

INDEPENDENT REVIEW PANEL

In the matter of:

Colas (Maurice) Ltee

(Applicant)

v/s

National Development Unit (Prime Minister's Office)

(Respondent)

(Cause No. 33/15/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.

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:

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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>

Selected Contractor	Number and Description of Zones	Limit of Awards (Rs)
Rehm Grinaker Construction Co. Ltd	One Zones (Zone 2)	465,750,000
Safety Construction Co. Ltd	Two Zones (Zones 3 and 4)	114,375,000

D. The Challenge

On 12 November 2015, the Applicant challenged the award on the following grounds:

“Bidder notes that Safety Construction Company Ltd has not been selected for Zone 1 and Zone 2 despite being within much than less than 30% of lowest bidder and Bidder considers in the same light that Safety Construction does not meet the qualification criteria set out in the document for Zone 3 and Zone 4, including but not limited to continuous access to a reliable asphalt plant and supply which is essential for such works.

Bidder therefore highlights that this Framework Agreement is for upgrading of roads and hence considers that it is primordial for selected Contractors to have such resources and expertise which may be different when compared to drain works, concrete works and the like which are readily available on the market.

Bidder calls upon Public Body to review the selection of Safety Construction Company Ltd for Zone 3 and Zone 4.”

E. The Reply to Challenge

On 18 November 2015, the Public Body made the following reply to the challenge:

“(a) (i) The guiding criteria for the selection of the number of zones should be the most economical value (as per Section II – evaluation and qualification criteria clause 1(c) which states that 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) so that a contractor performs the work satisfactorily (as stated at ITC 34).

- (ii) *Safety Construction Co. Ltd, having quoted for 4 zones, is qualified only for 2 zones as the number of key personnel and equipment proposed by the contractor satisfy only 2 zones. The 2 zones for which Safety Construction Co. Ltd, has quoted the lowest rates are Zones 3 and 4. Consequently, Safety Construction Co. Ltd, has been recommended for zones 3 and 4.*
- (b) *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 to ownership or undertaking from supplier/hirers of the availability of the minimum equipment”.

Clause 2.7 – “Contractors shall submit the name(s) of local supplier(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.”

Based on documents submitted, Safety Construction Co. Ltd has met the qualification criteria at Clauses 2.6 and 2.7.”

F. Grounds for Review

On 24 November 2015, the Applicant seized the Independent Review Panel for review on the following grounds:

“The Applicant refers the Review Panel to the Applicant’s challenge which was filed on 12 November 2015 and the Public Body’s decision dated 18 November 2015. The Applicant maintains its grounds for challenge as grounds for review since the Applicant is unsatisfied with the decision of the Public Body in that the Public Body’s responses to the grounds of challenge do not provide any detailed explanation as to the decision of the Public Body on the grounds for challenge.

For instance, with regards to contention of the Applicant at item 8 of the Applicant’s challenge, the Public Body’s response merely states: “Based on documents submitted, Safety Construction Co. Ltd, has met the qualification criteria at Clauses 2.6 and 2.7” without any further explanation whatsoever.

In addition to the above, the Applicant has reason to further believe that Safety Construction Co. Ltd, has proposed the name of an asphaltic concrete supplier which does not hold the necessary EIA license for its asphalt plant and hence is not licensed to operate an asphalt plant.

In view of the decision of the Public Body, the Applicant therefore maintains all its grounds for challenge and requests the Review Panel to call for the bid submission document of Safety Construction Co. Ltd for a hearing on the Applicant’s grounds for challenge which are hereby reiterated and set out in extenso:

Bidder notes that Safety Construction Company Ltd has not been selected for Zone 1 and Zone 2 despite being within much than less than 30% of lowest bidder and Bidder considers in the same light that Safety Construction does not meet the qualification criteria set out in the document for Zone 3 and Zone 4, including but not limited to continuous access to a reliable asphalt plant and supply which is essential for such works.

Bidder therefore highlights that this Framework Agreement is for upgrading of roads and hence considers that it is primordial for selected Contractors to have such resources and expertise which may be different when compared to drain works, concrete works and the like which are readily available on the market”.

G. The Hearing

Hearings were held on 01 and 14 December 2015. Written submissions were made on 09 December and 21 December 2015 by Applicant and 10 December 2015 by Respondent and 18 December 2015 by successful bidder respectively.

The Applicant was represented by Mr G. Glover, SC together with Miss S. Chuong, Counsel whereas the Respondent was represented by Mrs P.

Goordyal-Chittoo, Assistant Parliamentary Counsel together with Mr K. N. Reddy, Ag. Principal State Counsel and Mr R. Bhoohhun, State Counsel.

H. Findings

At the outset, two issues have been raised by the Applicant which need to be addressed by the Panel.

The first issue relates to the fact that the Successful Bidder Safety Construction Co Ltd did not bid specifically for zones 3 & 4, but for all 4 zones. Having found that Safety Construction Co Ltd is not qualified to bid for 4 zones, it was the Respondent's choice to retain its bid only for zones 3 & 4, rather than any other combination of 2 zones.

As per ITC 14.6, the Respondent is entitled to retain Safety Construction Co Ltd for only 2 zones even if it has bid for 4 zones, for which it was not qualified:

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.

The Applicant has questioned the **choice** of the specific zones for which Safety Construction Co Ltd has been retained. The Bid Evaluation Committee has also been faced with the same question, and it has resolved it thus:

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.

In an exercise of this sort leading to framework agreements, the concept of lowest tender is inappropriate. The amounts quoted by each bidder for

each zone result from the application of their quoted rates to fictitious quantities, so that the quoted amounts are also fictitious. The only values which will stay unchanged are the rates quoted, and all comparisons should only be based on the latter. It is also noted that the application of actual quantities of work for any forthcoming job in any zone to these rates will yield the actual costs of the job if performed by the bidders retained for that particular zone, which will then allow comparison and identification of the most advantageous bid for that particular job.

How then, can the Bid Evaluation Committee identify the zones for which the bids of Safety Construction Co Ltd would be most advantageous when the quantities of work for forthcoming jobs are not known? Should the rates of a bidder qualifying for a lesser number of zones be compared to those of other bidders for the different zones, or should that bidder's own rates for the different zones be compared with each other?

The Panel wishes to state its appreciation of the Bid Evaluation Committee's efforts to find solutions to problems raised by the quality of the Bidding Documents. These problems were mentioned in the Panel's Decision in *Super Builders v. NDU*, but the Panel at that time glossed over this specific issue, as it had not then been raised by any of the litigants.

The solution proposed by the Bidding Documents to this issue involves simulations with quantities based on the turnover for the past three years.

The guiding criteria for the selection of the number of zones should be the most economical value (as per Section II – evaluation and qualification criteria clause 1(c) which states that 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)

In the end, as a result of the above simulations, Safety Construction Co Ltd was retained for the 2 zones for which the fictitious amounts of its bids were lowest. Regretfully, this does not yield the actual amounts for actual quantities of works that will be performed in the different zones. However, the economic interest involved here is solely that of the Respondent. The Applicant does not have an interest to contest the manner in which are chosen the two zones for which the Successful

Bidder is qualified. The Applicant has contested the principle of the Successful Bidder being found qualified at all and retained for 2 zones. There is no evidence to support this view, but the issue of supply of asphaltic concrete is discussed further below.

The second issue raised by the Applicant is whether Safety Construction Co Ltd did submit the required undertaking for the supply of asphaltic concrete material from a licensed and authorised supplier, as per the terms of the tender.

Specifically, the Applicant mentioned that the supplier from whom the Successful Bidder Safety Construction Co Ltd obtained an undertaking did not possess a valid EIA License.

During hearings, Safety Construction Co Ltd produced the EIA license of its supplier. The Applicant then argued that there was no evidence that the license was still valid.

An Environment Impact Assessment license does not have to be renewed each year. Like the driving license, the issue of an Environment Impact Assessment license is a one off event, and the license stays valid unless withdrawn. It is not up to Safety Construction Co Ltd to prove that the Environment Impact Assessment license has not been withdrawn, but if the Applicant has any specific information relating to the Environment Impact Assessment license of Safety Construction Co Ltd's supplier, then it would be up to the Applicant to submit this information to the Panel. It is enough for any client to ensure that his supplier is in possession of the necessary trade license to assume that all pre-requisite permits and licenses have been obtained and are valid.

However, in this case, the Bid Evaluation Committee has noted that Messrs la Rocaille Ltd have undertaken to supply Safety Construction Co Ltd with asphaltic concrete in the event that the latter is awarded a contract, but the Evaluation Report does not show that any investigation was done to ensure that the proposed supplier has the necessary plant and equipment and is in possession of a valid trade license, nor was there any requirement to do so. Safety Construction Co Ltd did provide documentation that the supplier la Rocaille Ltd had been issued an Environment Impact Assessment license in 2011, and that this license had not been revoked by 10th December 2015.

In his latest submission, the Applicant avers that *from information gathered, the said plant has been out of use for a number of years and the asphalt plant is not yet properly operational and hence it cannot be guaranteed that such plant will eventually be able to produce asphalt not to mention the quality thereof.*

The Panel is of the view that a mere allegation in this respect cannot be the deciding factor for this issue, the more so as there is nothing on record regarding the suitability of other suppliers. Moreover, the risk thus incurred by the Public Body is limited, as this tender exercise does not immediately culminate in a works contract, but in a framework agreement where works will be awarded as and when they arise according to criteria already laid out in the Bidding Documents. At the time of allocation of jobs, should it be found advantageous to award works to Safety Construction Co Ltd, the suitability of the supplier could be checked before award. Furthermore, there are provisions for checking the quality of the asphaltic concrete at the time of supply.

The Panel finds that the Application for Review is devoid of merit on this ground.

There remains the issue, raised by the Panel at the last hearing, whether allowing suppliers to bid as works contractors as well as provide rates and undertakings to other bidders.

The Respondent as well as the Successful Bidder are both content with the fact that this is allowed in the Bidding Documents and addenda thereto. The Applicant agrees to some extent with the Panel, but seems to feel that since the Successful Bidder did find a supplier who is not also a bidder, the matter needs not to be investigated further.

To recapitulate, the Successful Bidder and the Applicant were in an Agreement whereby the latter will supply the former with asphaltic concrete whenever required. Yet, when solicited, the Applicant did not provide an undertaking to the Successful Bidder that it would supply the latter with asphaltic concrete for the purposes of this tender. Safety Construction Co Ltd did find another supplier to enable it to bid, but the suitability of this supplier is being contested by the Applicant.

This has to be viewed in the larger context of entities being allowed to be both suppliers and tenderers, and therefore participating in the same bid

twice. If this had actually happened, then the Panel would have had to take a long hard look at s52 (3) of the Public Procurement Act:

*A bidder shall not engage in collusion, before or after a bid submission, designed to allocate procurement contracts among bidders, establish bid prices at artificial non-competitive levels or **otherwise deprive a public body of the benefit of free and open competition.***

As it happened, by coincidence or design, no entity has undertaken to supply asphaltic concrete and at the same time provided a bid.

Documents Required as per ITC 12	Super Builders	Gencon	Colas	Gamma	Rehm Grinaker	Kisten	Safety	MGM	Monesh
Undertaking from local supplier of asphaltic concrete- Para 2.7 of Section II	Y Super Builders	Y Gencon	Y Colas	Y Gamma	Y Trio Contracting Ltd	N	Y La Rocaille Ltee	N	N

There is of course the possibility that a bidder has been eliminated or did not bid because it could not find a supplier willing to give an undertaking, but there is no evidence of this, and this possibility has not been evoked by any of the litigants. The Panel is therefore of opinion that the authorisation to allow entities to be both suppliers and bidders did not have any consequence in this tender exercise, but should be avoided in future similar exercises. If the Public Body did not want to deprive itself of the experience of supplier/contractors, and at the same time did not want to penalise smaller contractors who do not have asphalt plants, the proper way would have been a two stage process whereby suppliers and their rates are identified first, and they are then appointed as nominated suppliers in the second tender.

I. Decision

In view of the above, the Panel concludes that it cannot be said that the Successful Bidder is not qualified for the 2 zones for which it has been retained, and that Safety Construction Co Ltd has submitted the required documentation to show that it will be supplied asphaltic concrete.

The Panel finds therefore that there is no merit in the Application.

(R. Laulloo)
Chairperson

(Mrs C. Sohun)
Member

(V. Mulloo)
Member

Dated 22 December 2015