

INDEPENDENT REVIEW PANEL

In the matter of:

Medical Gases JV (Gaz Carbonique Ltee & Les Gaz Industriels Ltd)

(Applicant)

v/s

Ministry of Health & Quality of Life

(Respondent)

(Cause No. 26/15/IRP)

Decision

A. History of the case

The project consists of Supply of Medical Oxygen and Nitrous Oxide gases for period 01 January 2016 to 31 December 2016. The scope includes the purchase of Medical Oxygen and Nitrous Oxide gases for use in all hospitals.

The closing date for submission of bids was fixed 25 August 2015 up to 13.30 hrs at latest at the Central Procurement Board. However, as the abovementioned addendum was issued on 20 August 2015 the closing date for the submission of bids was postponed to 08 September 2015.

Four bids were received from the following bidders namely:

- (i) Rama Cylinders Pvt. Ltd*
- (ii) Medical Gases JV*
- (iii) Oxymac Ltd*
- (iv) Compagnie Mauricienne de Commerce Limitee.*

B. Evaluation

The Bid Evaluation Committee was composed of:

Dr S. Hemoo –	Consultant –in-charge, Anaesthesiology, SSRN Hospital (Chairperson)
Dr V. Dinassing -	Acting Regional Health Director, J. Nehru Hospital (Member)
Mr R. L. Seetaloo -	Superintendent Surgical Technology Workshop, Victoria Hospital (Member)
Mr D. Callychurn -	Acting Assistant Manager Procurement and Supply, Headquarters (Secretary)

The Bid Evaluation Committee recommended that the contract be awarded to the lowest evaluated bidder.

On 29 September 2015, the Bid Evaluation Committee recommended Oxymac Ltd to be the lowest substantially responsive bidder.

C. Notification of award

The Ministry of Health & Quality of Life through a letter dated 13 October 2015, informed the Applicant of the particulars of the successful bidder as follows:

Item No.	Bidder	Address	Contract Price (Rs)
10	Oxymac Ltd	No. 1 School Lane, Vallee des Pretes, Port Louis	23,128,800.00

D. The Challenge

On 19 October 2015, the Applicant challenged the award on the following grounds:

1. *As per the Special Conditions of Contract (Section VII of the tender documents – GCC13.1), "The supplier shall be capable to hold an adequate stock of Medical Oxygen and Nitrous Oxide gases to meet any unforeseen demand". In addendum No. 1, the Ministry of Health & Quality of Life advised that this adequate stock means "a stock equivalent to one month's consumption of medical oxygen and nitrous oxide gases". If Oxymac Ltd holds its medical oxygen stock in cylinders, it would factually mean holding a stock of 2095 x 8.50 m³*

(equivalent to 300cuft) cylinders of Medical Oxygen gas at any one time. Bearing in mind that Oxymac Ltd is a relatively newcomer in the medical gas industry in Mauritius and has until now supplied only a small percentage of the medical oxygen market to private clinics, we seriously doubt that Oxymac Ltd has the logistics and cylinder stock to meet this requirement.

2. *As per the Special conditions of Contract (Section VII of the tender documents – GCC13.1) and Addendum No. 1, the Supplier has to supply medical oxygen with the technical specifications set out in Section 3 of the bidding documents.*

Based on our field experience, we believe that Oxymac Ltd does not have the required facilities, equipment, system and quality control processes in place to guarantee compliance with this tender requirement over the duration of the contract.

E. The Reply to Challenge

On 21 October 2015, the Public Body made the following reply to the challenge:

- “(a) The Bid Evaluation Committee has found that Oxymac Ltd satisfied all mandatory conditions and was technically responsive. Oxymac Ltd was the lowest evaluated substantially responsive bid for item 10.*
- (b) As regards points 1 to 4 of your challenge, these relate to issues which do not form part of the Evaluation Criteria of the bidding documents, but which will have to be taken care of by Oxymac Ltd at time of contract implementation.*
- (c) As regards point 5, you may wish to note that in general, all bidders are allowed to submit as many offers as they wish, provided the number of offers is not limited, and such offers are not similar in the technical aspects, sources of supply as well as prices. This allowance is the same for all bidders and has applied to all government procurement up to now.*
- However, for this bidding exercise, Oxymac Ltd has submitted two offers in respect of item 13, which differ in terms of source of supply and price.*
- You may wish to note that by offering an option, a bidder is not submitting a bid twice.”*

F. Grounds for Review

On 27 October 2015, the Applicant seized the Independent Review Panel for review on the following grounds:

1. *The Applicant is of the view that the successful bidder, namely Oxymac Ltd, could not have established in its bid the required technical capability in the field and experienced workforce as required in Section III, Evaluation and Qualification Criteria, of the bidding documents and that the Bid Evaluation Committee was wrong to find that Oxymac Ltd satisfied all mandatory conditions and was technically responsive for the following reasons:*

1.1. *As per the Special Conditions of Contract (Section VII of the tender documents – GCC13.1), “The supplier shall be capable to hold an adequate stock of Medical Oxygen and Nitrous Oxide gases to meet any unforeseen demand”. In Addendum No. 1, the Ministry of Health and Quality of Life advised that this adequate stock means “a stock equivalent to one month’s consumption of medical oxygen and nitrous oxide gases.” If Oxymac Ltd holds its medical oxygen stock in cylinders, it would factually mean holding a stock of 2095 cylinders of Oxygen gas 8.50 m³ (equivalent to 300cuft) at any one time. Bearing in mind that Oxymac Ltd is a relatively newcomer in the medical gas industry in Mauritius and has until now only supplied a negligible percentage of medical oxygen to private clinics, the Applicant seriously doubts that Oxymac Ltd has the logistics and cylinder stock to meet this requirement and that it has provided sufficient evidence of technical capability to meet this requirement in its bid.*

1.2. *As per the Special Conditions of Contract (Section VII of the tender documents – GCC13.1) and Addendum No. 1, the Supplier has to supply medical oxygen with the technical specifications set out in Section 3 of the bidding documents. Based on the Applicant’s field experience, the Applicant believes that Oxymac Ltd does not have the required facilities, equipment, system and quality control processes in place to guarantee compliance with this tender requirement over the duration of the contract. It is unlikely that Oxymac Ltd has provided evidence or adequate evidence of such technical capability in its bid.*

1.3. *As per the Special Conditions of Contract (Section VII of the tender documents – GCC13.1) and Addendum No. 1, the Supplier will have to submit a document that Medical Oxygen is in conformity with the purity stated. Such certificate of conformity has to be issued by an accredited body for each batch delivered. Based on the Applicant’s field experience and based on the price quoted by Oxymac Ltd, the Applicant has serious grounds to doubt that*

Oxymac Ltd will have a certificate of conformity with the purity stated issued by an accredited body for each batch delivered. It is unlikely that Oxymac Ltd has provided evidence of its experienced workforce and the details of the accredited body which will provide the certificate of conformity for each batch which would be supplied by it. It is also unlikely that the price quoted by Oxymac Ltd factors in the cost of such certification of conformity by an accredited body for each batch delivered.

1.4. *As per the Special Conditions of Contract (Section VII of the tender documents – GCC13.1) and Addendum No. 1, the Ministry confirmed that the Supplier should be able to ensure traceability of all gas cylinders supplied. Based on the Applicant's field experience, the Applicant believes that Oxymac Ltd does not have the required cylinder tracking system in place to ensure traceability of all its cylinders. Such cylinder tracking systems are usually quite sophisticated and are normally tailor made. Oxymac Ltd would need to evidence such traceability as part of the evidence of its technical capabilities and experienced workforce and it is unlikely that it has done so.*

2. *The Applicant states that the above evidence of technical capability and experienced workforce could not have been provided by the other bidder either, namely Compagnie Mauricienne de Commerce Ltée, which has not, until now, as far as the Applicant is aware, been involved in medical gases supply to private or public bodies.*

3. *The Public Body erred in stating that points 1 to 4 of the challenge of the Applicant relate to issues which do not form part of the Evaluation Criteria of the bidding documents inasmuch as paragraph (1)(b)(v) of the Evaluation and Qualification Criteria require the bidder to provide:*

“Evidence of bidder’s technical capability in the field and experienced workforce”.

Furthermore, it is provided at clause 19.1 of Section I, Instructions to Bidders, that the bidder has to furnish documentary evidence that the goods conform to the technical specifications and standards specified in Section V, Schedule of Requirements, which includes the technical specifications and standards of the medical oxygen and nitrous oxide gases. Clause 19.2 further elaborates that the documentary evidence shall consist of a detailed item by item description of the essential technical and performance characteristics of the Goods and Related Services, demonstrating substantial responsiveness of the Goods and Related Services to technical specification. The Applicant states that the Public Body and the Bid Evaluation Committee failed to take into

consideration clauses 19.1 and 19.2 of Section 1, Instructions to Bidders, when evaluating the bids since the matters raised in points 1 to 4 of the challenge of the Applicant related to the essential technical and performance characteristics of the Goods themselves as well as the Related Services.

4. *During the bid opening exercise, it has been noted that Oxymac Ltd submitted two offers to the Ministry of Health and Quality of Life which is not permissible under the bidding documents. At clause 14.1 of Section 1, Instructions to Bidders, it is clearly specified that alternative bids shall not be considered. The BDS does not provide for any derogation from this provision. In the circumstances, a bidder is not permitted to bid twice for the same tender exercise either by offering alternative offers or by providing an option. This is unfair towards the other bidders. In the circumstances, the bid of Oxymac Ltd should have been disqualified. The Public Body erred in stating in the reply to the Applicant's challenge that bidders are allowed to submit as many offers as they wish."*

G. The Hearing

Hearings were held on 12, 27 November and 02 December 2015.

The Applicant was represented by Mr H. Dhanjee, Counsel whereas the Respondent was represented by Mr S. Boodhoo, Principal State Counsel.

H. Findings

The Panel has gone in depths through all the submissions and arguments, canvassed by both parties. It was necessary for the sake of clarity to explain how and why, it was so difficult for us to establish whether or not, a methodical approach was taken in the analysis of the procurement of medical oxygen and nitrous oxide gases. Most of the time, the tenderer preferred to allocate a tender to the lowest responsive bidder. However, this selection did not prove or clarify the aims and objectives of the bidding exercise.

The Applicant, in this case, felt to be aggrieved and dissatisfied with the Public Body's decision. The averment made by the Applicant regarding the technical capability, to stock and supply of medical oxygen of the successful bidder is unfounded. To illustrate, the Applicant is claiming that, the successful bidder failed to meet the technical specification of the bid. This is an issue which is not for the Applicant to thrash out. It

is the responsibility of the Public Body through its Bid Evaluation Committee to decide the efficiency and performance appraisal of each and every bidder.

The Panel has not been convinced that the successful bidder, Oxymac Ltd has kept its medical oxygen stock in cylinders which are not compatible for the storage of medical oxygen. We are under the impression that the Applicant is trying to bring forward a purported approach.

The main observation made by the Panel, was the argument put forward by the Applicant, making an allegation that the successful bidder submitted two offers in the same bid to the Public Body. In pursuance with the Procurement Policy Office, Circular No. 3 of 2008, paragraph 4.1(e) of Section 1 “Instruction to bidders” was amended and read as follows: “Group of bidders may submit bids or put themselves forward as candidates, either individually or as partner in a joint venture. However, a bidder may only submit or participate in one bid”.

The circular no. 3 of 2008, further states that “Participation by a bidder in more than one bid will result in the disqualification of all bids in which the party is involved. However, this does not limit the inclusion of the same sub-contractor in more than one bid”.

The Panel’s attention is drawn towards the issue of a possible breach in the application of the Public Procurement Act 2008. The Bid Evaluation Committee may have possibly failed to understand the rules and regulations of the bidding exercise. The rule is that, no bidder should be allowed to bid for a single and similar kind of tender twice. On the contrary, a bidder may propose to bid twice in a single contract if there are two different bids and the law also provides that, the name of a partner or a sub-contractor is mentioned in the bidding document. This would allow the tenderer to bid in partnership and also with the help of a sub-contractor.

Our observation were that, the successful bidder, for item no. 10, (i.e) procurement of medical oxygen gas 8.50 m³ cylinder, has been awarded the contract as the lowest evaluated substantially responsive bidder.

For comparison purpose, we are reproducing the table from the Bid Evaluation Committee.

We refer to paragraph 4 of the Bid Evaluation Committee, Bid Submission and Opening. Four bids were received and public opening was carried out on the same day at 14.00 hrs in the Conference Room at the Central Procurement Board.

Bidder	Read out bid price(s)
<i>Rama Cylinders Pvt. Ltd</i>	<i>257,223,099.00</i>
<i>Medical Gases JV</i>	<i>53,444,615.00</i>
<i>Oxymac Ltd</i>	<i>Offer 1:34,098,760.00</i> <i>Offer 2: 34,682,260.00</i>
<i>Compagnie Mauricienne de Commerce Limitee</i>	<i>45,050,829.10</i>

As per table above, it was observed that Rama Cylinders Pvt Ltd, Medical Gases JV and Compagnie Mauricienne de Commerce Ltee had quoted for one single bid price, which is a mandatory requirement of Directive No. 3, issued by the Procurement Policy Office.

It is likely, that Oxymac Ltd has failed to comply with Directive No. 3 and the reason for such a failure was that there were two offers for one single bid.

Offer 1: rating at Rs34,098,760

Offer 2: rating at Rs34,682,260

It is deduced from above, that the conclusion reached by the Bid Evaluation Committee was unfair and discriminatory against the other bidders. The three other bidders had quoted only one bid price, which is very clear from the table.

The Panel has taken from record, a letter dated 21 October 2015 addressed to the authorised representative of Medical Gases JV. The letter issued by the Public Body stated: “The Pubic Body wishes to inform you as follows: As regards point 5, you may wish to note that in general, all bidders are allowed to submit as many offers as they wish, provided the number of offers is not limited and such offers are not similar in the technical aspects, sources of supply as well as prices”. The Public Body has not been able to convince the Panel of what would amount to a limited offer”. The item no. 10 in the bidding document provided for the supply of medical oxygen gas 8.50 m³ (equivalent 300 cu ft) cylinder, thus it is likely that the procurement of medical oxygen and nitrous oxide gases was single bid, but split out into 13 items.

The final observation of the Panel was made from the letter dated 04 November 2015, which awarded the contract to the successful bidder. We referred to the letter dated 06 November 2015, addressed to the Independent Review Panel, which stated the urgency to lift the suspension. The Public Body relied on the certificate of urgency and

hence the contract was considered as (essential life saving and very critical item). The Panel is of the view that the Public Body had a couple of weeks in hand to trigger the award of contract, irrespective of the time factor.

The Public Body had in previous contract allocated a period of two weeks prior to the award of the contract. The Independent Review Panel, in fact, called the case, proforma on 12 November 2015, which would give the Panel sufficient time to hear the matter, before the effective date of the start of the contract (i.e. 01 January 2016 to 31 December 2016).

The Panel finds that there is merit in this application.

(A. Kallee)
Vice-Chairperson

(R. Rajanah)
Member

(R. Ragnuth)
Member

Dated 02.03.16