

INDEPENDENT REVIEW PANEL

In the matter of:

Keep Clean Ltd

(Applicant)

v/s

**Ministry of Education & Human Resources, Tertiary Education
& Scientific Research**

(Respondent)

(Cause No. 01/16/IRP)

Decision

A. History of the case

This is a peculiar case, arising directly out of a previous decision of the Panel.

The project consists in the rehabilitation and upgrading works in two blocks. Works include repairs to structural members, waterproofing, new metal burglar proofing, replacement of naco frames, electrical installation and finishes and associated works.

Tenders were invited on 14 September 2014 through open advertised bidding. On the closing date of 21 October 2014, seven (7) bids were received.

The (first) notification to unsuccessful bidders under Section 40(3) of the Public Procurement Act was made on 18 November 2014 through a letter from the Ministry of Education & Human Resources. The Particulars of the successful bidder were as follows:

<i>Description</i>	<i>Name of Bidder</i>	<i>Address</i>	<i>Contract amount</i>
<i>Rehabilitation and Upgrading works at Ramsoondur Prayag State Secondary School, Riviere du Rempart</i>	<i>Keep Clean Ltd</i>	<i>Supreme Square Sookdeo Bissoondoyal Street, Port Louis</i>	<i>Rs35,604,103.50 inclusive of VAT and a contingency sum of Rs2M</i>

Following this notification, there was a challenge by Messrs Kisten Enterprise Co. Ltd, followed by an Application for Review to the Panel on the following grounds:

“The Respondent was wrong to have determined that the Applicant’s bid was not responsive in terms of paragraph 6.3(b) of the Instructions To Bidders, as stated in the Respondent’s letter dated 27 November 2014, and Respondent was wrong not to have selected the

Applicant’s bid for award as the Respondent has plainly failed to take into account the various contracts which had been successfully performed by the Applicant over the last five years and which are referred to in the relevant spreadsheet which formed part of the Applicant’s bid.”

The Panel delivered its Decision on 23rd January 2015, to the effect that “*The Panel has gone through the proceedings and through the bidding documents and has paid particular attention to ITB 6.3(b) which reads as follows:*

“The number of work is two, the period is 5 years”.

There is no mention of a minimum value attached to the work to be performed by any bidder. The Panel is therefore of the view that imposing a minimum value is, in the circumstances, arbitrary.

It is noteworthy that in its report at paragraph 2(a) no mention was made of any minimum value. The Bid Evaluation Committee stated that the Applicant had not undertaken a minimum of two works of a similar nature and complexity over the past five years as prime contractor in compliance with paragraph 6.3(b) of the Bidding Data Sheet without the least reference to any minimum value.” The Panel therefore concluded that “*the Panel finds merits in the application and recommends the annulment of the decision of the Public Body and a re-evaluation of the bids.*”

B. Evaluation

We are concerned here only with the re-evaluation exercise carried out by the same evaluation team as a result of the above Decision:

Independent Review Panel – Decision No. 03/16

Mr M. S. Ayoob Saab	Deputy Permanent Secretary	Chairperson
Mr N. Ramsurn	Engineer/ Senior Engineer	Member
Mr H. Jankee	SFOO	Member
Mrs S. Carpanen	Office Management Assistant	Secretary

In its Report dated 20th November 2015, the Bid Evaluation Committee noted: *“Though the BEC was of the view that ITB 6.3(b) was meant to consider only works of RS 25.9 M or above, the re-evaluation was carried out in light of ruling of the IRP, according to which the project value of listed projects was not to be taken into consideration. However, the BEC is still of the view that the ruling does not preclude the fact that ITB 6.3 (b) provides as well for complexity of works which should have been taken into consideration during evaluation exercise.*

.....

In regard to 6.3(d), the BEC noted that all bidders complied with the requirements of the ITB except for Kisten Enterprise Co Ltd and Canakiah Associates Co Ltd which did not propose an Engineer as Site Agent and qualification of Electrical Technician respectively.

The BEC considered the above as a minor deviation such that clarifications might be sought on acceptance of offer in

case one of these two bidders were to be the lowest responsive bidder.”

The Bid Evaluation Committee concluded that: *The BEC recommends that the contract be awarded to the lowest responsive bidder, Kisten Enterprise Co Ltd, in the fixed corrected amount of Rupees Thirty One million Five Hundred and Ten Thousand and Twenty Seven and cents Sixty (31,510,027.60) inclusive of a contingency sum of Rs 2.0 M and VAT for a contract duration 300 days from start date subject to the bidder proposing:*

- (i) a Site Agent who is registered Civil Engineer with a minimum of 5 years experience in similar works as per ITB 6.3 (d);*
- (ii) the following equipment on site as per ITB 6.3 (c):*
 - (a) Electric concrete breakers;*
 - (b) 25 mm diameter core driller;*
 - (c) Scaffoldings.*

In a supplementary report dated 10th December 2015, the Bid Evaluation Committee noted that The BEC noted that *Bidder Kisten Enterprise Co. Ltd complied with the requirements of the bid documents in regard to:*

- (i) site Agent in compliance with ITB 6.3 (d); and*
- (ii) the following equipment in compliance with ITB 6.3 (c)*
 - (a) Electric concrete breakers;*
 - (b) 25 mm diameter core driller;*
 - (c) Scaffoldings.*

It is to be noted that the Bid Evaluation Committee did not mention the identity of the Site Agent nor include his/her CV in the supplementary report.

C. Notification of Award

The Ministry of Education & Human Resources, Tertiary Education & Scientific Research through a letter dated 18 December 2015, informed the Applicant of the particulars of the successful bidders as follows:

<i>Description</i>	<i>Name of Bidder</i>	<i>Address</i>	<i>Corrected Contract Amount</i>
<i>Rehabilitation and Upgrading Works at Ramsoondur Prayag State Secondary School – Riviere du Rempart</i>	<i>Kisten Enterprise Co. Ltd</i>	<i>Royal Road, Chamouny, Chemin Grenier</i>	<i>Rs31,510,027.60 inclusive of VAT and a contingency sum of Rs2M.</i>

D. The Challenge

On 22 December 2015, the Applicant challenged the award on the following grounds:

- “(i) *ITB 6.3 (b) of page 9 of the Bidding Data Sheet, explains that “experience as prime contractor (5 years) in the construction of a minimum number of works (2) of a nature and complexity equivalent to the Works (Rehabilitation of the Ramsoondur Prayag), is a minimum qualifying criteria.*

To qualify, a bidder should have performed works on at latest 2 sites of similar value, amount and characteristic within a period of 5 years. A sum of small rehabilitation projects (also known as maintenance contracts or district contracts) undertaken at different times cannot be collectively taken to mean works of a nature and complexity equivalent to the Works for the present contract. The rates for district contracts encompass the total amount for all

construction works which will be performed over a whole district during a year. Apart from the renovation of the SSRN Hospital, the selected bidder had not undertaken works on another site of similar magnitude at the time of closing of bids. The selected bidder has performed under a series of small maintenance contracts (District contracts) in different locations in the district of Flacq and Savanne over the last years, and no other single location can be identified where Works of similar nature, complexity and magnitude have been undertaken. The selected bidder cannot claim to have undertaken works of a nature and complexity equivalent to the present procurement exercise. This is considered a major deviation and it renders the selected bidder's bid unresponsive.

- (ii) *To qualify for award, a bidder must satisfy the minimum requirements of ITB 6.2(d) of the Bidding Data Sheet. At least ten years of experience for works are required. As a general rule, financial statements are prepared and filed for each year of accounting transaction. Without casting doubts on the integrity of the selected bidder who has filed his accounts at the Registrar of Companies as from 2007, only 7 years of accounting transaction can be traced, and hence work experience for ten years cannot be satisfactorily demonstrated. It would be unfair to other bidders to allow for experience to be claimed with documents other than those which have been filed with the Registrar of Companies at the time of closing of bids. At the time of closing of bids, the selected bidder had not filed his financial statement for year 2013-2014 and once again, without casting doubts on the integrity of the selected bidder or his accountant, it cannot be said that, in principle, financial statements prepared and filed after the submission of tenders would be unquestionably identical if*

they had been prepared and filed before that date. The financial statement for the FY 2013-2014 of the selected bidder will therefore not be acceptable.

(iii) The selected bidder is not the lowest substantially responsive bidder in the present procurement exercise.”

E. The Reply to Challenge

On 30 December 2015, the Public Body made the following reply to the challenge:

“Bidders Grounds for Challenge

- (i) Evaluation of bids has been carried out in the light of the decision of the Independent Review Panel of 23 January 2015, according to which, ITB 6.3(b) in the Bidding Document provides for the number of work to be two and the period to be 5 years. There is no mention of a minimum value attached to the work to be performed by the Bidder. Kisten Enterprise Co. Ltd has submitted a list of projects carried out over the last five years and complies with requirement of ITB 6.3(b);*
- (ii) Kisten Enterprise Co. Ltd has submitted a list of projects carried out over a period of ten years and complies with ITB 6.2(d) in the Bidding Data Sheet; and*
- (iii) Kisten Enterprise Co. Ltd is the lowest evaluated substantially responsive Bidder.”*

F. Grounds for Review

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

- “1. Failure to disqualify the selected bid for non-responsiveness to Sub clause 6.3(b) of the Bidding Data Sheet, inasmuch as at least 2 sites of work of a nature and complexity equivalent to the Works are required to be attended over 5 years. The Public body has failed to take into consideration that the selected bidder has performed only 1 work of a nature and complexity equivalent to the works over a period of 5 years.*
- 2. Failure to disqualify the selected bidder for not satisfying the minimum criteria as stipulated in ITB 6.2(d); at least ten years of experience for works are required.*
- 3. The Public Body should not proceed with award of the contract to selected bidder as Kisten Enterprise Co. Ltd is not the lowest substantially responsive bidder.”*

G. The Hearing

Hearings were held on 12 and 26 January 2016. The Applicant was represented by Mr N. Hurnaum, Counsel whereas the Respondent was represented by Ms P. Punchu and Ms H. Maherally both State Counsel. The Successful Bidder was represented by Mr A. Domingue, Senior Counsel and Y. Caunhye, Counsel.

Written submissions were made by Respondent on 18 January and 05 February 2016. For the Applicant, written submission were made on 21 and 29 January 2016 whereas the successful bidder made written submission on 18, 21 January 2016 and 02 February 2016.

At the Hearing of the 26th January, the counsel for the Successful Bidder suggested that the previous Decision of the Panel should not be revisited, and that this Review

exercise should be concerned only with matters dealing with the second evaluation leading to the recommendation for award to Kisten Enterprise Co. Ltd. There was no immediate objection to this, although in subsequent submissions, the Applicant took exception to this view. The Panel wishes to make it clear that it does not intend to review the previous Decision in regard to this procurement exercise, and that the views expressed by the Counsel for the Successful Bidder echoed its own views. This matter will not be discussed again in this Decision.

During the same Hearing, the Chair queried the representative of the Bid Evaluation Committee as to the failure of the Successful Bidder to include in his original tender a qualified civil engineer as Site Agent, in response to BDS ITB 6.3(d). The representative of the Bid Evaluation Committee clarified that at the request for clarification of the Public Body, Kisten Enterprise Co. Ltd had provided the name and CV of Mr Narad Bachoo as Site Agent, but that since no CV had been requested, the latter had not been scrutinised.

The Successful Bidder has taken exception to the raising of this issue in his later submissions, because the Applicant was evidently not aware of these facts contained in the Bid Evaluation Report which was not made available to the Applicant.

H. Findings

The Panel wishes to thank all counsel for their invaluable help, but more specifically the counsel for the Successful Bidder for his very learned submissions and Case Law citation.

The Panel wishes, at the outset, to emphasise that it will not review the previous Decision (03/15, CN 38/14/IRP) in regard to this case. It will only review the re-evaluation process following the above mentioned Decision, as a result of which an award to Kisten Enterprise Co. Ltd is being envisaged.

It is also apposite to mention that although the present review exercise concerns the same tender, and the parties involved are identical, yet this review exercise is different in that it is concerned with a different evaluation. The bid of Kistnen Enterprise Co Ltd had not been analysed previously, and it is the first time that its contents are being scrutinised.

In this respect, and in reply to comments from the Successful Bidder that the Panel should not give any consideration to points raised by the Applicant late in the proceedings, the Panel wishes to highlight Regulation 53(3) made under the Public Procurement Act.

Regulation 53(3)

(3) The Review Panel may request or allow the submission of additional statements by the parties and by other parties not participating in the application for review as may be necessary for the fair resolution of the application for review.

It is obvious that the Applicant could not have raised the issue of the Successful Bidder's failure to include a qualified Site Agent in his bid in his Application for Review, as this fact was unknown to him until mentioned by the Chairman of the Panel at the Hearing. Also, this fact only became known when the bid from Kistnen was analysed after the Decision of the Panel dated 23rd

January 2015, and therefore could not have been canvassed at the last proceedings (CN 38/14).

However, we still have to consider what, if any, is the importance of not including a qualified Site Agent in a bid, of allowing a bidder to appoint one after the closing date, and not scrutinising the CV of the Site Agent when at last one is appointed.

The Panel is of the view that not appointing a Site Agent is equivalent to appointing one who does not meet the required qualification. Both situations will result in a non-responsive or incomplete tender. The situation is, however, not equivalent to a missing document. In a case where all information is already known, but a supporting document as evidence of what is purported in the submitted information is missing, then the latter may be accepted at evaluation stage, if it cannot be altered from its state at the time of tender. In the case under consideration, no Site Agent having been appointed, the Bidder has ample latitude to appoint an engineer of his choice among all available engineers, and thus alter the quality of his tender.

It is true that Site Agents are not rated during evaluation, and therefore whether a bidder appoints a most qualified Site Agent or one who just makes the mark, this would not affect the evaluation of the respective tenders. This cannot be taken to mean that the appointment of a qualified Site Agent after the date of tender does not alter the tender. There is a cost to the employment of a qualified engineer, which was evidently not included in the Successful Bidder's original tender, as no Site Agent had been appointed. Allowing him to appoint the Site Agent at a later stage, without changing the price of his

tender is equivalent to allowing him to make a reduction to this price. The Bid Evaluation Committee's argument that failure to appoint a qualified engineer as Site Agent is a minor omission is therefore spurious.

Moreover, ITB 6.2 (e) includes as information to be supplied with the tender: *qualifications and experience of key site personnel and technical personnel proposed for the contract*; failure on the part of the Bid Evaluation Committee to scrutinize and report on the CV of the proposed Site Agent is a major lacking of the Evaluation Report. Such scrutiny would have elicited the following information, which, in the eyes of the Panel are important:

1. Is the proposed Site Agent in the full time employment of the Successful Bidder? If so, for how long?
2. Was he in the employment of the Successful Bidder at the time of tender?
3. Is he in the full time employment of a consulting firm, and is being proposed as a Technical Assistant?
4. Would he be available full time for this contract? If not, what percentage of his time would be allocated to this contract? What are the requirements of the project?

I. Decision

In view of the various lacking in the evaluation report, some of them arising out of faulty Bidding Documents, and in view of the risks of further contests of the results of any new evaluation, the Panel is of the view that the interests of fairness and transparency are best served by a new tender exercise after correction of the Bidding

Documents, and hereby finds that there is merit in the application and orders an annulment of the decision of the Public Body to award to Kisten Enterprise Co. Ltd.

(R. Lalloo)
Chairperson

(Mr R. Rajanah)
Member

(V. Mulloo)
Member

Dated 11 February 2016