



Independent Review Panel

Decision No. 11/17

In the matter of:

Super Construction Co. Ltd

(Applicant)

v/s

National Housing Development Company Limited

(Respondent)

(Cause No. 12/17/IRP)

Decision

A. History of the case

A.1 Introduction

- **Project Description:** Construction of 206 Housing Units and Associated Infrastructural Works at St Julien D’Hotman – Lot 5B
- **Procuring Entity:** National Housing Development Co Ltd
- **Contract number:** CPB/50/2016
- **Method of Procurement:** Open International Bidding
- **Margin of preference (if applicable):** International SMEs

A.2 Bidding Process

(a) General Procurement Notice:

Open International Bidding process was used and procurement notice was uploaded on the PPO website (www.publicprocurement.govmu.org) on 09 November 2016. The notice dated 11 November 2016 was published in local newspaper i.e. L’Express and Le Mauricien on the 11th and 14th November 2016 respectively.

(b) The Standard Bidding Document was specifically customized by the National Housing Development Co Ltd (NHDC Ltd) and was approved by the Central Procurement Board (CPB) on 4 November 2016.

(c) Three addenda were issued during the tender process

A.3 Scope of Works

The works consist of:

- i. Construction of 206 Nos two storey (i.e. 103 Nos. duplex type) housing units each with a net floor area of 63.3m²;
- ii. Construction and completion of one sample (duplex type) housing unit within 3 months after Commencement date;

- iii. Construction of 6m wide road within the housing estate with footpath and associated drainage works, road markings traffic signs, etc;
- iv. Water supply and internal water reticulation network to connect to the existing main supply and associated civil engineering works;
- v. Individual on-site sewerage disposal system consisting of septic tanks, absorption pits, manholes and pipe network;
- vi. Earthworks including Landscaping and other associated works; and
- vii. Other ancillary / minor off-site works.

A.4 Bid Submission and Opening

The closing date for the submission of bids was fixed for Thursday 12 January 2017 up to 13.30 hours at latest at the Central Procurement Board (CPB).

Seven (7) bids were received and Public Opening was carried out on the same day at 14.00 hours in the Conference Room at the CPB.

At the opening of bids at the Central Procurement Board on Thursday 12 January 2017, bids from the following bidders were received and prices as read out were as follows:

S/N	BIDDER	DISCOUNT (MUR)	BID AMOUNT AFTER DISCOUNT (MUR)	BID SUBMISSION FORM COMPLETED AND SIGNED YES/NO	BID SECURITY IN THE SUM OF MUR 3,000,000 SUBMITTED YES/NO
1	Beijing Construction Engineering Group Co. Ltd	Nil	329,195,136.52	Yes	Yes
2	Gamma Construction Ltd	Nil	413,518,266.00	Yes	Yes
3	Unik Construction Engineering (Pty) Ltd	Nil	293,702,696.70	Yes	Yes
4	REHM Grinaker Construction Co. Ltd	Nil	390,634,544.00	Yes	Yes
5	Super Construction Co. Ltd	3,578,907.20	324,888,698.00	Yes	Yes
6	Sinohydro Corporation Limited	Nil	314,921,662.07	Yes	Yes
7	Square Deal Multipurpose Cooperative Society Ltd	Nil	333,892,375.00	Yes	Yes

B. Evaluation

B.1

The evaluation team was composed as follows:

Mr. P.K Domah	Lead Architect - Ministry of Public Infrastructure & Land Transport (Team Leader & registered evaluator)
Mr. S. Boodoo	Electrical Engineer / Senior Electrical Engineer - Ministry of Public Infrastructure & Land Transport (Member & registered evaluator)
Ms. D. Beeknoo	Assistant to Quantity Surveyor – National Housing Development Co. Ltd (Member & registered evaluator)
Mr. Zuber Patel	Assistant Systems Administrator – National Housing Development Co. Ltd (acting as Secretary)

B.2

After Preliminary Examination of bids, and clarification, the Bid Evaluation Committee observed that:

Bidder No. 1 – Beijing Construction Engineering Group Co. Ltd

- (a) *Is a locally registered contractor.*
- (b) *Has applied for Margin of Preference as per clause 34 of ITB for employment of local manpower for 80% or more.*
- (c) *Has confirmed vide letter dated 17th February 2017 (i) acceptance of the correct figure to Rs 329,195,136.78 (ii) Has submitted the CV of the proposed personnel.*

The bidder is fully responsive to submission requirement.

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Bidder No. 5 - Super Construction Co. Ltd

- (a) *Is a locally registered contractor.*

(b) *Has applied for Margin of Preference with respect to employment of minimum 80% local labour.*

(c) *Has not submitted the form ELI 1.1; however all requested information has been submitted.*

(d) *Vide letter dated 20th February 2017, the bidder:*

(i) Has confirmed acceptance of the corrected figure to Rs 333,012,211.00.

(ii) Has submitted the CV of proposed personnel.

The bidder is considered substantially responsive to the submission requirement.

Based on the above the responsiveness of the bidders to the submission requirement is as indicated in the table below. Except for Bidder No. 3 (Unik Construction Engineering (Pty) Ltd) and Bidder No. 6 (Sinohydro Corporation Limited), all the bidders are found to be responsive. Their bids are therefore retained for further evaluation.

<i>BIDDER NO.</i>	<i>REMARKS</i>
<i>BIDDER 1</i>	<i>Fully responsive</i>
<i>BIDDER 2</i>	<i>Fully responsive</i>
<i>BIDDER 3</i>	<i>Non-responsive</i>
<i>BIDDER 4</i>	<i>Fully responsive</i>
<i>BIDDER 5</i>	<i>Substantially responsive</i>
<i>BIDDER 6</i>	<i>Non-responsive</i>
<i>BIDDER 7</i>	<i>Fully responsive</i>

B.3

Bid Evaluation Committee's observations on Eligibility and Qualification Criteria:

Bidder No. 1 – Beijing Construction Engineering Group Co. Ltd

Bidder No. 7 [1?] complies with the requirement of the eligibility and qualification criteria and has made profit in all last five years and is therefore considered to be financially sound.

[---]

Bidder No. 5 – Super Construction Co. Ltd

Bidder No. 5 complies with the requirement of the eligibility and qualification criteria. Bidder has encountered losses in year 2013 and 2014 but profit in the year 2015. It is noted that the return on equity for the last three years is negative but has provided a bank certificate with the term “Net of other Contractual Commitments”.

B.4

After detailed technical evaluation of the lowest bidders, the Bid Evaluation Committee made the following observations:

Bidder No. 1 – Beijing Construction Engineering Group Co. Ltd

Personnel – With the exception of Sworn Land Surveyor the bidder satisfies all requirements for personnel as prescribed in the bid document.

Equipment – Bidder partly complies with requirement to equipment as prescribed in the bid document.

The shortcomings of the bidder with respect to the provision of a Sworn Land Surveyor and shortage of one compressor are considered as minor deviations.

Bidder No. 5 – Super Construction Co. Ltd

Bidder No. 5 complies fully to the requirement of both personnel and equipment.

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B.5 Financial Evaluation

Arithmetical Check

<i>Bidder No.</i>	<i>Bidder</i>	<i>Discount</i>	<i>Bid Amount After Discount (MUR)</i>	<i>Corrected Amount (MUR)</i>	<i>R</i>	<i>M</i>
					<i>a</i>	<i>O</i>
					<i>n</i>	<i>P</i>
					<i>k</i>	
1	<i>Beijing Construction Engineering Group Co. Ltd</i>	<i>Nil</i>	<i>329,195,136.52</i>	<i>329,195,136.78</i>	<i>1</i>	<i>Y</i>
5	<i>Super Construction Co. Ltd</i>	<i>3,578,907.20</i>	<i>324,888,698.00</i>	<i>333,012,211.00</i>	<i>2</i>	<i>Y</i>

After effecting, and obtaining agreement to, the above arithmetical corrections, the Bid Evaluation Committee commented as follows on the application of the margin of preference (MOP):

Margin of Preference

Since all the responsive bidders have applied for Margin of Preference with respect to employment of 80% of local labour, application of the Margin of Preference clause has no incidence on the bid price and ranking of the bidders.

B.6 Recommendation

The Bid Evaluation Report concluded as follows:

*The BEC therefore recommends that the contract for the 'Construction of 206 Housing Units and Associated Infrastructure Works at St Julien D'Hotman – Lot 5B (CPB/50/2016) be awarded to **Beijing Construction Engineering Group Co. Ltd** for the corrected sum of MUR 329,195,136.78 (Mauritian Rupees Three Hundred and Twenty-Nine Million, One Hundred and Ninety-Five Thousand, One Hundred and Thirty-Six and Cents Seventy-Eight).*

C. Notification of Award

The National Housing Development Company Limited through a letter dated 28 March 2017, informed the Applicant of the particulars of the successful bidder as follows:

Item No.	Description	Successful Bidder	Address	Contract Price (MUR)
1	Construction of 206 Housing Units and Associated Infrastructure Works at St. Julien D’Hotman	Beijing Construction Engineering Group Co. Ltd	Local Office, 112 Corner Sodnac and des Tulipes Avenue, Quatre Bornes	329,195,136.78

D. The Challenge

On 31 March 2017, the Applicant challenged the award on the following grounds:

- “(a) The successful bidder, BCEG fails to meet the conditions satisfying eligibility for a Margin of Preference;*
- (b) The successful bidder, BCEG is a foreign contractor as per the provisions of the Construction Industry Development Board Act and does not meet the requirement of employing local manpower for 80% or more of the total man-days deployed for the execution of Work contract;*
- (c) When carrying out the evaluation and comparison of the bids, the Public Body ought to have increased the bid of the successful bidder by the same percentage of preference applicable to the Applicant is lower than that of the successful bidder; and*
- (d) The Public Body should have awarded the bid to the Applicant, whose bid is the lowest substantially responsive bid.”*

E. The Reply to Challenge

On 05 April 2017, the Public Body made the following reply to the challenge:

“Our response as advised by the Central Procurement Board on 04 April 2017

(a) With respect to Margin of Preference, ITB 34.2 of the Bid Data Sheet specifies inter-alia:

Bidders applying for the Margin of Preference shall submit, as part of their bidding documents evidence of:

- (i) their incorporation in the Republic of Mauritius*
- (ii) the percentage of the total man-days to be deployed by local manpower with breakdown indicating type of works to be entrusted to local manpower”.*

(b) Beijing Construction Engineering Group Co. Ltd (BCEG) is incorporated in the Republic of Mauritius since July 2007 with Business Registration Number C07072808. The bidder has a valid registration with the Construction Industry Development Board as Grade A Contractor for Building Construction Works and Grade A Contractor for Civil Engineering Construction Works. The bidder has submitted an undertaking to employ local manpower for 80% or more of the total man-days deployed for the execution of the works contract and has given a breakdown indicating type of works to be entrusted to local manpower.

(c) According to the provisions of the bidding documents, especially ITB 34, Beijing Construction Engineering Group Co. Ltd is eligible for Margin of Preference and accordingly the Bid Evaluation Committee has concluded that the bid of BCEG is the lowest evaluated substantially responsive one.

(d) The arguments put forward by you, therefore, do not stand.”

F. Grounds for Review

On 07 April 2017, the Applicant seized the Independent Review Panel for review on the following grounds:

- I. The Applicant is not satisfied with the reply of the Public Body dated 05 April 2017 to its challenge dated 31 March 2017 inasmuch as the Public Body itself confirmed that “The bidder has submitted an undertaking to employ local manpower for 80% or more of the total man-days deployed for the execution of the works contract...” whilst the criteria for eligibility for a Margin of Preference is that the bidder is “employing local manpower for 80% or more...”. The eligibility requirement to benefit from the Margin of Preference is that the bidder must, at the time of the bid employ 80% of local labour. The word “employing” is used in the present tense so that a bidder to benefit from the Margin of Preference must have 80% or more local labour at the time of the submission of the bid. Given that the successful bidder, Beijing Construction Engineering Group Co. Ltd (hereinafter referred as “BCEG”) has undertaken to employ at least 80% of the local labour, it is absolutely clear that the successful bidder does not have in its employment the 80% local labour and thus does not meet the eligibility criteria for the Margin of Preference.*
- II. The Public Body was wrong to have applied the Margin of Preference in favour of the successful bidder, in as much as the latter fails to meet the criteria for the Margin of Preference to apply since it does not meet the requirement of employing local manpower for 80% or more of the total man-days deployed for the execution of Work contract (ITB 34.1 and Section III – Evaluation and Qualification Criteria paragraph 1.5 – Margin of Preference);*
- III. The Public Body has failed to carry out a proper evaluation and comparison of the bids when it did not increase the bid of the successful bidder, BCEG, by the same percentage of preference applicable to the Applicant; and*
- IV. Failure to retain the bid of the Applicant whose bid was the lowest substantially responsive one.”*

G. The Hearing

Hearings were held on 10 April and 02 May 2017. Statement of reply was made on 13 April 2017 by Respondent.

The Applicant was represented by Mr G. Glover, Senior Counsel whereas the Respondent was represented by Miss R. Appanna, State Counsel. The Successful Bidder was represented by Mr M. Namdarkhan and Mr Y. Rajahbalee both of Counsel.

H. Findings

H.1

This case revolves around the application of the Margin of Preference. From the corrected bid figures, should the margin of preference be applied to both the Applicant and the Selected Bidder, or to none, then the latter would be the most competitive responsive bidder. The only scenario whereby the Applicant would be the most competitive responsive bidder is when he benefits from the preference clauses, but the Selected Bidder does not.

H.2

The Applicant therefore contests only the application of the margin of preference, and not the principle thereof.

The relevant provisions of the Bidding Documents in respect of preference are as follows:

ITB 34:2 of the Bid Data Sheet:

"Bidders applying for the Margin of Preference shall submit, as part of their bidding documents evidence of

(a) their incorporation in the Republic of Mauritius;

(b) [---]

(c) the percentage of the total man-days to be deployed by local manpower with breakdown indicating type of works to be entrusted to local manpower".

(d) [---]

ITB 42.3

"The successful bidder having benefitted from a Margin of Preference shall provide a Preference Security, as specified in the BDS. The amount

for the Preference Security shall be the difference between the price quoted by the selected bidder and that of the lowest evaluated bid which would have been selected for award of contract, if the said Margin of Preference was not applicable.”

ITB 42.3 of the BDS:

“The preference security in the form of a bank guarantee issued from a local commercial bank shall be submitted at the time of contract award failing which the award of contract may be annulled.”

Section III, Evaluation and Qualification Criteria, Clause 1.5

“A Margin of Preference for employment of Local manpower shall be applicable as follows:

1.5 .1 For International Bidding

A bidder, incorporated in the Republic of Mauritius and employing local manpower for 80 % or more of the total man-days deployed for the execution of a Works contract, shall be eligible for a preference of 15 %.”

The Applicant has relied on the term “and employing local manpower for 80 %” to argue that the Selected Bidder should already be employing 80% of local manpower to be eligible for preference. However, viewed in context, this interpretation is erroneous. It is obvious from all the provisions of the Bidding Documents dealing with preference, that the 80% refers to the number of man-days to be deployed on the contract which is the subject matter of the bidding exercise. There would be no need to demonstrate “the percentage of the total man-days to be deployed by local manpower with breakdown indicating type of works to be entrusted to local manpower” (ITB 34.2 of BDS) nor for the submission of a preference security if the Applicant’s interpretation was correct. The Panel is also satisfied that the wording of the relevant preference clauses is not ambiguous, as any reasonable bidder would understand correctly that the requirement to be eligible for a preference is the deployment of 80% of local labour in the contract that would follow the current tender exercise, if the bidder is successful. However, the bidder applying for the margin of preference would be required to show, as evidence

of his intentions, how the local labour is to be deployed. This is discussed further below.

H.3

The Panel would tend to agree that perhaps preference clauses should favour the employment of permanent local staff, rather than transient local manpower employed on contract for the specific purposes of one contract. However, the intent and purpose of preference clauses in the Bidding Documents are clear, and the Bid Evaluation Committee as well as the Public Body have little choice but to interpret them in the way that they have.

H.4

There is, however, one element of the Bidding Documents that the Panel finds disturbing. The amount of the preference security, meant to ensure that a bidder having benefitted from preference, does effectively implement the conditions to which he has committed in his tender, is set at *“the difference between the price quoted by the selected bidder and that of the lowest evaluated bid which would have been selected for award of contract, if the said Margin of Preference was not applicable”*. In all cases, this security amount would be less than the preference from which the selected bidder would have benefitted. Thus, any bidder who is eligible for preference under other criteria, may be encouraged to lie about the 80% local labour that he intends to employ under the ensuing works contract, and forfeit his preference security, which would effectively bring his contract amount to the same level as the lowest bid. Thus, the dishonest bidder would have ensured that his bid, though higher, is reduced to the same level as that of the lowest bidder, after the opening of bids. The Panel understands that these clauses are the result of Directive 12 of 2012 from the PPO, but is nevertheless of the opinion that the resulting amount of preference security would in all cases be too low to provide assurance of the good faith of the bidder who undertakes to employ 80% of local labour on the ensuing works contract.

Moreover, the preference security would eventually compensate the Employer in case the selected bidder who has benefitted from preference does not thereafter abide by the conditions which have enabled him to obtain the

contract, but does not acknowledge the injury to the bidder who should have obtained the contract.

Moreover, in the present case, it may not be possible to respect the condition of submission of a preference security to an amount equivalent to *the difference between the price quoted by the selected bidder and that of the lowest evaluated bid which would have been selected for award of contract, if the said Margin of Preference was not applicable*, as the selected bidder is also the lowest evaluated bidder.

The Applicant has not contested or questioned any part of the Bidding Documents before the submission of bids, and the Panel would infringe on its own declared principles, and overstep its powers were it to declare the tender procedure vitiated.

H.5

In the specific circumstances of this exercise, the Panel only has to seek out any mismatch between the provisions of the Bidding Documents in respect of preference and the bid of the Selected Bidder. Unfortunately, there is one such mismatch which has gone undetected by the Bid Evaluation Committee.

Having decided that all responsive bidders *“have applied for Margin of Preference with respect to employment of 80% of local labour”*, and are eligible for such preference, the Bid Evaluation Committee concluded that the *“application of the Margin of Preference clause has no incidence on the bid price and ranking of the bidders”*. There was no further analysis on its part.

The Selected Bidder, however, has not submitted with his bid any breakdown as to the deployment of labour, in conformity with ITB 34.2 of the BDS:

“(c) the percentage of the total man-days to be deployed by local manpower with breakdown indicating type of works to be entrusted to local manpower”

The Bid Evaluation Committee has therefore sought clarification from the Selected Bidder, as a result of which the latter has submitted a proposed time-based (monthly) deployment of labour. This does not constitute a *“breakdown indicating type of works to be entrusted to local manpower”*, and the Selected Bidder therefore has not met the requirements of S 34.2(C) of the BDS.

Moreover, the Panel is not convinced that such a shortcoming may be cured by clarification.

The Panel has no idea whether the Applicant did meet all the requirements entitling him to a preference, as the Bid Evaluation Report is silent on the subject.

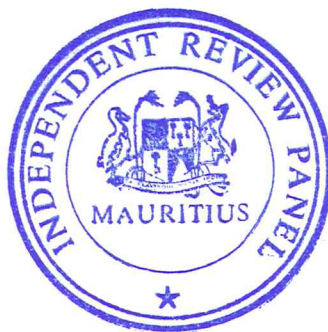
I. Decision

I.1

The Panel therefore finds that, on the basis of his bid, and subsequent clarification, the Selected Bidder is not entitled to a “*Margin of Preference for employment of Local manpower*”, and that the Bid Evaluation Committee was wrong to consider that all responsive bidders were eligible for the Margin of Preference. The Panel therefore finds merit in the Application for Review, and orders a re-evaluation of the bids as the Bid Evaluation Committee has failed to properly scrutinise submissions from bidders to ascertain their conformity with the requirements of the Bidding Documents in respect of Margin of Preference.

I.2

The Bid Evaluation Committee would have to decide, in the first instance, whether or not to seek clarification from any bidder. If, however, the recommendation to award to the present Selected Bidder is maintained, the Public Body would have to show how it will address the problem of the amount of preference security mentioned above, as without submission of this security, “*the award of contract may be annulled*” (S42.3 of BDS)





(Reshad Laulloo)
Chairperson



(Mrs Christelle Sohun)
Member



(Rajsingh Ragnuth)
Member

Dated 18 May 2017

