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Independent Review Panel

Decision No. 28/16

In the matter of:

Trivan and Company Limited

(Applicant)

v/s

Central Water Authority

(Respondent)

(Cause No. 22/16/IRP)

Decision

A. Background

A1.

TITLE OF PROJECT: The title of the project is "Contract ONB/CWA/C2016/60 [CWA/IFB/2016115] -"Cleaning and Maintenance of La Marie Water Treatment Plant including Slow Sand Filters".

A2.

Project Description: The contract consists of Cleaning and Maintenance of La Marie Water Treatment Plant including the Slow Sand Filters. The scope of works includes: -

- a. Cleaning of filters (scraping, forking & levelling)
- b. Re-sanding of filter
- c. Miscellaneous works (various manual works which include among others: moving of chlorine cylinders and cleaning)
- d. Painting of building (Cleaning and preparing the surface and applying three coats of paint)
- e. Grass cutting and weeding
- f. Provision of Labour & Equipment

A3.

Advertisement and Closing date: Advertisement for invitation to bid was through Open National Bidding (ONB) in local newspapers and e-Procurement System Portal. The closing date was 19 July 2016 and bids were to be submitted electronically on the e-Procurement System.

A4.

CLOSING AND OPENING OF BIDS: Bids were received on 19 July 2016 at 13:45 hours on the e-PS and opened by the Bid Opening Committee on 21 July 2016 at 13:01 hours at the CWA Head Office - St Paul.

The list of Bidders and the "Read-Out Bid prices" were as given below.

Bidder No.	Bidders Name	TOTAL (excl. VAT) carried forward as the Base Offer to the Bid Submission Form	Remarks (Bid Submission Form)
1	Safety Construction Co. Ltd	21,871,850.00	Submitted Electronically
2	Kisten Enterprise Co. Ltd	23,308,200.00	Submitted Electronically
3	Trivan & Co Ltd	20,097,860.00	Submitted Electronically

B. Evaluation

A Bid Evaluation Committee was constituted as follows to evaluate the bids received.

SN	Name	Designation
1	Mr. S. Chan Chit Cheong	Principal Engineer (P&D) - <i>Chairman of BEC</i>
2	Mr. P. Subramanien	Executive Engineer/ Senior Executive Engineer (Ops South) - <i>HODR Member</i>
3	Mrs. S. Ramtohul	Ag. Accountant - <i>Finance Member</i>

The BEC submitted its Bid Evaluation Report and the recommendations are as follows -

“Trivan & Co. Ltd submitted the lowest Base Offer for an amount of Rs 20,097,860.00 (excluding VAT). However, its bid was considered non-responsive as at the time of bid submission, Trivan & Co Ltd was not registered with the CIDB as per ITB/BDS Clause 6.3(a) of the Bidding Document.

Safety Construction Co. Ltd submitted the second lowest Base Offer for an amount of Rs 21,871, 850.00 (excluding VAT). Its bid was found responsive and the Bid Evaluation Committee recommended award of the Contract to Safety Construction Co. Ltd.”

C. Notification of Award

The Central Water Authority through a letter dated 05 October 2016, informed the Applicant of the particulars of the successful bidders as follows:

Contract No.	Name of Bidder	Address	Contract Price (Rs) excl. VAT
C2016/60	Safety Construction Co. Ltd	Royal Road, Camp de Masque Pave	21,871,850.00

D. The Challenge

On 11 October 2016, the Applicant challenged the award on the following grounds:

“Trivan and Co. Ltd submitted the lowest bid under contract C2016/60 for the sum of Rs20,097,860.00 and would like to know the reasons why the bid was not retained by Central Water Authority, as per information given in the ‘notification to unsuccessful bidders’ dated 05 October 2016.”

E. The Reply to Challenge

On 13 October 2016, the Public Body made the following reply to the challenge:

“As per Clause ITB 6.3(a) of the Bidding Data Sheet, the Contractor must have a valid registration grade of A, B, C & D with the Construction Industry Development Board (CIDB).

At the time of your bid submission on 19 July 2016, you were not holding a valid registration grade of A, B, C & D.

Consequently, your bid is considered as non-responsive.”

F. Grounds for Review

On 19 October 2016, the Applicant seized the Independent Review Panel for review on the following grounds:

“1. Applicant’s bid was the lowest and it has been wrongly considered to be and wrongly rejected as being “non-responsive”.

2. *Further, CWA's letter dated 13 October 2016 determining applicant's challenge is ex facie erroneous in point of law as it has misconstrued ITB 6.3 (a) which has two different limbs which are clearly disjunctive and the applicant was qualified under the first limb itself.*
3. *CWA's decision in the present matter is not consistent with its earlier decisions in germane procurement processes under QUO/2016/128 and QUO/2016/129.*
4. *CWA should have borne in mind that the applicant had ever since 15 April 2016 applied to the Construction Industry Development Board (CIDB) for registration, of which CWA was kept informed and applicant finally obtained its registration on 16 August 2016, of which CWA was duly notified in writing on the very next day.*

G. The Hearing

Following Applicant's Statement of Case, written submissions were made by the Respondent on 31st October 2016.

Hearings were held on 26 October and 04 November 2016.

The Applicant was represented by Mr A. Domingue, Senior Counsel whereas the Respondent was represented by Mr Rishi Pursem, Senior Counsel. The Selected Bidder was present at the Hearing of 4th November, but was not represented by Counsel.

H. Issues

H1.

The case for the Applicant rests on two limbs:

- ❖ The Applicant avers that Clause 6.3 (a) should not be read as making a registration with the Construction Industry Development Board (CIDB) mandatory, in view of the contents of Clause 6.3 (b), which allegedly gives an option of either registration with CIDB, or showing evidence of experience.

- ❖ The Applicant also believes that an application for registration made to CIDB on or before the 15th April 2016, followed by registration at any subsequent date, is evidence that the Applicant is eligible for registration at any time in between, and therefore should have equivalent rights in respect of offering his services as if he was registered.

H.2

Clause 6.3 of the ITB reads: *6.3 To qualify for award of the Contract, bidders shall meet the following minimum qualifying criteria subject to ITB sub clause 6.5:*

- a) a minimum average annual financial amount of construction work over the specified period as mentioned in the BDS **or registered with the CIDB under the grade specified in the BDS.***

Clause 6.5 mentioned above does not exist in the ITB. However, it is not contested by any of the parties that the Bidding Data Sheet (BDS) overrides the general provisions and the respective sub-clauses of the BDS provide a clearer view of the requirement for registration with CIDB:

ITB 6.3 (a) *The Contractor must have a valid registration grade of A, B, C & D with the CIDB.*

ITB 6.3 (b) (A1) *The Contractor shall demonstrate that it is registered with the CIDB with specialization in the following area(s): General Civil engineering works*

Or

(A2) *The Contractor shall demonstrate that it meets experience as prime contractor in the construction of a minimum of two works of a nature and complexity equivalent to the Works over a period of 10 years*

H.3

It is clear from the above that ITB 6.3 (a) makes it mandatory to be registered with the CIDB at the time of submission of tender, and that the alternative offered by 6.3 (b) applies only to registration in **specific specialisation areas.**

Thus, a bidder who is registered with the CIDB, but in a different field of “specialisation” than that required for the particular job which is the subject of the bidding exercise, may avail himself of the provisions of the alternative provided under A2 to prove his experience in that field. However, the provisions of A2 of the BDS of the ITB will not be available to a bidder who is NOT registered with the CIDB in any field.

Moreover, extensive reference was made during the Hearing to the CIDB Act, and attendant regulations, and it is clear from the latter that it would be against the provisions of that Act for any Contractor to offer his services after the cut-off date of 30th June 2016 without being registered with the CIDB. It follows that it would also not be possible for any Public Body to solicit the services of any Contractor who is not so registered.

The Applicant’s case under this limb must therefore fail.

H.4

The Applicant has also demonstrated convincingly that at the time of tender, he had already submitted an application for registration with the CIDB, and that the application was under process at the time of tender. Moreover, the fact that he was subsequently registered with the CIDB proves that at the time of tender he was eligible for registration at the material time. The Bid Evaluation Committee was prepared to accept the CIDB registration certificate, if available, even if submitted after the date of tender:

“... except that the Bidder failed to submit a valid CIDB registration certificate of grade A, B, C or D.

However, the Bidder has submitted a cover letter to inform that he has already applied for registration to the CIDB. The BEC considers the above as a minor omission and subsequently requested the missing document through clarification letter from Bidder 3.”

Through no fault of his own, the Applicant was unable to produce a registration certificate, as his application was still under process at the time of tender.

H.5

It is appropriate here to elaborate on the circumstances that led to this shortcoming in the Applicant’s tender.



According to the provisions of the CIDB Act, an entity may not propose its services as contractor, unless as provided in the Act. Section 19(1) of the Act provides that: *"No person shall offer his services as a consultant or as a contractor, unless he is registered under this Act"*. Furthermore, transition provisions under Section 37(28) of the Act (inserted by Act No.2 of 2015) provide that: *"Notwithstanding sections 19 and 20, a firm or person that was providing consultancy services, or undertaking construction works, in Mauritius immediately before 1 August 2014 may continue to provide consultancy services or undertake construction works for such period as may be prescribed, without being registered as a consultant, contractor, foreign consultant or foreign contractor, as the case may be."*

The "prescribed period" was defined in Regulations made by the Minister. The Construction Industry Development Board (Prescribed Period) Regulations 2015 were made by the Minister on 30 December 2015. Regulation 3 of these Regulations provides that: *"For the purpose of section 37(28) of the Act, the period shall start on 1 February 2015 and end on 30 June 2016."*

Finally, the CIDB issued a press communiqué in February 2016 to inform those wishing to be registered before the cut-off date of 30th June 2016 that they should apply for registration on or before the 15th April of the same year: *"In line with the latest Regulations, the deadline for registration of Consultants and Contractors operating in the local Construction Sector is **30th June 2016**, failing which they would not be allowed to continue their operations. Consultants and Contractors, who have not yet done so, are consequently, requested to submit their applications for registration at latest by **15th April 2016**, failing which CIDB will not be held responsible if the mandatory Certificate of Registration is not issued by the deadline."* It would appear from this wording of the CIDB that Contractors would have a reasonable expectation, if eligible, to be registered in time if they make their application for registration before the 15th of April 2016. Yet, the Applicant made his application on the 13th April 2016 (Document D produced by the Applicant), and the CIDB failed to process his application to grant him registration before the cut-off date, thus making him ineligible for this tender.

Had there been any indication of intent to withhold the registration of the Applicant in order to influence the outcome of this tender exercise, the Panel would not hesitate to declare the process vitiated. However, there is no

indication of such intent, and neither is there any indication that the Applicant's is the sole case where the CIDB failed to deliver on its promise and fulfil its statutory obligations. It is therefore the duty of the Panel to draw the attention of the authorities that the outcome of tenders is being affected, albeit involuntarily, by this nonchalant and irresponsible attitude of the CIDB which failed to inform the Minister and request for an extension of the prescribed period when it became obvious that eligible contractors who did submit their application for registration before the 15th April 2016 would not obtain their registration certificate by the cut-off date.

However, this attitude does not per se vitiate the tender process to render it invalid, as long as there is sufficient competition, and there is no wilful intent to influence the outcome of the tender exercise. Although it is evident that the interests of operators of the Construction Industry are being jeopardised by the very institution set up to safeguard its interests, the Panel must agree with the statements of the Respondent to the effect that "*... the Respondent's duty under the PPA was to purely and simply evaluate the Applicant's bid according to the criteria and methodology set out in the bidding documents (section 27(9)). Its duty under the PPA did not extend to waiting for the CTDB to process the Applicant's application for registration.*

...

Although the Respondent is subject to the principles of public law that require bodies exercising public functions to act fairly, the determination of an alleged breach of such duty falls outside the jurisdiction of the Panel. The allegation is in any case denied by the Respondent. Such allegation should be made in the presence of the CIDB before the appropriate forum. The Respondent reserves its rights to respond fully to that allegation before the appropriate forum." The Panel finds that there has been no breach of duty on the part of the Respondent in this respect.

The Application for Review must therefore fail on this count also.

H.6

The Panel wishes to thank both Counsel for the Applicant and the Respondent for their invaluable help and assistance which have guided it to this conclusion.

I. Decision

In the light of the above, therefore, the Panel finds that there is no merit in this Application for Review, and hereby dismisses the Application.



(R. Lalloo)
Chairperson



(Mrs C. Sohun)
Member



(R. Rajanah)
Member

Dated 14th November 2016

