



Independent Review Panel

In the matter of:

Jan De Nul Dredging Ltd

(Applicant)

v/s

Mauritius Ports Authority

(Respondent)

(Cause No. 17/16/IRP)

Decision



A. Background

A.1

The Mauritius Ports Authority is proceeding with the extension and strengthening of the Mauritius Container Terminal Quay with a view to accommodating larger vessels at Port-Louis Harbour. The work in this Contract is for the dredging in the port basin and access channel at Mauritius Container Terminal (MCT) and the navigational channel to the Multi-Purpose Terminal.

The works comprise mainly of the following:

- (a) Mobilisation of plant and equipment to carry out the work;
- (b) Dredging of seabed materials in the basin and channel at MCT, the channel to Quay 1 and at the Cruise Terminal;
- (c) Placement and trimming of dredged material into existing reclamation bunds at Fort William and Fort George and;
- (d) Demobilisation of plant and equipment after completion of the work.

A.2

Project Description: Extension and Strengthening of the Mauritius Container Terminal Quay Project- Contract MPA 297A/2015 - Dredging Works Package

Procuring Entity: Mauritius Ports Authority

Method of Procurement: Shortlist following Pre-qualification of Bidders

Margin of preference (if applicable): NIL.

Funding Agencies: Co-funded by Mauritius Ports Authority and Agence Francaise de Development.

A.3

This procurement was initiated following the pre-qualification of six (6) firms.

Bids were invited from six (6) pre-qualified Bidders on 12 January 2016 under the aegis of the CPB and the deadline for the submission of bids was set for 10th March 2016.

A Pre-bid meeting & site visit were held on 15 February 2016 and was attended by three of the prequalified Bidders in the presence of representatives from AECOM Middle East Ltd, the Consultants on the project. The Minutes of the Pre-bid meeting have been circulated to prequalified bidders on 23 February 2016.

MPA issued 3 clarifications and 4 Addenda during the bidding period as follows:

- Addendum No 1 - issued on 18 January 2016 to include a pre-bid meeting scheduled for 15 February 2016.
- Addendum No 2 - issued on 28 January 2016 responding to four (4) queries from bidders.
- Addendum No 3 - issued on 23 February 2016 amending Clause 1.13 of Preamble to BOQ
- Addendum No 4 - issued on 26 February 2016 addressing 12 queries from bidders.

A.4

The closing date for the submission of bids was fixed for Tuesday 10th March 2016 up to 13:30 hours at latest at the Central Procurement Board (CPB).

Public Opening was carried out on the same day at 14:00 hours in the Conference Room at the CPB and three (3) bids were received.

The names of the Bidders and the corresponding Bid prices as read out at the public opening are listed in Table below:

| | Bidders Name | Letter of Bid duly signed | Bid Security Submitted (MUR 5,000,000 or USD 150,000 or Euro 125,000) | Bid Price MUR (Inclusive of VAT) |
|---|--|---------------------------|---|--|
| 1 | Jan de Nul Dredging Ltd (JDN) | Yes | Yes | 1,750,072,225.25 |
| 2 | Van Oord Dredging and Marine Contractors bv (VO) | Yes | Yes | 1,620,882,018.75 |
| 3 | Dredging International nv (DI) | Yes | Yes | 1,665,616,159.96 (inclusive day works) 1,466,152,083.86 |



B. Evaluation

B.1

The Bid Evaluation Committee was composed as follows:

Mr. Telkraj PARBHUNATH - Deputy Director(CE), Ministry of Public Infrastructure & Land Transport. (Chairperson & Registered Evaluator)

Mr. Shakeel GOBURDHONE - Deputy Director General Mauritius Ports Authority. (Member & Registered Evaluator)

Mr. Dashwanyl JHUBOO - Lead Engineer, Ministry of Public Infrastructure & Land Transport. (Member & Registered Evaluator)

Mr Niraj TACOURI - Civil Engineer, Mauritius Ports Authority (Secretary)

The BEC also consulted the technical evaluation reports submitted by Mr. Juan Recio, the representative of the Consultants Messrs AECOM.

B.2

In respect of the Applicant, the Bid Evaluation Committee noted the following:

Equipment proposed and capacity

Taking into consideration the characteristics of the area and the materials to be dredged, the Bidder intends to perform the works with their biggest self-propelled Cutter Suction Dredger (CSD), the J. F.J De Nul with a stated cutter power of 7,600kW for the main works. In addition, for dredging in hard material, JdN has proposed to mobilize a backhoe dredger, "Jeromeke", which is appropriate for dredging in very hard material.

The Bidder has not stated the hardness of rock materials which the two types of dredgers can dredge. However, JdN has indicated that out of the 1,298,500m³ volume of material to be dredged at the Container Terminal Area, where most of the rock is likely to be encountered, the Bidder has expressed his apprehension that with these equipment, 100,000m³ of rock will remain undredgable (as against a volume of 60,000m³ of rock having an Unconfined Compressive Strength (UCS) up to 90 MPa indicated in the Bid Documents).

The Bidder has proposed to chisel out and remove 50,000m³ of the rock using their backhoe Dredger "Jerommeke" at an extremely reduced productivity leaving about 100,000m³ of hard high strength rock which the bidder considers to be 'not economically dredgeable' as it would require expensive specialised tools.

For these 100,000 m³ of hard rock they have stated that expensive specialised equipment would have to be brought in and requiring a lead time of five months for the necessary purchases and have proposed alternatively to amend the design to exclude this rock removal. By fine tuning and making further design verifications and amendments the bidder intends to explore a solution whereby ships can be guided to their berths through the provision of a manoeuvring area with the assistance of tug boats.

BEC Comments

- 1. The alternative solution proposed by JdN, through the non-removal of 100,000 m³ of rock in the basin of the MCT Quay is not in line with the requirement of the Bidding Documents which require the whole basin to be dredged to a depth of 16.5 m.*
- 2. The alternative solution proposed by JdN could otherwise be considered as an alternative bid, only if JdN is ... determined to be the best evaluated offer on the basis of a base bid.*
- 3. The BEC has however noted that the bid documents rule out alternative bids at ITB 14.*
- 4. Based on the Bidder's statements in his submission and in consideration of the above, the BEC considers that the Bidder is not capable of successfully undertaking the dredging works within the time frame laid down in the bid documents.*

Method Statement

JdN has made no reference to strength of rock for use of CSD or backhoe or chiselling, if retained for an award the strength of rock that can be dredged by each equipment needs to be obtained from JdN.



Rock dredging based on rate of pick points consumed is not acceptable. The execution will be under the control of JdN and thus there will be no proper monitoring.

.....

The Bidder has pointed that the reclamation area at Fort William is limited to ensure adequate settlement area. The Bidder's statement "we have not assumed any delays and/or additional costs due to certain discharge restrictions" imply payment for stand-by time.

.....

JdN has proposed to use the CSD until the use of pickpoints exceeds 50 pickpoints per hour. This condition is not acceptable to BEC as it is not based on any standard method of measurement. There is no indication of rock strength. Once the use of pickpoints exceeds 50 pickpoints per hour, JdN proposes to mobilise a Backhoe Dredger (BHD). This condition is not acceptable. The use of backhoe is necessary if rocks of strength greater than 90 MPa is encountered or if the production rate of the backhoe is greater than the CSD.

It is noted that JdN intends to dredge basalt using its bucket. BEC opines that dredging using bucket is appropriate for dense sand and coral but not basalt. In case very hard basalt is encountered, JdN proposed to use a hydraulic hammer which is considered acceptable.

.....

Mobilisation Schedule and Construction Schedule

The different tasks in the programme of works cover the full scope of the project. However, it is observed that the bidder has considered that the dredging of the 60,000m³ of hard material will be executed over a period of 26 weeks at a production rate of 30m³/hr. Whilst the dredging works is completed within a period of 4 months, the total project extends over a period of 8 months i.e. 1 month beyond the 7-month contract period allowed in the bidding document which is not acceptable more so that the whole area will not be dredged.

C. Notification of Award

The Mauritius Ports Authority through a letter dated 04 August 2016, informed the Applicant of the particulars of the Selected Bidders as follows:

| Bidder | Address | Price of Contract (MUR) |
|------------------------------------|---|--------------------------------------|
| Dredging International N.V. | Scheldedijk 30-Haven 1025, 2070 Zwijndrecht Belgium | 1,665,616,159,96 Inclusive of VAT |

D. The Challenge

On 09 August 2016, the Applicant challenged the award on the following grounds:

“We challenge the award based on the following unequivocal contract obligations, amongst others, that we believe cannot possibly have been complied with by Dredging International:

A. Soil risk lies and remains with Contractor under the Tender Requirements

In accordance with Particular Condition 4.10 the Selected Bidder must assume full responsibility for the “geotechnical characteristics of the Site and its surroundings”.

B. Price at Tender Opening is not final and the actual price will be announced at award.

In accordance with preamble 1.13.1, it is noted that:

“Payment as per contract for the extra over rate to be payable for the quantity of rock, as calculated by the Contractor in its tender (provisionally set at 60,000m³ = virtual lump sum) to be made fixed after this quantity for basalt rock has been accepted by the Employer at award.”

C. The Bid cannot be conditioned in such way so that the final price becomes uncertain.



Reference is made to the minutes of meeting of 22 February 2016:

“It was explained that conditional bid, where the bid price could not be ascertained may lead to rejection of the bid”.

Thus the Employer obliged Bidders to commit to the following:

- a. A price based on pre-set volume of 60,000m³ of rock*
- b. The volumes of rock which will actually have to be removed in Tender’s opinion*
- c. Clarity in the bids so that the total bid price can be established by accepting/agreeing on the actual total quantities of rock at award.*

In compliance with the above obligations imposed by MPA, JDN had carried out additional geophysical investigations. None of the other Bidders did so. Thus JDN alone has been able to confidently comply with the Contract requirements. JDN has based its price on 60,000m³ (as requested) and has established the quantity of material it believes will have to be removed with other, specialized requirement (150,000m³).

It was therefore that JDN, in full knowledge of the actual total contract sum was the only bidder who has provided an affordable solution to this dredging cost in its discounted offer which amounts to a final Contract Price of 1,248,443,950.25 MU, inclusive of all soil risk.

With reference to the award notification and the bid opening it is suspicious that mention contract price is exactly the same as announced during the bid opening: 1,665,616,159.96 MUR.

This can only mean that:

- 1. Dredging International has been provided with unfair advantages with regards to how the rock will be paid (either Re-measurable or via certain conditions or variation clauses); or*
- 2. Dredging International has accepted soil risk without the benefit of any additional geophysical data that will inevitably result in disputes and very significant risks for MPA, and*

3. *MPA has failed to achieve the most economically advantageous bid as JDN Contract Price is lower than that intended to be awarded by the Employer*

All of the above suggesting that MPA has failed to comply with the evaluation criteria.”


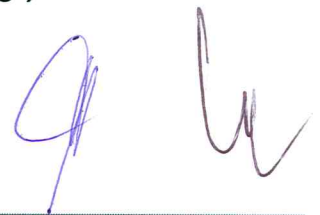
E. The Reply to Challenge

On 16 August 2016, the Mauritius Ports Authority made the following reply to the challenge:

“The Mauritius Ports Authority is directed to respond to your challenge as follows:

(a) Reference is made to paragraph 7 of application for challenge:

- (i) The BEC has prepared an evaluation report detailing the examination and evaluation of bids and has identified the lowest evaluated and substantially responsive bid as per the requirements of the bid documents in compliance with provisions of the Public Procurement Act 2006.*
- (ii) The selected bidder has satisfied the Bid Evaluation Committee by subscribing to all bid conditions, conditions of contract, specifications and other provisions of the bidding document.*
- (iii) In accordance with Preamble to Bill of Quantities 1.13.1, Bidders were allowed to calculate the volume of rock and price for same accordingly in their tender.*
- (iv) JDN has not complied with the bid requirements. JDN calculated the volume of rock as 150,000m³, but did not include the removal of same in its priced offer of MRU 1,750,072,225.25 (highest bid). Accordingly, JDN did not cover the full scope of works as required. In accordance with Preamble to Bill of Quantities 1.13.1 Bidders were allowed to calculate the volume of rock and price for same accordingly in their tender.*

(v) *Discounted offer of JDN was not for full scope of works and was an alternative offer. In line with sub Clause 14 of the Instructions to Bidders alternative bids were not considered.*

(b) *With reference to paragraph 8, the Central Procurement Board cannot consider allegations which are not based on facts. However, the Central Procurement Board confirms that out of the three bids evaluated, the lowest evaluated substantially responsive bid is from Dredging International NV.”*

F. Grounds for Review

On 22 August 2016, the Applicant seized the Independent Review Panel for review on the following grounds:

“It is the humble submission of the Applicant that MPA intends to award the contract for a higher price and at greater risk to MPA than that offered by Jan De Nul Dredging Ltd in contravention with the Bidding Rules established by MPA and Section 40(1) of the Public Procurement Act 2006, whereby “A procurement contract shall be awarded to the bidder having submitted the lowest evaluated substantially responsive bid which meets the qualification criteria specified in the prequalification or bidding documents.

The Bid documents required in order that tenders could be compared on an equal basis that all bidders price the Works as follows:

- a. *A price based on pre-set volume of 60,000m³ of rock.*
- b. *The volumes of rock, which will actually have to be removed in Tenderer’s opinion.*
- c. *Clarity in the bids so that the total bid price can be established by accepting/agreeing on the actual total quantities of rock at award.*

In view of the foregoing, JDN had carried out additional geophysical investigations, which were very fruitful and has taken into account this additional data in its offer. JDN has based its price on 60,000m³ (as requested) and has established the quantity of material it believes will have to be removed with other, specialized equipment (150,000m³).

Given these above-mentioned requirements and the fact that the actual rock removal volume has more than doubled, it is beyond belief that Dredging International NV could be awarded the contract by MPA at the very same price level announced during the bid opening: 1,620,882,018.75 MUR.

This can only mean that Dredging International NV will avail itself of a post-contract mechanism that will eventually enable Dredging International NV to by-pass/override/defeat and/or not to abide by the tender requirements to take the soil condition risk as a fixed price lump sum. This would amount to selective and preferential treatment of Dredging International NV in contravention of the bid requirements.

The second but unsustainable and unrealistic possibility is that Dredging International NV has agreed to remove 2½ times more rock for the same price which-if true-means that Dredging International NV will certainly be loss making on this project unless they make claims for additional payments. Again if these claims were to be agreed by MPA on whatever pretext it would amount to selective and preferential treatment of Dredging International NV in contravention of the bid requirements.

It makes no business sense that Dredging International NV would undertake the project at the same price as the bid opening when the rock volume is 2½ times more than that price. Some form of relaxation to the bid requirements must have been agreed or intimated by MPA.

What makes the appointment of Dredging International NV more surprising is that at bid opening they were not the lowest bidder, so why are they to be appointed based on the bid opening price and not the lowest bidder.

The Applicant considers that there is a case to answer under section 37(11) of the Public Procurement Act 2006 in that the proposed award to Dredging International NV is not the “lowest evaluated bid that meets the qualification criteria”. This can only mean that:

- 1. Dredging International has been provided with unfair advantages with regards to how the rock dredging will be paid (either Remeasurable or via certain conditions or variation clauses); or*

2. *Dredging International has accepted soil risk without the benefit of any additional geophysical data that will inevitably result in disputes and very significant risks for MPA, and*
3. *MPA has failed to achieve the most economically advantageous bid as JDN Contract Price is lower than that intended to be awarded by the Employer.*

In response to MPA allegations dated 16 August 2016 items (iv) and (v) attached, the Applicant has fully addressed these in its letter dated 22 August 2016 attached. However, for ease of reference are included below:

MPA allegation that JDN did not comply with the Bid Documents (Denied):

(iv) JDN fully complied with the bidding documents as MPA had specifically requested the bidders to calculate a price based on a notional 60,000m³ of rock in order to be able to compare the offers on an equal basis. It would be only at award and based on the volume named by the bidder that the final quantity (and thus contract price) would be established.

MPA allegation that JDN did not price the full scope of works (Denied):

(vi) JDN priced the full scope of work required by MPA in both the base and discounted bids. As there is no definition of 'discounted offer' or 'alternative' in the tender documents, we are unclear upon what basis you have come to your decision. In the absence of a tender requirement or it being breached, JDN cannot possibly be in violation as no such requirement exists. Our discounted offer provides a very economical solution which has been adopted by many other ports. This proposal is fully functional and has no (or insignificant) effect to the port operations. It is prima facie the most economically advantageous offer to MPA, which makes it being ignored and rejected inexplicable.

G. The Hearing

Hearings were held on 30 August, 09 and 20 September 2016. Written submissions from the Applicant were received at the Independent Review Panel on 09 September 2016, and from the Respondent, on 19 September 2016.

The Applicant was represented by Mr K. Colunday, Counsel whereas the Respondent was represented by Mr L. Aujayeb, Ag Assistant Solicitor General together with Mr D. Bissessur, State Counsel. The Selected Bidder was represented by Mr Gavin Glover SC, Mr H. Duval, SC together with Ms S. Chuong.

H. Findings

H.1

The whole case revolves around the issue of rock: its quantity, quality (in terms of compressive strength), its measurement and pricing.

It may be appropriate to summarise the intentions of the Employer as stated in the bid documents and clarifications:

1. Excavation involves the breaking and removal of material that includes silt, sand and granular material, and rock. Whereas the former do not involve different equipment or technology, rock, on the other hand is excavated by specialized equipment. Rock encountered will also be of varying hardness.
2. Rock may therefore be defined as material which may not be excavated economically by normal everyday equipment, at the same rate as other material. Depending on the “everyday” equipment intended to be used, therefore, different tenderers may have different definitions of rock, which explains the huge difference in appreciation of the amount of rock to be removed in this tender. The PB has defined rock as material that cannot be economically removed by the Cutter Suction Dredger (CSD).
3. The Employer or Public Body (PB) has caused to be made various standard investigations and has determined that the volume of rock to be excavated to be in the region of 60 000 m³.
4. The PB has also determined that the maximum hardness to be encountered in rock excavation, expressed as Unconfined Compressive Strength (UCS) in Mega Pascal (MPa) would be 90 MPa.
5. However, the PB does not want to be open to risks of extra claims, and although the results of its geo-technical investigations were communicated to tenderers, it did not ask the latter to accept those as



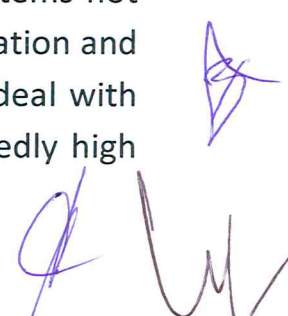
gospel truth, and has asked each tenderer to carry out his own investigations to determine the volume and hardness of rock to be excavated, and price his unit excavation rates accordingly.

6. The PB did not also want to measure or re-measure the volume of rock during implementation. It has therefore prescribed in the Bill of Quantities an all-in unit rate for soil and rock excavation (of hardness or UCS < 90 MPa) which will apply to all excavated material. Thus measurement will involve only measurement of excavated trench from the dimensions in drawings + allowances.
7. Such all-in excavation rates are common in works involving “dry” excavation, when the Employer may or may not give his own estimates of rock. In such a case, the tenderer would estimate the amount of rock that would be excavated, and from there determine the time involvement of specialised machinery. The cost to him of total excavation will therefore determine his all-in unit rate.
8. The tenderer in the hypothetical “dry” works described above, takes a risk if he undervalues the percentage of rock, and thus the unit all-in excavation rate, but a tenderer who submits a bid under those conditions is deemed to accept the risks involved. On the other hand, if he over-values the percentage of rock in the excavation, he runs the risk of quoting a high all-in unit rate, and pricing himself out of the competition.
9. In the case under review, the PB has, in effect, similarly shifted the responsibility of evaluating the amount of rock to be excavated from itself to the tenderer. Nevertheless, it is perfectly acceptable to expect tenderers to acquaint themselves and be familiar with site conditions before submitting a tender. The Bidding Documents have also specifically requested bidders to carry out their own investigations to assess the amount of rock to be excavated.
10. The Bidding Documents have also included in Preamble 1.13 the manner in which the excavation rates should be determined:

The Contractor to complete unit rates in the Bill of Quantities for capital dredging, together with an extra over rate for dredging rock of the basalt type. The extra over rate to include the cost of alternative dredging methods (not involving explosives) for materials of which, in the Contractor's opinion, the CSD will not be capable to achieve grade in the basalt rock area. Payment as per contract for the extra over rate to be payable for the quantity of rock, as calculated by the Contractor in its tender (Provisionally set at 60,000m³ =virtual lump sum) to be made fixed after this quantity for basalt rock has been accepted by the Employer at Award. These rates shall be inclusive of all dredging, filling and stockpiling in the reclamation, installation of bunds, water level controls, collection of fines, meeting discharge allowable standards, etc. as further described in the Contractor's Work Method Statements and required by the Specifications.

Thus, the tenderer is bound to give his own assessment of the amount of rock, whether he accepts the PB's estimates or not. The amount of rock shall not be measured thereafter, except for rock of UCS>90 MPa, if any is encountered. There cannot be any dispute or extra claims during implementation in respect of the amount of rock.

11. The PB has similarly determined that the hardest basalt to be encountered during excavation will not exceed a UCS of 90 MPa. However, since it could not have a 100% confidence in investigations, it has provided an opportunity for the eventual Contractor to claim extra by requesting for a schedule rate for excavation of basalt of UCS > 90 MPa. This rate, however, is not included in the tender price, as it is not assorted with any quantity. The tenderer in this case is not taking any risk.
12. Lastly, the PB has provided in the Bills of Quantities (BoQ) items called "Method Related Charges", whereby tenderers may price for items not included in the BoQ. Thus, a tenderer may price for the mobilization and running of any equipment he thinks appropriate *inter alia* to deal with any condition not anticipated by the PB, such as an unexpectedly high amount of rock.



H.2

Tenderers were uneasy about this arrangement and the risks involved. The matter was raised at the pre-bid meeting held on 15th February, as evidenced by the extract of minutes below.

Extract of Minutes of Pre-bid meeting held on 15 February 2016

Bidders queried the mechanism for payment of hard material in the bidding document indicated a provision of 60,000m³ of rock as a virtual lump sum as included at Clause 1.13 of the Preamble to the BOQ.

It was explained that as at this point in time it could not be ascertained which dredging equipment was being proposed by each bidder and therefore the hardness of material which would be treated by their respective equipment would differ from bidder to bidder.

Furthermore, it was also explained that a series of geotechnical investigations (boreholes and vibrocores) had been carried out as well as a seismic survey of the area. The results are included as part of the bidding documents. It is in the light of these investigations that the Engineer had assessed that about 60,000m³ of hard material of up to 90MPa could be encountered and need to be dredged.

Accordingly, the document allows for this volume to be considered and spread in the dredging rates and same has been mentioned to be considered as a virtual lump sum.

MPA stated that the quantity of rocks payable was assessed based on boreholes, coring and seismic test results. Accordingly, the consultant determined that the volume of the rocks to be dredged will not exceed 60,000m³. The rate for this volume of rocks is to be included in the rate for the dredging.

H.3

The above lays the foundations for the determination of issues raised in the Application for Review.

All tenderers were aware that they were to make their own assessment of the amount of rock and price accordingly. However, once the all-in rate has been determined as from this assessment, no payment for rock shall be made, and rock shall not be measured.

The Applicant has assessed the total amount of rock to be excavated at 150 000 m³, but he has based his price on the assumption of 60 000 m³ of rock excavation, and proposes to remove only 50 000 m³ at the rate provided, and either leave the rest unexcavated with a new design, or bring in more expensive excavation equipment requiring extra time and extra costs.

The Public Body did not find either acceptable. The Bidding Documents do not provide for alternatives, and even if they did, alternatives can only be accepted from the lowest evaluated bidder in respect of the conforming bid. Moreover, the Public Body is not bound to accept any design which differs substantially from the one that it proposes to implement.

In regard to his main offer, the Applicant's bid cannot be qualified as conforming, as he has deliberately departed from the stated method of pricing, leaving the door open to extra claims and extra time. The amount of extra claims may be estimated by the Applicant's own assertion that *"it is beyond belief that Dredging International NV could be awarded the contract by MPA at the very same price level announced during the bid opening: 1,620,882,018.75 MUR."* Having deliberately departed from the Bidding Documents, the Applicant should not be surprised that his bid has been rejected.

As to his allegations that there must be some way in which the Selected Bidder intends to claim extra money during implementation, they assign intentions to the Selected Bidder and the Public Body which cannot be proved at this time, and the Public Procurement Act does not empower the Panel to look into these. Nevertheless, it is incumbent on the Panel to ensure that the bid of the Selected Bidder does not contain conditions and other elements against the spirit of the tender that would entitle him to extra claims. This is treated further below.

H.4

The Applicant has also alleged that the Selected Bidder did not mention any volume of rock to be excavated, this is a departure from the requirements of the tender, and opens the door to various claims.

The Selected Bidder did mention the amount of rock he expects to excavate: *BEC observed that in the priced BOO, DI has assessed the volume of rock to be 62,960m³ in the priced BOQ instead of 60,000m³, BEC accordingly considers*

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that this volume may be agreed and fixed in line with the Clause 1.13-1 of the Preambles to the Bill of Quantities...

The BEC has noted that Dredging International is the only bidder to have made a firm offer as per the requirements of the BOQ and has allowed extra over rates for the dredging of 26,812 m³ weathered basalt and 36, 1482 m³ high strength basalt based on the Bidder's own assessment of soil characteristics.

H.5

Subsequent to H.3 above, the Panel has noted that the Selected Bidder has made a number of statements in his method statement, some of which look suspiciously similar to conditions that contradict the spirit of the tender, and to conditions imposed therein which the tenderer is supposed to accept without reservations. The Bid Evaluation Committee has rightly reported that those are unacceptable. However, if those were conditions, they cannot just be waived, as they would make the bid conditional and qualified.

The Bid Evaluation Committee further notes that: *The BEC has taken note of certain statements made by Dredging International N.V in its Proposal Assumptions and in its method statement, which do not reflect the requirements of the bid documents. Furthermore, the BEC has also noted that Dredging International NV has in its Bid Submission Form at paragraph (a) stated that "We, the undersigned, declare that We have examined and have no reservations to the Bidding Documents including Clarifications No. 1 to 3, Addenda 1 to 4 and the Minutes of Pre-Bid Meeting issued in accordance with Instructions to Bidders (ITB) 9."*

As the Bid Submission Form has priority over other submissions in the bid, the BEC considers, that the offer from Dredging International N.V is substantially responsive to the bid requirements despite the statements made which do not reflect the provisions of the bid documents. All the provisions of the bid document have to be maintained.

Nevertheless, the Panel is still uneasy about the apparent contradiction between those statements and the Bid Submission Form. Although it is true that the latter takes precedence over any statement made in the methodology statement or elsewhere, the Panel feels that the real intentions of the Selected Bidder should be ascertained before negotiations.

The Applicant has said that the price of the Selected Bidder is beyond belief, and that the latter has something up his sleeve to come up with extra claims during implementation. Therefore, it should be the Selected Bidder who has to withdraw any statements that suggest methods of measurement or payment other than prescribed. If the assertions of the Applicant are correct, then given the chance, the Selected Bidder would insist on maintaining his statements/conditions without which, still assuming the Applicant's assertions are correct, he would stand to lose huge amounts of money.

However, the Panel cannot order a re-evaluation unless it finds merit in the Application. In the words of the Bid Evaluation Committee, *"The bid from Jan De Nul ... cannot be accepted as the bidder has quoted the highest price for works which, from the bidder's own statement, will remain incomplete or at prohibitive costs with non-respect of the time frame, if required to be completed by the employer as per the requirements of the bid documents."* Therefore, whatever be the outcome of any negotiations with the Selected Bidder, the bid of the Applicant cannot be considered for award.

The Panel, therefore, can only strongly recommend completion of the evaluation exercise by seeking clarification from the Selected Bidder as to the contradiction between the statements made in his tender and the Bid Submission Form. If the Selected Bidder withdraws those statements unreservedly, as mere suggestions, complying thus with his own Bid Submission Form, then the Bid Evaluation Committee was correct in its conclusions. If, however, when given the chance, the Selected Bidder chooses to maintain any or all of these statements that contradict the bid documents and conditions contained therein, then the Public Body would have no alternative than to proceed with a new tender.

H.6

The Panel wishes to reiterate its recommendations that the Public Body guarantees that the Contract does not leave any loophole for extra claims to be made by the Selected Bidder in respect of rock or otherwise.

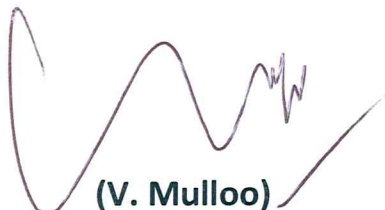
Also, it would be wise for the Public Body to agree beforehand with the Selected Bidder as to the manner of determination of the hardness/UCS of rock in excess of 90 MPa, so as to avoid disputes at the time of implementation. The Public Body should also ensure that the rate proposed for



excavation of rock of a hardness/UCS > 90 MPa is not excessive, as this may also be an avenue for large extra claims.

I. Decision

In view of the foregoing, the Panel does not find merit in the Application, which is therefore dismissed.



(V. Mulloo)
Member



(R. Laulloo)
Chairperson



(R. Ragnuth)
Member

Dated 26 September 2016

