Decision No. 19/16

INDEPENDENT REVIEW PANEL

In the matter of:

JV Aqua Science and Technology Ltd and Aqualia DPI Ltd

(Applicant)

v/s

Commission for Public Infrastructure and Others

(Rodrigues Regional Assembly)

(Respondent)

(Cause No. 16/16/IRP)

Ruling

A. History of the case

The objective of the project is to design, supply, install and commission two Reverse Osmosis Desalination Plants having a production of not less than one thousand (1000) cubic meters per day at Bay Malgache and Pointe Coton respectively. The plant shall have two trains or modules.

The works shall be executed at the Bay Malgache and Pointe Coton sites in the Island of Rodrigues and shall comprise of the following: -

- Design of Reverse Osmosis Desalination Plant having a production of not less than one thousand (1000) cubic meters per day. The plant shall have two trains or modules. The characteristics of raw water to be treated are given indicatively in the bidding document for bidding purposes. However, the characterization of the raw water for the final design of the RO plant shall be carried out by the Contractor after award of contract.
- Supply, install test and commission the Reverse Osmosis Desalination Plant and all required auxiliary systems and accessories including feed pumps, booster pumps working in duty/standby mode from the raw water tank to the plant complete with all electrical and control cabling and all necessary piping works.
- Monitor and maintain the RO plants and Equipment for a period of six months following their successful testing and commissioning.
- Training of Local Personnel.

The final closing date for the submission of bids was fixed for 27th April 2016 up to 13.30 hours at latest at the Central Procurement Board (CPB).

Ten (10) bids were received at the prescribed date and time. Public Opening of the bids received was carried out on the same day at 14.00 hours in the Conference Room at the CPB.

Bidder's No.	Bidder's Name	Bid Amount inclusive of VAT (MUR)
1	Befula Investments (Pty) Ltd t/a Rossi Engineering	Price not inserted in Form of Bid
2	Proctecno Srl	134,481,699.00
3	Aqua Science and Technology Ltd and Aqualia DPI Ltd	91,929,299.00
4	Veolia Water Solutions & Technologies South Africa (Pty)	143,154,879.60 + 2 alternative offers
5	Odis Filtering Ltd	103,010,470.00 (incl. of 5% Discount)
6	Metito Overseas Limited	138,000,727.00
7	JV – Aquaflo Ltd & Aquamarine	135,824,324.20
8	MAK WATER -EDCC JV	136,439,570.75
9	PVS GmbH	124,440,762.68 (in figure) 124,444,762.68 (in word)
10	Blychem Ltd	113,433,956.00

B. Evaluation

The Bid Evaluation Committee (BEC) was set up by the CPB in accordance with Section 11(1) d of the Public Procurement Act 2006 and comprises of the

Mr. CHUNNOO Suresh – Director (Mechanical Engineering) – Ministry of Public Infrastructure & Land Transport (Team Leader & registered evaluator)

Mr. DEERPAUL Utamsingh – Electrical Engineer/Senior Electrical Engineer-Ministry of Public Infrastructure & Land Transport (Energy Services Division) (Member & registered evaluator)

Mr. BEEDASEE Pravesh Kumar – Engineer/Senior Engineer (Mechanical) – Waste Water Management Authority - (Member & registered evaluator)

Mrs. CLAIR-JEAN Marie Antoinette - Confidential Secretary (Secretary)

The Panel, at this stage, will not go into the details of the conclusions of the Evaluation Report of the BEC.

C. Notification of Award

The Commission for Public Infrastructure & Ors (Rodrigues Regional Assembly) through a letter dated 21 June 2016, informed the Applicant of the particulars of the successful bidders as follows:

Name of Bidder	*Address*	*Contract Price Inclusive of VAT*
Odis Filtering Ltd (Israel)	*8, Martin Gehl St, P.O.B. 3137 Kiryat-Arye, Petach-Tikva 49130 Israel*	*MUR 103,010,469.00*

D. The Challenge

On 24 June 2016, the Applicant challenged the award on the following grounds:

"Our Bid was responsive and was the lowest of the tender exercise."

E. The Reply to Challenge

On 29 June 2016, the Public Body made the following reply to the challenge:

"(a) You are a joint venture between Aqua Science and Technology Ltd represented by Mr Mrinal Khadoo and Aqualia DPI Ltd represented by Mr Jean Francois Rault. According to the joint venture agreement dated 21 April 2016 Aqua Science and Technology Ltd will act as

Manager (Team Leader) for the works and of the operation of the joint venture. However, the bid has been signed by Mr F. Rault of Aqualia DPI Ltd instead of Mr Mrinal Khadoo;

(b) *The Contract Manager proposed has a B. Tech (Hons) in Mechanical Engineering with 16 years of experience mainly in sugar milling industry followed by only 4 years experience in the construction and water industry as opposed to a minimum 5 years experience in water industry;*

(c) *The Process Engineer proposed meets qualification. However, no CV has been submitted to assess his experience in design of RO plants. The Technician is qualified. However full detailed CV has not been submitted to assess experience in installation, operating and maintenance of RO desalination plants;*

(d) *The list of Plant and Equipment to be deployed on the project has not been submitted;*

(e) *You have submitted experience which relates mainly in installation and commissioning of desalination plant rather than experience as prime contractor in the construction of RO desalination plants; and*

(f) *You have experience solely in the supply, installation and commissioning but not in design of RO desalination plant over the last 10 years."*

F. Grounds for Review

On 05 July 2016, the Applicant seized the Independent Review Panel for review on the following grounds:

"1. The Applicant avers that the Tender exercise was substantially flawed and led to an erroneous intention to award to a foreign bidder since it is expressly provided that in Open Advertised Biddings which includes International Biddings (vide s.18 of the PPA), a margin of preference

shall apply in favour of bidders incorporated in Mauritius (vide Circular No. 13 of 2012 of the PPO) – an application of the margin of preference would obviously had favoured the applicant and other Mauritian bidders – see result of the opening of bids of 27 April 2016;

2. *The decision of the Public Body to consider Odis Filtering Ltd as the successful bidder and to declare its intention to award the tender to the latter is wrong and untenable in as much as:*

(a) *The bid price of the Applicant was MUR 91,929,299.00 as compared to that of the successful bidder which amounted to MUR 103,010,470.00, which is around MUR 11 Million more than that of the Applicant; and*

(b) *The bid of the Applicant was in the circumstances the lowest substantially responsive bid.*

3. *The Public Body and/or the Bid Evaluation Committee have failed to properly assess and/or evaluate the bid of the Applicant, which is in compliance with all the requirements of the bidding documents.*

4. *The decision of the Public Body not to retain the bid of the Applicant, the lowest substantially responsive bid, is wrong and the alleged six reasons put forward by the public Body and/or the Bid Evaluation Committee are untenable and unfounded in view of the following:*

(a) *<u>Authorized representative</u>*

It is to be noted that according to the JV agreement, there is an Executive Committee of which Mr Jean Francois Rault is a member (Clause 10 (ii) of the JV Agreement refers). All the decisions of the Executive Committee shall be binding on the Consortium (vide Clause 10 (iv) of the JV Agreement). Mr Jean Francois Rault is duly authorized by the Executive Committee of the Joint Venture to sign the bid for and on behalf of the Joint Venture. In any case the bid of the applicant bore the seal of BOTH companies to the JV. Furthermore, the

challenge dated 24 June 2016 was signed by the same Mr Jean Francois Rault alone and the respondent duly entertained the challenge and responded to same. The respondent cannot be heard today to complain that the bid document was erroneously signed.

(b) *Experience of the Contract Manager*

The Contract Manager reckons 16 years working experience at the Medine Sugar Milling Co. Ltd, Mauritius wherein he was in charge of the whole factory including the water treatment process namely the Reverse Osmosis plant on the boiler feed water of the power plant. The Contract Manager has thus more than 5 years of experience as required by the tender documents.

(c) *Submission of CVs*

The Applicant has provided the qualification and the years of experience of the process Engineer and Technician as requested by the bidding documents and the Public Body confirmed in its letter of reply to the challenge that these two persons meet qualification. The Applicant cannot be penalized for not having submitted the CV's of the Process Engineer and the Technician in as much as the required information has been provided by the Applicant in its bid. In any case this cannot be deemed to be a material deviation rendering the bid unresponsive.

(d) *List of Plant and Equipment*

The Applicant has submitted the main plant and other equipment, which will be deployed on the project (vide Resources – Sub-contractors – Mechanical and Electrical Works – Section 1 – Instructions to Bidders). According to section 7 of the bidding documents – Schedules, these schedules are intended to provide the Employer with essential supplementary information in an organized format and they do not generally give a full description of the plant

and equipment to be supplied and the services to be performed under each item. The Applicant has submitted complete set of the technical specifications of all plant and equipment that would be supplied and the Applicant cannot be penalized for not having filled Schedule II of Section 7 – Schedule of Major Items of Construction Plant and Schedule of Recommended Spare Parts – M. Schedule of Major Items of Equipment. Furthermore, the major items of equipment, which will be deployed on the project will be purchased by the JV as brand new ones. Again this cannot be deemed to be a material deviation and render the bid unresponsive.

(e) *Experience as prime contractor*

(f) *Experience in design of RO Desalination plant*

This is a design build and turnkey contract. The Applicant has bid for the contract on that basis and has provided the respondent with all the details of its project which in effect does not entail the construction of the plant but the setting up of the plant and equipment supplied by Temak SA from Greece, a leading supplier of such plant and equipment as provided in the company profile submitted win the bid.

5. *The decision of the Public Body and/or the Bid Evaluation Committee not to retain the bid of the Applicant for award on the account of the above alleged reasons is wrong in as much as the Applicant ought not to be penalized, more particularly in view of the substantial difference between the bid price quoted by the Applicant and that of the successful bidder amounting to some MUR 11 Million (about 10% more of the contract price).*

6. *The Public Body should have awarded the contract to the Applicant, the lowest substantially responsive bidder."*

G. The Hearing

Hearings were held on 14, 21 and 26 July 2016. Written submissions were submitted to the Independent Review Panel on 19 July 2016 by the Applicant.

The Applicant was represented by Mr G. Glover, SC together with Ms S. Chuong, Counsel and the Respondent was represented by Mr I. Cooshna, Counsel.

H. Objection

H.1

At the first Hearing of 14th July 2016, Counsel for the Respondent raised an objection that the Application for Review had not been properly made, and could not be entertained. Essentially, the objection was that the Application for Review was not signed by a duly authorised representative of the Joint Venture, as evidenced by the following extracts of the Minutes:

Mr. Cooshna: *Mr. Chair the Respondent strongly objects to this present application being entertained by the Panel. In that the application has not been made by the aggrieved bidder. The aggrieved bidder ought to be the joint venture and not two companies assigned by a representative of the two companies. So, the motion is clear. This Panel cannot entertain this application.*

Miss Chuong: *Yes, we believe that application has been rightly entered by the joint venture because the name in the tender documents, both names appear as a joint venture. So, I don't know if my friend has a copy of the joint venture agreement first and on which basis he is stating that this is not the joint venture application.*

Mr. Cooshna: *I reply on the application itself. It is nowhere mentioned that this is an application made by the joint venture. Applicant in his own application, there is no mention anywhere of the joint venture. So, it is clear it is not an application made by the aggrieved bidder which ought to be the joint venture.*

Miss Chuong: *Even the reply of the Commission when the tender was opened for the reply of the Commission; the names as it is on which the letter has been signed is the name of both companies which represent the joint venture.*

Proceedings were postponed to the 21st July for arguments on the preliminary objection.

H.2

At the Hearing of the 21st July, Counsel for the Applicant tabled a document purporting to be an authorisation from the JV authorising Mr Rault to act on its behalf (see below). However, Counsel for the Applicant conceded that this document had not been included in the Applicant's bid, nor had it been previously submitted to the Public Body.

AQUA SCIENCE AND TECHNOLOGY

AQUALIA-DPI

TO WHOM IT MAY CONCERN

Date: 21/04/2016

This is to certify that Mr Jean-Francois RAULT is duly mandated and authorized to sign on behalf of the Joint Venture between Aqua Science and Technology Ltd and Aqualia DPI Ltd for all issues related to the procurement proceedings for the tender "DESIGN-BUILD AND TURNKEY CONTRACT FOR REVERSE OSMOSIS DESALINATION PLANTS AND EQUIPMENT AT BAY MALGACHE AND POINTE COTON, RODRIGUES – CPB/31/2015" and to represent the joint venture at all hearings or meetings in connection thereto.

Mrinal Khadoo Clarel Fanchon Krishna Moothoocaroopen Jean-Francois Rault

AQUA SCIENCE AND TECHNOLOGY

AQUALIA DPI LTD

TAYLOR SMITH GROUP

AQUA SCIENCE AND TECHNOLOGY LTD – AQUALIA DPI LTD
Head Office: Old Quay D Road, Port-Louis, Mauritius
Tel: (230) 206 32 18 – Fax: (230) 241 16 56
Email: admin@aquascience.mu

DPI Plastics Group

The Applicant also relied on the fact that the original bid had been signed by Mr Rault, and had been accepted as a bid. Subsequent correspondence from the Public Body referred to the submission signed by Mr Rault as a bid. The Applicant therefore argued that if Mr Rault is authorised by virtue of the

Joint Venture Agreement to sign a bid on behalf of the Applicant, then he would be equally authorised to sign the Challenge and Application for Review.

It was also noted that the Challenge was signed by the same Mr Rault, and was accepted by the Public Body. In fact, in the first paragraph of its reply to the Challenge, the Public Body stated *"(a) You are a joint venture between Aqua Science and Technology Ltd represented by Mr. Mrinal KHADOO and Aqualia OPI Ltd represented by Mr. Jean Francois RAULT. According to the joint venture agreement dated 21 April, 2016 Aqua Science and Technology Ltd will act as Manager (Team Leader) for the works and of the operation of the joint venture. However, the bid has been signed by Mr. F. RAULT of Aqualia DPI Ltd instead of Mr. Mrinal KHADOO;"*

The Panel therefore wished to know from the Central Procurement Board whether the bid from the JV had been found properly signed by Mr Rault, and to inform the Panel what instrument empowered the signatory to sign the bid. Proceedings were adjourned to the 26th July 2016.

At that Hearing, the CPB submitted a letter (reproduced below) to the Panel, of which the contents are essentially the same as the reply to the Challenge sent to the Applicant. The letter did not enlighten the Panel as to why the bid from the Applicant had been retained for evaluation. The CPB did however quote the relevant Directives to show that failure to submit a properly signed bid is considered a major deviation.

CENTRAL PROCUREMENT BOARD

My Ref: CPB/IRP/RRA/OSMOS/03/16 | 26 July 2016

The Chairperson
Independent Review Panel
9th Floor
Wing A, Emmanuel Anquetil Building
Pope Hennessy Street
Port Louis

Dear Sir

Design-Build and Turnkey Contract for Reverse Osmosis Desalination Plants and Equipment at Bay Malgache and Pointe Coton – CPB/31/2015

Further to the hearing held on Thursday 21 July 2016 and the request of the Independent Review Panel, please find hereunder the various deviations in the bid of the aggrieved bidder, the Joint Venture Aqualia Science and Technology Ltd and Aqualia DPI Ltd:-

(a) The bidder is a joint venture between Aqua Science and Technology Ltd represented by Mr. Mrinal KHADOO and Aqualia DPI Ltd represented by Mr. Jean Francois RAULT. According to the joint venture agreement dated 21 April 2016 Aqua Science and Technology Ltd will act as Manager (Team Leader) for the works and of the operation of the joint venture. However, the bid has been signed by Mr Rault, the representative of Aqualia DPI Ltd and not by Mr Khadoo of the representative of Aqua Science and Technology Ltd the Team Leader;

(b) The Contract Manager proposed has a B.Tech (Hons) in Mechanical Engineering with 16 years of experience mainly in sugar milling industry followed by only 4 years experience in the construction and water industry as opposed to the requirement of a minimum 5 years experience in water industry;

(c) The Process Engineer proposed meets qualification. However, no C.V has been submitted to assess his experience in design of RO plants. The Technician proposed is qualified. However full detailed CV has not been submitted to assess experience in installation, operation and maintenance of RO desalination plants;

(d) The list of Plant and Equipment to be deployed on the project has not been submitted;

(e) The bidder has submitted its experience which relates mainly in installation and commissioning of desalination plant and not as required, as prime contractor in the construction of RO desalination plants as per requirement in the bid documents; and

(f) The bidder has no experience in the design of RO desalination plants over the last 10 years.

2 You would wish to note that paragraphs (a), (c) and (f) above are major deviations rendering the bid of JV Science and Technology Ltd / Aqualia DPI non responsive.

Yours faithfully

D Mannick
for Ag Chief Executive

I. Ruling

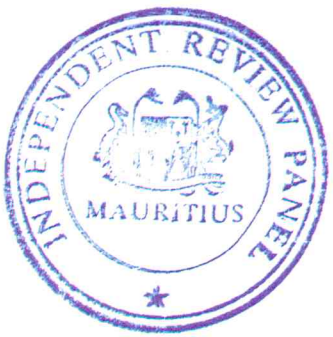
At this time, we are only concerned with the validity of the Application for Review signed by Mr Rault, and not with the merits of the Application. There may, however, be considerable grounds to argue that the procedure was vitiated at evaluation stage.

The Panel therefore gives the following Ruling:

As at now, the Panel is not in possession of a valid instrument to show that that the signatory of the Application for Review has been duly authorised to do so.

The Document submitted to the Panel dated the 21st April 2016 by Counsel for Applicant is not in accordance with the provisions of the Deposit of Powers of Attorney Act.

Should such a document be made available to the Panel, then the latter would be in a better position to carry on with the proceedings.



J. Conclusion

In view of the above Ruling, this matter is fixed *proforma* stand Tuesday 16th August 2016 at 14h00.

(R. Laulloo)
Chairperson

(Mrs C. Sohun)
Member

(V. Mulloo)
Member

Dated 12 August 2016

INDEPENDENT REVIEW PANEL MAURITIUS