

INDEPENDENT REVIEW PANEL

In the matter of:

AVIC-INTL/CCCE/ETERN Consortium

(Applicant)

v/s

Central Electricity Board

(Respondent)

(Cause No. 04/16/IRP)

Decision

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A. History of the case

The project caters for the Redevelopment of Saint Louis Power Station – Design, Supply, Install and Commissioning of Diesel Power Plant of Capacity 60 MW +/- 10%.

The components of the project are:

- Three or four medium speed reciprocating (four stroke) diesel generating sets each rated not less than 15 MWe and with a total capacity of 60 MWe +/- 10%.
- Alternators and associated equipment
- Power transformers and auxiliary transformers
- Indoor 66 kV GIS substation
- Power plant switchgear and protection system
- Control & Instrumentation system
- DC power supply system
- Cables and earthing system
- Sludge and oily water treatment and incinerator system
- Radiator cooling system
- Compressed air system
- Firefighting and detection system.
- CCTV camera
- Hot water heating system including steam drum, pumps, treated water tank, blow-down vessel, feed pumps, fuel and tank heaters, boiler complete with isolation dampers and inspection doors.

- Two new 1000m³ HFO storage tanks and fuel treatment system
- 2 two-flue chimneys in case of 4 engines or 1 common three-flue chimney in case of three engines, minimum 45 m high above ground level. The chimneys will be equipped with necessary continuous emission monitoring system (CEMS) to monitor exhaust gases.
- A new power station building including engine hall, mechanical annexes and electrical annexes.
- An emergency standby generator set

The project caters for the Design, Installation and Commissioning of three or four Diesel Engines at Saint Louis Power Station with a total capacity of 60 MW +/- 10%.

- Procuring Entity: Central Electricity Board
- Budget Allocated: MUR 4.2 Billion (excluding VAT)
- Method of Procurement: International Open Advertised Bidding

The International Open Advertised Bidding (CPB/20/2015) was published through a SPN in the dgMarket, AfDB website, CEB website, PPO website and the press on 3 July 2015. Furthermore, the invitation for bids was sent to embassies on 3 July 2015 and the Ministry of Foreign Affairs on 6 July 2015.

Potential bidders were invited to attend a pre-bid meeting and a site visit on Tuesday 04 August 2015 at 10.30 hrs (Mauritian time) at Saint Louis Power Station, Plaine Lauzun.

The closing date for the submission of bids was 01 October 2015 up to 13.30 hours at the Central Procurement Board (CPB). Out of Forty five potential bidders who purchased the bidding documents, only five bids were received. Public Opening was carried out on the same day at 14.00 hours in the Conference Room at the CPB.



The list of bidders and prices as read out in public opening is shown in table below:

No	Bidder	Bid Amount
1	DRA Projects (Pty) Ltd (DRA)	<i>Proposal for a Feasibility Study</i>
2	IMM/MATELEC S.A/MPG Mauritius Consortium (IMM)	EUR 74,641,164 and MUR 323,854,652
3	Burmeister & Wain Scandinavian Contractor A/S (BWSC)	EUR 83,989,404 and MUR 908,272,408
4	TSK Electronica y Electricidad S.A (TSK)	EUR 61,741,177 and MUR 635,990,962
5	AVIC - INTL/CCCE/ETERN Consortium (AVIC)	USD 55,076,764 + EUR 36,553,979 + MUR 841,366,625

B. Evaluation

The Bid Evaluation Committee (BEC) was composed as per table below.

The BEC by a letter dated 6 October 2015 made a request to the CPB to seek technical assistance from the CEB Consulting Engineer for this project namely, Mott Mac Donald Ireland Ltd (MMDI), due to the complex nature of the project. Following the approval of the request, MMDI delegated Mr Fergal Collins to assist the BEC from Wednesday 14 October to Wednesday 28 October 2015.

A further request was made on 8 October 2015 to the CPB to seek the assistance of a qualified accountant to examine the financial criteria of the offers received. The request was approved on 15 October 2015 and Mr Navind Rambajun, Assistant Accountant General at the Treasury, Ministry of Finance and Economic Development was appointed to examine the financial responsiveness of the bidders.

Composition of Bid Evaluation Committee:

Name	Designation	Organisation	Function
Mr. Hemchand Rai Heeroo	Former Senior Energy Specialist	World Bank	(Chairperson & Registered Evaluator)
Mr. Clement Li Cheng Sin Sam Soon	Former Director (Maintenance & Assets)	Airports of Mauritius Ltd	(Member & Registered Evaluator)
Mr. Rajiv Gopaul	Senior Engineer (Mechanical)	Central Electricity Board	(Member & Registered Evaluator)
Mr. Jivarettynum Moorghen	Acting Chief Supply Chain Executive	Central Electricity Board	(Acting as Secretary)

In respect of completeness of the bid of Avic, , the Evaluation Committee found that:

Bidder No 5 – Consortium AVIC – INTL/CCCE/ETERN

The Price Schedule No. 2 has not been submitted as same is not applicable in his case as it concerns plant and mandatory spare parts from within Employer’s Country and Bidder No. 5 is from Republic of China.

In respect of *Evaluation and Qualification Criteria as per Part 2 of Section III of SBD*, the Bid Evaluation Committee concluded that:

Bidder No 5 – Consortium AVIC – INTL/CCCE/ETERN (AVIC)

Though a Govt Entity, Bidder No 5 has submitted individual financial statements demonstrating that it satisfies criteria ITB 4.5.

Bidder No. 5 has complied with all the requirements of the Evaluation and Qualification criteria.

In respect of other criteria, the Bid Evaluation Committee noted that the Applicant was conforming in all respects, but adjustments needed to be made to the Bid price:

Clarification was sought from Bidder No. 5 [AVIC] regarding the Manufacturer's Authorisation Forms for Alternator and GIS switchgear. The requested information was submitted to the satisfaction of the BEC.

Some spare parts and tools are being procured from Estonia which is a non-eligible country. If retained, bidder must be asked to source same from eligible countries at no additional cost to the project.

Bidder No. 5 [AVIC] has not submitted the following drawings/information:

- *Instrumentation hook-up drawings*
- *Access, laydown, storage and site office details*
- *Description of diesel engine alternator starting and shutdown sequences*
- *Performance curves for each unit*
- *Details of any special measures to meet emission control requirements*

The above drawings/information, being factual, will be requested in case the bidder is determined as the preferred bidder.

With reference to the warranty covering the extended defect liability period of three years for Alternator, GIS Switchgear, turbocharger and Continuous Emission Monitoring System, the bidder [AVIC] has priced this item and same has been included in the total bid price to meet the Employer's Requirements.

The Bid Evaluation Committee concluded its technical evaluation with the following conclusion:

As a result of the technical evaluation, the following bidders are considered responsive and are retained for financial evaluation:

- Bidder No. 3 –Burmeister & Wain Scandinavian Contractor A/S
- Bidder No 5 – Consortium AVIC – INTL/CCCE/ETERN

Corrections were made to the Bid prices as hereunder:

Bidder	USD (1 USD = MUR 36.174)	EUR (1 EUR = MUR 40.4807)	MUR	Conversion in MUR	Remarks
BWSC		83,989,404	908,272,408		MUR component includes VAT
			-118,470,314		15 % VAT excluded as per GCC 3.4.2
		83,989,404	789,802,094	4,189,751,961	
		110,000	68,000	4,520,877	Lifting Equipment
		50,000		2,024,035	Excitation System
		276,000	-3,306,000	7,866,673	Sub Station Building + Lightweight Cladding/ Removal of block building
		193,000	758,000	8,570,775	Lightweight Cladding
		11,000		445,288	Atmospheric Emissions
		556,000	36,670,000	59,177,269	To meet noise requirement of 55 dB at Position 6 and 7 (Industrial zone)
		Total Price in MUR			4,272,356,878
AVIC	55,076,764	36,553,979	841,366,625	4,313,444,144 (see note 1)	
		631,000		25,543,322	Extended warranty
	Total Price in MUR			4,338,987,465	

After financial evaluation, Bid Evaluation Committee concluded that:

<i>Name of Bidder</i>	<i>Levelised Unit Cost per kWh</i>	<i>Rank</i>
Bidder No. 3 -BWSC	3.8498	1
Bidder No. 5 - AVIC	3.8982	2

C. Notification of Award

The Central Electricity Board through a letter dated 04 January 2016, informed the Applicant of the particulars of the successful bidders as follows:

“Burmeister & Wain Scandinavian Contractor A/S of Postboks 235, Gydevang 35, DK-3450 Allerod, Danmark for the total evaluated contract price of EUR 85,185,404 plus MUR 823,992,094 excluding VAT”.

D. The Challenge

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

“Bidder has submitted a fully compliant Bid and the notification for award under Section 40(3) of the PPA is for a bidder who has submitted a Bid which is not fully compliant to the requirements of the Bid and contains several deviations in his bid.

The reasons for the Bid from AVIC-INTL/CCCE/ETERN Consortium not being retained for award are not clear to Bidder.”

E. The Reply to Challenge

On 12 January 2016, the Public Body made the following reply to the challenge:

“We wish to inform you that we have been advised by the Central Procurement Board that your bid has not been retained for award for the following reasons:

- (a) With reference to warranty covering the extended defects liability period of three years for Alternator, GIS Switchgear, turbocharger and Continuous Emission Monitoring System, the bidder has priced these items separately and consequently the total bid price of this bidder has been adjusted to meet the Employer’s Requirements;*
- (b) It is to be noted that the bids for both bidders BWSC and Consortium AVIC-INTL/CCCE/ETERN have been found to be technically responsive;*
- (c) After computation of the levelised evaluated cost per unit of electricity it has been found that the offer of BWSC is the lower one.”*

F. Grounds for Review

On 18 January 2016, the Applicant seized the Independent Review Panel for review on the following grounds:

- “1. *The Applicant is not satisfied with the reply of the Public Body to its challenge dated 07 January 2016 because the Public Body failed to address the main issue which was that the successful bidder’s bid was not fully compliant by reason of several deviations.*
2. *The Public Body failed to take into account that the successful bidder had not complied with the requirements imposed by GC 8.2.5(a)(i) inasmuch as it had proposed that the seat of arbitration be outside Mauritius.*
3. *The Public Body failed to take into account the correct output figures submitted by the Applicant in its computation of the levelised evaluated cost per unit of electricity, and was therefore wrong to have concluded that the Applicant was not the lowest bidder.*
4. *The Public Body was wrong to have awarded the contract to the successful bidder inasmuch as the successful bidder has failed to submit a fully compliant bid as its bid contains several major deviations.*
5. *The timing of the discontinuance of legal proceedings initiated by the successful bidder to contest (I) the finding that its initial bid was not responsive, and (II) the re-tendering exercise, leads to the inescapable inference that the successful bidder obtained reassurances that its second bid would be successful and that such reassurances were obtained as a result of undue influence being exerted on the Public Body.”*

G. The Hearing

Hearings were held on 26 January, 16, 25 February, 08 March and 05 April 2016. Written submissions were made on 29 January, 04 February

and 19 April 2016 and 28 January and 05 April 2016, by Applicant and Respondent respectively. Evidence was also adduced orally, notably through the examination and cross-examination of the chairman of the Bid Evaluation Committee.

The Applicant was represented by Mr H. Duval and Mr D. Dodin, Counsel together instructed by Mr M. Mardemootoo, Senior Attorney, whereas the Respondent was represented by Mr R. Chetty, Senior Counsel, assisted by Mr Reesaul, Counsel.

The Successful Bidder was represented by Mr G Glover, SC, and Ms S Chuong Counsel. The Co-Respondent, CPB was represented by Mr Bissesur State Counsel, assisted by the members of the Bid Evaluation Committee.

At the outset, there was some discussion about the adequacy of the instrument produced by the Applicant in relation to the delegation of Power to Mr D Bujun by AVIC. The Applicant finally submitted a Power of Attorney, which was acceptable to all parties.

The Applicant also dropped the following ground of Review during proceedings:

The Applicant contends the decision of BWSC to discontinue the judicial proceedings is incomprehensible in view of the nature of the arguments put forward by it to contest the decisions of the Respondent to (i) cancel the initial procurement process; and (ii) proceed with a re -tendering exercise with amended specifications.

The Applicant further contends that the fact that BWSC should do so only a couple of days after the Central Procurement Board had informed the Respondent of its decision but before the Respondent had proceeded with the notification of the award, leads to the inescapable inference that BWSC has exerted undue influence to obtain reassurances from the Respondent that it would be awarded the contract irrespective of the views of the funding agency.

H. Findings

Some of the grounds for Review of the Applicant are based on surmises, and the Panel will not comment on those grounds which the Applicant has been unable to sustain.

In the end, the Applicant's case is reduced to the following issues, which are addressed one by one:

1. Whether the cost of additional 3 years warranty was included in Applicant's bid

It is the Applicant's contention that the CEB was wrong to have adjusted the total bid price to meet the employer's requirements as the Applicant had already included the three-year warranty covering the extended defects liability in its bid price.

The Respondent and Co-Respondent have submitted that this item should have been listed in Schedules 1 to 4 of the Applicant's Price Schedules as stated in Chapter 2, Appendix B of the Bidding Documents.

The Applicant did submit the cost for the extended three years' warranty in Volume II of its bid proposal (Section 2.3, Appendix B), which is separate from the Applicant's Price Schedules. Therefore, the amount of EUR 631,000 representing the three years' extended warranty was added to the Bid Price of the Applicant to bring all the offers on the same level for evaluation purposes by the Bid Evaluation Committee.

The Panel wishes, at the outset, to clarify that it is immaterial whether or not the Applicant had included this ground in his original Challenge or Application for Review. All parties may introduce additional arguments during Review proceedings. By the same token, the fact that the Respondent failed to respond in time to the Applicant's Statement of Case cannot be held to be fatal to his case.

It is the Applicant's contention that the figure EUR 631, 000 representing the three years' extended warranty that he mentioned elsewhere in his bid, was included in his final bid price. However, he did not so state

anywhere in his bid. All bidders were required to fill in the different schedules, where fields were provided for the different items of cost. The Applicant did not include any cost to the field provided for the additional warranty, nor did he mention in this field, or anywhere else, that the cost of such additional warranty was already included elsewhere in his bid. In such cases, the Respondent would be fully justified to add the Applicant's own estimate of the cost of additional warranty to the bid price. If that is not consistent with the Applicant's intentions, then it would be the latter's own fault in not making his intentions known in his bid, in which he in fact made the gross mistake of not filling in the required fields in the provided schedules. Such mistakes cannot be allowed to be corrected to the advantage of the bidder.

Moreover, the Respondent was not compelled by Law to seek clarifications from the Applicant, the more so as in this case clarifications would have changed the substance of the tender. Furthermore, clarification on this issue cannot be sought from the Bidder at the evaluation stage, since this is prohibited by Section 1 of the Bidding Documents (Instruction to Bidders) at paragraph 6.1, which states "*No change in the prices or substance of the bid shall be sought, offered, or permitted, except to confirm the correction of arithmetic errors discovered by the Employer in the evaluation of bids, in accordance with ITB 29*".

The Panel therefore cannot find merit in the Applicant's arguments on this ground, as the Applicant has failed to prove his contention that the CEB was wrong to have adjusted his bid price to include the additional warranty.

2. Levelised Unit Cost of Electricity

The Applicant contends that the CEB has used the wrong figure to compute his levelised evaluated cost per unit of electricity. He argues in effect that the output at 85% load at site conditions is the same as output at 85% load at ISO conditions. In other words, he argues that no derating should apply at 85% load, and that such derating may only apply for loads of 96% or above.

The Applicant did include in his bid extracts of commercial catalogues where the figure of 17,993 kWe appears, but the Respondent contends that only *guaranteed values provided in the Letter of Bid, Functional Guarantees, and Commercial Schedules that can be used in the computation of levelised unit costs.*

The Panel has gone into the extensive technical submissions of the Applicant in this respect, and is receptive to the idea that all generators are not the same.

The Respondent and the Bid Evaluation Committee argue *that the methodology used to calculate the levelised unit cost of electricity is laid down in Section III of the Bidding Documents (Evaluation and Qualification Criteria) (Annex 3). The output to be used is "Guaranteed Power from New Power Plant under Site Conditions at generator terminals. If total plant capacity is above 66 MWe, it shall be taken a 66 MWe for evaluation purposes "*.

Also, as per the bidding documents, for evaluation purposes, it is expressly stated that a value of 85% MCR of the total plant capacity at site condition must be used.

The question therefore arises: what steps did the Applicant take to ensure that it was clear in his bid that the **guaranteed** output at 85% load at site conditions is the same as the output at 85% load at ISO conditions? The Applicant was aware at all times how the bids were to be evaluated, and that the calculation of levelised unit costs would necessarily entail a calculation of output at 85% load at site conditions. And yet, at no time did he state **in any of the contractually binding documents** how his equipment differed from others, and why there should be no derating at 85% load. Instead, the Applicant included a graph in his bid to show that the output at site conditions is proportionally lower than that at ISO conditions **at all loads**. He now argues that this graph applies to a different equipment than the one proposed in the bid. Even if this was to be believed, the Respondent had absolutely no grounds at the time of evaluation, to doubt that the output at 85% load at site conditions should be de-rated.

The Panel is satisfied that the same methodology was used by the Bid Evaluation Committee for computation of levelised unit costs of both technically compliant bidders. Moreover, the Respondent did not have any grounds to seek clarification from the Applicant as to the output at 85% load at site conditions.

The output figure used in computing the unit levelised cost for the Applicant was obtained from its 'Letter of Bid', which states that *"The total plant output capacity shall be 61.281 MWe at site conditions". In the circumstances, the Guaranteed output at 85% is equal to 61.281 MWe multiplied by 0.85, which is equal to 52.08885 MWe (52,088.85 kWe).*

The Panel therefore finds that the computation of levelised unit costs was correctly done by the Bid Evaluation Committee and the Respondent.

3. Deviations in the bid of the Successful Bidder.

The Panel is satisfied that minor deviations in both bids (that of the Applicant and that of the Successful Bidder) were addressed in the same way by the Bid Evaluation Committee.

There remains the issue of the seat of arbitration in respect of which the Applicant has averred that *the successful bidder has proposed a different seat of arbitration than the one stipulated in the bidding documents.*

The Respondent has argued that *as the seat of arbitration did not affect the substance of the bid, same was considered as a minor deviation by the Co-Respondent.*

Additionally, it has been submitted that *Section VIII-Particular Conditions at Page 3-213 of the Bidding Documents [--] allows for "several provisions and related information to be either completed or modified in accordance with the information provided by the Bidder whose bid has been accepted by the Employer or agreed between that Bidder and the Employer". Moreover, the BEC has recommended in its report that this issue be clarified with the successful bidder prior to contract award.*

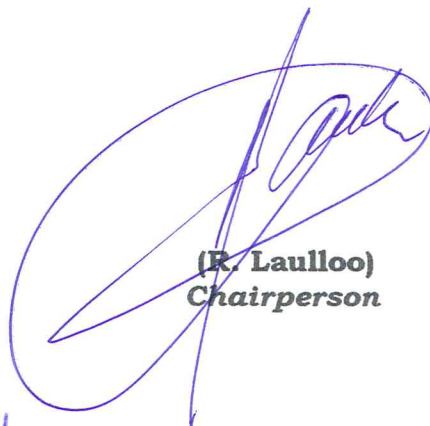
It has also been highlighted that *the LCIA-MIAC arbitration rules provide that the parties are free to agree the seat, or legal place of the arbitration and that the LCIA Court has an upper hand to decide in case of dispute about the seat of arbitration.*

The Panel finds that were the parties to agree to the seat of arbitration proposed by the Successful Bidder, the additional costs in case of arbitration would be insignificant in relation to the bid price, and therefore this issue cannot be said to be major. The seat of arbitration does not change the substance of the tender.

The Panel once again fails to see merit in this ground of Review.

I. Decision

For the above reasons, the Panel finds that there is no merit in this Application for Review.



(R. Laulloo)
Chairperson



(Mrs C. Sohun)
Member



(V. Mulloo)
Member



Dated 22nd April 2016

