Independent Review Panel

Decision No. 06/17

In the matter of:

Keep Clean Ltd

(Applicant)

v/s

University of Technology, Mauritius

(Respondent)

(Cause No. 04/17/IRP)

Decision

A. History of the case

On the 29th June 2016, University of Technology Mauritius (hereinafter referred to as the Respondent) issued bidding documents for the procurement of cleaning services bearing procurement number UTM/PU/OAB/11/2/2016. Keep Clean limited (hereinafter referred to as the Applicant submitted its bid in response of the invitation for bids for the procurement of cleaning services. On the 6th of February 2017, the Respondent informed the Applicant by way of letter that an evaluation of the bids has been carried out and its bid has not been retained for award.

The bid was awarded to the Silver Clean Co Ltd (hereinafter referred to as the Successful bidder). Feeling aggrieved by the decision of the Respondent the Applicant challenged former's decision on the 10th February 2017. On the 17th February 2017 the Respondent replied to the Applicant's challenge.

Feeling dissatisfied with the Respondent's reply, the Applicant applied for review on the 21st February 2017 to the Independent Review Panel pursuant to section 45 of the Public Procurement Act 2006.

B. Notification of Award

The University of Technology, Mauritius through a letter dated 06 February 2017, informed the Applicant of the particulars of the successful bidder as follows:

Name of Bidder	***Address***	***Total Contract Amount (Rs) VAT Incl.***	***Monthly Contract Amount (Rs) VAT Incl.***
Silver Clean Co. Ltd	*1st Floor, ELP Complex 4, Club Road, Vacoas*	*4,319,400.00*	*179,975.00*

C. The Challenge

On 10 February 2017, the Applicant challenged the award on the following grounds:

"I. *Keep Clean Ltd is the lowest substantially responsive bidder in the exercise as it meets all qualifications and eligibility criteria.*

II. *As per the Evaluation Criteria laid down in Section VI of the Contract, Silver Clean Co. Ltd and Keep Clean Ltd may have achieved a financial score of 10.68 and 10.06, respectively. In order to be awarded the contract, the successful bidder must achieve the highest combined technical and financial score, Silver Clean Co. Ltd has not scored a higher technical score than Keep Clean in respect of the following:*

a. *Experience in providing cleaning services of comparable nature and size during the last 2 years -*
Silver Clean Co. Ltd has not provided services to tertiary institutions during the last 2 years, and hence cannot claim to possess experience of similar nature.

b. *Site Management and Organization/Methodology and Management Approach –*
As Silver Clean Co. Ltd has not provided services to tertiary institutions during the last 2 years, the company cannot claim to have site management experience and organization which are relevant for the present bidding exercise.

c. *Manpower Policy, Recruitment and Screening Mechanism, Training -*
The selected bidder cannot claim relevant experience specially regarding training of personnel for work in tertiary institutions over the last 2 years, where the duty of care owed to fellow students is very high.

d. *Supervision and Monitoring -*
The selected bidder may not be equipped in order to efficiently monitor the delivery of its services in an environment where such services have never been provided before.

e. *Logistics -*
Without casting doubts on the credibility of the selected bidder, Keep Clean Ltd notes that, as per the last financial summary of the selected bidder for year ended 30 June 2015, and as filed with the Registrar of Companies, Silver Clean Co Ltd does not possess any plant, property and other equipment, and so the company will not be able to deploy the logistics required for good performance of the contract.

Under ITB Sub-clause 31.1, "the Employer will award the Contract to the Bidder whose bid has been determined to be substantially responsive to the bidding documents and who has scored the highest marks provided that such Bidder has been determined to be:
(a) Eligible in accordance with the provisions of ITB Clause 4, and
(b) Qualified in accordance with the provisions of ITB Sub-Clause 5.2".

The aggrieved bidder verily believes that he has scored the highest combined financial and technical marks by virtue of his relevant experience, adequacy of cashflow and availability of resources, both mechanical and human.

III. *The selected bidder for the procurement exercise, namely Silver Clean Co. Ltd, is not the lowest evaluated substantially responsive bidder.*

IV. *For the reasons given above, the Public Body ought to award the Contract to the lowest evaluated substantially responsive bidder, viz Keep Clean Ltd."*

D. The Reply to Challenge

On 17 February 2017, the Public Body made the following reply to the challenge:

"This is to inform you that your Company has not been retained for award on the basis that it did not score the highest mark as per Section VI – Schedules (Evaluation Criteria) of the bid document.
Furthermore, you are kindly informed that as per Clause 40(a) of the Public Procurement Act and Section 38(3) of the Public Procurement Regulations 2008, the prescribed threshold for challenge shall be Rs15 million."

E. Grounds for Review

On 21 February 2017, the Applicant seized the Independent Review Panel for review on the following grounds:

"1. *The Applicant is not satisfied with the reply of the Public Body to its challenge by letter dated 17th February 2017 to the effect that its bid did not score the highest mark as per Section VI – Schedules (Evaluation Criteria) of the bid document.*

2. *The Public Body has failed to properly assess and/or evaluate the bid of the Applicant which is the lowest substantially responsive bid in as much as the Applicant has scored the highest mark both technically and financially.*

3. *The Applicant avers that the selected bidder, Silver Clean Co Ltd does not rank highest after adding the technical score to the financial score, as provided for under the Contract at* ***ITB 28 and ITB 30 of Section II – Bidding Forms****, in as much as Silver Clean Co Ltd has not scored a higher technical score than that of Keep Clean in respect of the following:*

a. Experience in providing cleaning services of comparable nature and size during the last 2 years-

Silver Clean Co Ltd has not provided services to tertiary institutions during the last 2 years, and hence cannot claim to possess experience of similar nature.

b. Site Management and Organization / Methodology and Management Approach -

As Silver Clean Co Ltd has not provided services to tertiary institutions during the last 2 years, the latter cannot claim to have site management experience and organization which are relevant for the present bidding exercise.

c. Manpower Policy, Recruitment and Screening Mechanism, Training -

Silver Clean Co Ltd cannot claim relevant experience specially regarding training of personnel for work in tertiary institutions over the last 2 years, where the duty of care owed to fellow students is very high.

d. Supervision and Monitoring -

Silver Clean Co Ltd may not be equipped in order to efficiently monitor the delivery of its services in an environment where such services have never been provided before.

e. Logistics -

Without casting doubts on the credibility of the selected bidder, the Applicant notes that, as per the last financial summary of Silver Clean Co Ltd for year ended 30 June 2015, and as filed with the Registrar of Companies, Silver Clean Co Ltd does not possess any plant, property and other equipment, and so the latter will not be able to deploy the logistics required for good performance of the contract.

The Applicant further submits that under ITB Sub-clause 31.1, "the Employer will award the Contract to the Bidder whose bid has been determined to be substantially responsive to the bidding documents and who has scored the highest marks provided that such Bidder has been determined to be:

(a) eligible in accordance with the provisions of ITB Clause 4, and

(b) qualified in accordance with the provisions of ITB Sub-Clause 5.2".

4. *The Applicant avers that it has scored the highest combined financial and technical marks by virtue of his relevant experience, adequacy of cashflow and availability of resources, both mechanical and human and therefore the Applicant's bid ought to have been selected for award.*

5. *The Public Body ought to have disqualified the bid of Silver Clean Co Ltd for non-compliance with ITB 5.2(b) of Section II – Bidding Forms in that the selected bidder does not have experience over the last two years as prime contractor in providing services on sites of similar nature as specified in the scope of service.*

6. *The selected bidder for the procurement exercise, namely Silver Clean Co Ltd, is not the lowest evaluated substantially responsive bidder.*

7. *The Public Body ought to have awarded the contract to the Applicant, the lowest evaluated substantially responsive bidder."*

F. The Hearing

Hearings were held on 23 February and 13 March 2017. Written submissions were made on 06 March and 01 March 2017 by Applicant and Respondent respectively.

The Applicant was represented by Mr N. Hurnaum, Counsel whereas the Respondent was represented by Ms A. Ombrasine, Senior State Counsel.

G. Findings

After taking into consideration all evidences on record and submissions of Counsel, the Panel notes the following:

The Respondent avers *in limine litis* that prayer 13(d) of the Applicant's Statement of Case cannot validly be proceeded with in as much as the contract for the provision of cleaning services had already been signed on the 6th February 2017 between the Respondent and the successful bidder

namely Silver Clean Co Ltd. The Respondent further adduced evidence to the fact that they have acted within the parameters of the law and since the contract value is below the threshold that is Rs15m they have awarded and signed the contract on the 7th February 2017.

It is the contention of the Applicant that at the time the bids were submitted the latter was not aware of the threshold. Furthermore the Applicant submitted to the fact that in its letter dated 6th of February 2017 the Respondent never mentioned that the contract was awarded to the successful bidder. The Applicant submitted to the fact that the Respondent made reference to Section 40(3) of the Public Procurement Act in the said letter.

Section 40(3) stipulates that *"A public body, in relation to a procurement contract, the value of which is above the prescribed threshold, shall notify the successful bidder in writing of the selection of its bid for award and a notice in writing shall be given to the other bidders, specifying the name and address of the proposed successful bidder and the price of the contract".*

True it is that no mention was made to the Applicant that the contract has already been awarded, but the letter dated 6th February 2017 clearly made reference to the total amount of the contract. Thus the Panel finds that at that material time the Applicant was well aware of the total amount of the contract which was below the threshold. The point *in limine* is therefore upheld. The Panel will also determine the two additional points raised by the Applicant.

Firstly, the Applicant submitted that the successful bidder has not provided services to tertiary institution during the last 2 years and hence cannot claim to possess experience of similar nature. However, the Panel notes that clause 51(c), Qualification of Bidder stipulates that "experience in services of similar nature and of similar size as far as possible in each of the two years...." The Panel has observed and reached the conclusion that since the

clause made reference to *"as far as possible"*, therefore the requirements are not compulsory and same reasoning applies to ground 10(b), 10(c) and 10(d).

As far as logistics are concerned the Applicant contended to the fact that as per the last financial summary of the successful bidder for the year ended 30 June 2015 and as filed with the registrar of companies the successful bidder does not possess any plant, property and other equipment and thus the latter will not be able to deploy logistics for good performance of the contract.

The Panel observed that the Applicant conceded to the fact that beside purchasing plant and equipment, there could have been other means of securing those equipment. Thus the Panel is of the opinion that successful bidder is under no obligation to give an undertaking in its bid that they would hire those equipment.

The Panel therefore concludes that the Application for Review is devoid of merits and is therefore set aside.

(Arassen Kallee)
Vice-Chairperson

(Virjanan Mulloo)
Member

(Rajsingh Ragnuth)
Member

INDEPENDENT REVIEW PANEL MAURITIUS

Dated 05 April 2017