as pointed out by you, have both met the qualification criteria at Clauses 2.6 and 2.7.

2. *In view of the financial situation of your company at (i) above with respect to positive net worth which is a mandatory requirement, your bid has been declared non-responsive and consequently has not been retained for award.”*

F. Grounds for Review

On 10 November 2015, the Applicant seized the Independent Review Panel for review on the following grounds:

“1. The Public Body was wrong to have come to the conclusion that the bid of the Applicant was non-responsive on the basis of the Financial Situation (Sub Factor 2.3.1 (2nd paragraph) – Historical Financial Performance) inasmuch as –

- a. The Public Body based its decision of the Audited Financial Statements of the Applicant for the year ended 30 June 2014 whereas the closing date for submission of bids was 22 September 2015 such that the Public Body ought to have considered the Financial Statements for “.. the bidder’s latest financial year” i.e. the figures for the year ended 30 June 2015; (with emphasis added)*

- which show that the Applicant’s bid is fully responsive. The latest financial statements of the Applicant show a positive net worth of Rs1,213,841;*
- b. The Public Body ought to have requested by the Applicant to submit its Financial Statements as at year 2015 and not merely rely on the figures for 2014 inasmuch as Financial Statements or Audited Accounts are considered as minor omissions in accordance with Circular No. 4 of 2010 (reference F/PPO/4/1 Vol. 3);*
- (i) In accordance with Section 210 of the Companies Act, the Applicant had a statutory delay of 6 months to file its financial statements which it did;*
- (ii) In similar procurement proceedings, the Applicant had been requested to provide its financial statements – vide letter dated 21 October 2015 reference CPB/B/NDU/DRAINS/11/15; it is therefore patently clear that for consistency in decision making that the Applicant ought to have been requested to provide its latest financial statements.*
- 2. The Public Body was wrong in its assessment of Clause 2.6 and 2.7 of the Evaluation and Qualification Criteria with respect to the supply of asphaltic concrete material.*
- (a) Rehm Grinaker Construction Co. Ltd and Safety Construction Co. Ltd have submitted letters from suppliers of asphalt inasmuch as these bidders do not own or operate any asphalt plants themselves. The “letters from suppliers” submitted by the said two bidders ought to be discarded for purposes of the evaluation and qualification inasmuch as those alleged “suppliers” of asphalt do not even hold the necessary Environment Impact Assessment license and thus are not licensed to operate any asphalt plant whatsoever.*
- (b) The Applicant operates its own asphalt plant.*
- 3. It is an undisputed fact that the Applicant is the lowest bidder.”*

G. The Hearings

Hearings were held on 17 November and 01 December 2015. Written submissions were made on 30 November 2015 and 20 November 2015, by Applicant and Respondent respectively.

The Applicant was represented by Mr M. Gobin, Counsel whereas the Respondent was represented by Mr N. K. Reddy, Ag. Principal State Counsel together Mr D. Bissessur, State Counsel.

H. Findings

The Applicant has argued that, being the lowest bidder, the Public Body was wrong to have come to the conclusion that the bid of the Applicant was non-responsive on the basis of its Financial Situation, and that the Public Body was wrong in its assessment of clause 2.6 and 2.7 of the Evaluation and Qualification Criteria with respect to the supply of asphaltic concrete material. Written and oral submissions were made in support of the grounds for Review.

The Respondent has refuted the arguments of the Applicant, quoting extensively from the Bidding Documents on the acceptability of a financial statement prepared and filed after the date of tender. There was otherwise no discussion on the subject of asphalt concrete, but the Respondent did point out that the concept of “lowest tenderer” does not exist in a tender for a framework contract, where the rates, and not the amounts should be considered for comparison, as the latter may vary as a function of the relative quantities of work included in the tender.

The determination of ground 1 of the Application for Review revolves around the term “latest” used in the Bidding Documents at 2.3.1 of the Evaluation Criteria: *To qualify for award, the bidders’ net worth calculated as the difference between total assets and total liabilities should be positive for the bidder’s latest financial year.*

The Bid Evaluation Committee considers that the “*last three years*” relate to the years 2012, 2013 and 2014, and the “latest” financial statement to be for the year 2014. The CPB has a different interpretation, as stated by its representative at the last hearing. The CPB does not consider that the “last three years” and “latest” refer to any specific years, and it would be up to the various bidders to submit what are “last” and “latest” for them.

It is a basic rule of procurement that all bidders should bid on the basis of the same information. This principle does not only preclude withholding information from any bidder(s), but also implies that each bidder will understand the same thing from the bidding documents. There should be no room for subjective interpretation. In the present case, the

term “latest” is understood differently by the Applicant, the CPB and the Bid Evaluation Committee.

The consequence of differing interpretations among bidders is that they each would submit information according to their own understanding. In the present case, can financial situations of bidders be compared for different years? The effect of differing interpretation is attenuated in a framework exercise where there is no financial competition among bidders, although, in the present case, there is some element of competition by the fact that contracts will be allocated *based on the lowest evaluated price using the quoted rates of each contractor selected for a particular zone under the terms and conditions of the framework agreement*. Moreover, for works above 5 million rupees, the Public Body intends to carry out a mini-competition among retained bidders. Thus the present exercise would serve as a prequalification, the result of which will have an impact on the final outcome. In the present exercise, all bidders, including the Applicant have submitted financial statements for the years 2012, 2013 and 2014.

The Applicant has argued that “latest” should refer to the year 2014-2015, and that the Public Body had a duty to request for the statement for that FY, if not submitted with the tender. Being in possession of what it believes to be financial statements for the last three years, the Public Body had no obligation to seek additional information. However, in view of the ambiguity in interpretation of terms, if the Applicant had submitted his certified or audited and filed financial statement for FY 2014-2015 with his tender, the Public Body would have been bound to give adequate consideration to this statement as the “latest” financial statement, which would have raised several issues which the Panel will not attempt to resolve here.

However, the Applicant did submit after the date of tender a financial statement for the year 2014-2015, duly filed at the Registrar’s office, arguing that non-submission of this document at the time of tender is a minor omission which can be corrected by its subsequent submission. Should the Public Body then have given the same consideration to that document?

There are in fact two limbs to that question. The first limb is whether the financial statement for the year 2014-2015 is relevant. This has been amply discussed above, and the Panel believes that it is. The second limb

concerns the acceptability of a financial statement prepared and filed after submission of tenders.

There is one guiding principle in deciding whether any information may or may not be accepted after the submission of tenders (what in fact constitutes minor or material omissions or deviations). For information to be acceptable even if submitted after the date for submission of tenders, it should be clearly demonstrable that it would be materially identical whether submitted before or after the date of submission of tenders. It would be unfair to other bidders to allow submission of new information after their own bids have been opened.

In the present case, without casting doubts on the integrity of the Applicant's Accountant, it cannot be said that **as a general rule**, financial statements prepared and filed **after** the submission of tenders would be unquestionably identical if they had been prepared and filed before that date. The financial statement for the FY 2014-2015 submitted by the Applicant is therefore not acceptable, although it would have been if it had been prepared and filed **before** the date of submission of tenders.

Ground 2 did not generate much discussion, and the Panel will not make a determination on this ground, as the discussion above is already fatal to the Applicant's case.

As regards Ground 3, the concept of "lowest bidder" is not relevant to an exercise leading to framework agreements, where the rates and not the amounts should be considered for comparison, as the latter may vary as a function of the relative quantities of work included in the tender. Works estimated at less than 5 million rupees will be subsequently allocated to the contractor whose rates when applied to the quantities of work for the specific project will yield the lowest amount.

The Panel does not understand why there should be further competition for works above 5 million rupees, since the rates of the various contractors are known, and the application of those rates to quantities already provide a competition. However, this has not been raised by the Applicant, and the Panel will refrain from delving further into this.

Furthermore, for the sake of completeness, the Panel wishes to point out that the qualification of Safety Construction for 2 lots, when that Company had tendered for all four lots, is justified in view of ITC 14.6

14.6 -----

Contractors may submit proposals for one or more zones but their selection will depend on their capacity to qualify for one or more zones.

I. Decision

For the above reasons, the Panel finds that the Application is devoid of merit and it is hereby dismissed. The haziness surrounding certain terms in the Bidding Documents did not have any effect on the outcome of the exercise. There was no obligation on the Public Body to request for or accept financial statements prepared and filed after the date of tender.

(R. Lauloo)
Chairperson

(Mrs C. Sohun)
Member

(V. Mulloo)
Member

Dated 14 December 2015