



Independent Review Panel

Decision No. 14/17

In the matter of:

Canakiah Associates Co. Ltd

(Applicant)

v/s

National Assembly

(Respondent)

(Cause No. 10/17/IRP)

Decision

A. Background

A.1

The National Assembly intends to upgrade the Parliamentary ICT Unit to allow for Live Broadcast of Parliamentary session. In this context, it wishes to undertake works consisting of: Refurbishment of Level 2 of Old Government House including builders' work and mechanical & electrical works.

A.2

- Procuring Entity: National Assembly
- Contract Number: OAB/NA/Q12/16-17
- Method of Procurement: Open Advertised Bidding in Local Newspapers

A.3

- Date of Invitation of bids: 23 November 2016
- Funding Agency: National Assembly
- Standard Bidding Documents used: Open Advertised Bidding-Procurement of Works
- Addenda Issued: 3 Nos.

A.4

At bid opening, the read-out prices were as follows:

Bidder No.	Read-out Bid Price(s)	
	Name of bidder	Bid Amount inclusive of discount and VAT MUR
1	Canakiah Associates Co. Ltd	28,110,000.00
2	Kisten Enterprise Co. Ltd	32,775,000.00
3	Neel Industries Ltd	26,608,668.91
4	Marbobois Ltee	23,856,157.75
5	Bolah Jeetun Co. Ltd	24,925,974.00

B. Evaluation

B.1

The Bid Evaluation Committee was composed as follows:

Mr. S.M.R. Auckloo	Electrical Engineer/Senior EE - Chairperson Ministry of Public Infrastructure & LT
Mr. J.Roja	Architect/Senior Architect - Member Ministry of Public Infrastructure & LT
Mr. G.Oogarah	Quantity Surveyor/Senior QS- Member Ministry of Public Infrastructure & LT
Mr S.Ramparsad	Assistant Accountant-General* Treasury- Member
Mr. D.Cunee	Management Support Officer – Secretary National Assembly

B.2

Preliminary examination showed that all five bidders were generally responsive. Detailed analysis showed that:

Bidder No 1 (Canakiah Associates Co. Ltd)

This bidder has fully complied with all the mandatory requirements and is therefore retained for further evaluation.

Bidder No 5 (Bolah Jeetun Co Ltd)

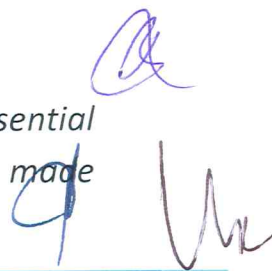
This bidder has fully complied with all the mandatory requirements and is retained for further evaluation.

B.3

Detailed technical evaluation revealed that:

Bidder No 1 -Canakiah Associates Co Ltd

This bidder has generally complied with ITB 6.3(c) regarding essential equipment except for 2 Nos. Breakers & 1 No. Demolition Hammer to be made



available for the contract. However, this requirement is considered as a minor deviation.

Therefore, this bidder is retained for further evaluation.

Bidder No 5 -Bolah Jeetun Co Ltd

This bidder has generally complied with ITB 6.3(d) regarding key personnel except for one experienced Electrical Technician for the contract. However, this requirement is considered as a minor deviation.

Moreover, the bidder has not submitted adequate information regarding fire alarm system for this project as per Section V-Employers' requirements, E.2, schedule of materials. However, this requirement is considered as a minor omission.

Therefore, this bidder is retained for further evaluation.

B.4

After financial evaluation, the Bid Evaluation Committee concluded the main Bid Evaluation Report as follows:

“Taking into consideration the Technical and Financial evaluation of the Bids, the BEC considers that the bid submitted by Bidder No. 5 Bolah Jeetun Co. Ltd. is the lowest substantially responsive evaluated bid.

The corrected bid amount for bidder No. 5 Bolah Jeetun Co. Ltd. is found to be less than 17.8% of the cost estimate.

13. Recommendation

The BEC recommends that the contract be awarded to the lowest substantially responsive evaluated bidder, Bolah Jeetun Co. Ltd., for the corrected sum of Rs 24,982,324.00 (Rupees Twenty-Four Million Nine Hundred and Eighty-Two Thousand Three Hundred and Twenty-Four only) inclusive of contingency sum & VAT, subject to clarification as at Section 14 below.

14. Clarification

Bolah Jeetun Co. Ltd. will have to: -

- *Confirm the availability of one experienced Electrical Technician holding Part II Electrical Engineering Technician's Certificate 280 or 803 of the City and Guilds of London or any equivalent qualifications as per ITB 6.3(d);*
- *Submit detail information regarding fire alarm system as per (Section V-Employer's requirements, E.2 Schedule of Materials;)*
- *Confirm his agreement regarding the corrected bid amount of Rs 24,982,324.00 (Rupees twenty-four Million Nine Hundred and eighty-two Thousand Three Hundred and twenty-four only) inclusive of contingency sum and VAT."*

B.5

After clarification, the Bid Evaluation Committee submitted a supplementary report, in which it reported that the Selected Bidder had successfully clarified all the above items, except for the following:

"ii. Detailed information regarding fire alarm system.


The Bidder has proposed a 'conventional fire alarm system' instead of 'addressable fire alarm system.'

With the conventional type, the exact location for the alarm is unknown. While, with the requested addressable type the exact point for the alarm is shown on the panel to facilitate the intervention of fire rescue services during emergency.

The proposed fire alarm system is not in compliance with the specifications laid down at page 85 of the Bidding Document Section V, Employers' requirements which read as follows: 'The object of this contract is to provide an addressable system as per existing one.'

*As per Section IV, Evaluation Criteria, paragraph 1(d) at page 36 of the Bidding Document, **Technical Alternatives are not permitted.**"*

The Bid Evaluation Committee concluded the supplementary report as follows:



*“In light of the above, the BEC concludes that this Bidder Bolah Jeetun Co. Ltd has not complied with technical requirements of the Bid Document and therefore **cannot be retained for award.**”*

C. Notification of Award

The National Assembly through a letter dated 27 March 2017, informed the Applicant of the particulars of the successful bidder as follows:

Name of Bidder	Address	Contract Price Rs
<i>Bolah Jeetun Co. Ltd</i>	<i>Angus Lane II, Granum Road, Vacoas</i>	<i>24,982,324.00</i>

D. The Challenge

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

“Because the public body was wrong to award the bid to Bolah Jeetun Co. Ltd although the Bid Evaluation Committee found them to be non-responsive.”

E. The Reply to Challenge

On 03 April 2017, the Public Body made the following reply to the challenge:

“I wish to inform you that the Departmental Bid Committee (DBC) has approved the lowest responsive bid proposed by Bolah Jeetun Co. Ltd.”

F. Grounds for Review

On 05 April 2017, the Applicant seized the Independent Review Panel for review on the following grounds:

“The Applicant requests the IRP to look thoroughly into the Bid Evaluation Committee Report to have the decision of the Public Body quashed.”

G. The Hearing

Hearings were held on 10 April, 08 and 30 May 2017. Respondent’s reply was made on 17 April 2017 and Applicant’s reply was made on 21 April and 18 May 2017.

The Applicant was represented by Mr S. Potayya, Counsel whereas the Respondent was represented by Mr M. Seetaram and Mr D. Reetoo both Principal State Counsel.

H. Findings

H.1

The Panel has first to determine whether the Departmental Bid Committee (DBC) is bound by the recommendations of the Bid Evaluation Committee, or may overrule the recommendations of the latter.

In S 37(11), the Public Procurement Act sets the conclusion of the Bid Evaluation Committee's activities as follows:

“(11) The bid evaluation committee shall prepare an evaluation report detailing the examination and evaluation of bids and identifying the lowest evaluated bid that meets the qualification criteria.”

The Panel agrees that “evaluation report” here includes the supplementary report referred to above.

However, in S 40(1), the Public Procurement Act gives the responsibility for the decision to award to the Public Body:

“(1) A procurement contract shall, subject to subsection (1A), be awarded by a public body to the bidder having submitted the lowest evaluated substantially responsive bid which meets the qualification criteria specified in the prequalification or bidding documents, following the steps outlined in subsections (3) and (4)”.

The Legislator does not impose on the Public Body strict conformity to the recommendations of the Bid Evaluation Committee, but to procurement rules, as stated in S40 (1A):

“(1A) The chief executive officer of a public body shall, before awarding a contract under subsection (1), certify and keep on record that all the procurement rules have been complied with in accordance with this Act.”

Therefore, if the DBC is of the opinion that the recommendation of the Bid Evaluation Committee is wrong in Law, or contrary to the *procurement rules*, it has the duty to correct the mistake. It is customary to send the report back to



the Bid Evaluation Committee with comments as to where it has erred, but this is not mandatory.

However, it stands to reason that there should be a record why an award has been made contrary to the recommendation of the Bid Evaluation Committee, and where the latter has erred.

In its reply to the Statement of Case, dated the 17th April 2017, the Respondent states: “[---] on 21 February 2017, the Departmental Bid Committee took cognizance of the recommendations of the BEC;

(e) the price difference between the Applicant and Bolah Jeetun Co Ltd was analysed by the Departmental Bid Committee;

(f) in light of clause 2.11 (a) and (b) of the Evaluation Guide which is to the effect that a minor deviation in technical compliance should not be a cause for rejection of a bid, Bolah Jeetun Co Ltd was convened for a meeting on 17 March 2017;

(g) on 17 March 2017, the representative of Bolah Jeetun Co Ltd was requested to inform the Respondent whether they would be agreeable to supply an addressable alarm system instead of a conventional alarm system and the cost implication thereof;

(h) on 22 March 2017, Bolah Jeetun Co Ltd informed the Respondent that they were agreeable to supply an addressable fire alarm system instead of a conventional alarm system at no additional cost; and

(i) on 23 March 2017, the Departmental Bid Committee took cognizance of the confirmation received from Bolah Jeetun Co Ltd and approved the decision to award the contract to Bolah Jeetun Co Ltd.”

The Panel is in presence of the Minutes of the above-mentioned meeting of the DBC, and considers that it constitutes sufficient record of how the recommendations of the Bid Evaluation Committee were altered.

H.2

The Panel, next, has to determine whether the DBC was right to consider that the recommendations of the Bid Evaluation Committee were wrong, and had to be altered. Moreover, it also has to determine whether the “clarification”

sought from the Selected Bidder was in fact a negotiation allowing him to change the substance of his bid.

The Selected Bidder did not state in his bid that he would supply a fire alarm system or any other equipment not in conformity to what was specified in the Bidding Documents. On the contrary, he has stated in the Bid Submission Form that:

“(a) We have examined and have no reservations to the Bidding Documents, including Addenda issued in accordance with Instructions to Bidders (ITB) Clause 10;

(b) We offer to execute in conformity with the Bidding Documents the following Works:

Refurbishment Works for Data Centre and Control Room at National Assembly;

[---]”

Other than that, the Selected Bidder has not identified the fire alarm system, and there would normally be no reason to believe that he intends to supply one that is not in conformity with specifications, and the need for clarification would not arise. However, the Selected Bidder had not submitted form E2, where the bidder is required to identify the specific fire alarm system and other equipment and materials he intends to supply. The Bid Evaluation Committee considered this a minor deviation to be clarified.

The Panel does not believe that the Bid Evaluation Committee was wrong to seek clarification on this subject. Contrary to what the Applicant has stated, the Public Procurement Act allows such clarification under S 37 (1):

“(1) The Board, in the case of a major contract, or a public body may seek clarification during the examination of bids from any bidder to facilitate evaluation, but it shall neither ask nor permit any bidder to change the price or substance of his bid.”

By definition, only “minor deviations” may be clarified, as such clarification would not alter either the price or substance of the bid. The Panel considers that at that point, the Bid Evaluation Committee should not have given the opportunity to the Selected Bidder to alter his bid by a proper formulation of



the question. If, nevertheless, the bidder clarifies the issue by changing his bid, such clarification should have been rejected, and the Bid Evaluation Committee should have then pointed out to the Selected Bidder that his clarification is not in conformity with his bid.

By performing the task of getting confirmation from the Selected Bidder that he will execute the works *execute in conformity with the Bidding Documents*, the DBC has not negotiated with the Selected Bidder, but has clarified an issue without “ask[ing] nor permit[ting] any bidder to change the price or substance of his bid.”

H.3

Having established that no negotiation was carried out with the Selected Bidder, it is not incumbent upon the Panel to determine whether negotiations in this particular case would be legal or not, in spite of the learned and inspiring arguments raised by Counsel for the Applicant.

I. Decision

In the light of the above, the Panel does not find merit in this Application for Review.



(Virjanan Mulloo)
Member



(Reshad Lulloo)
Chairperson



(Rajsingh Ragnuth)
Member

Dated 07 June 2017