



Independent Review Panel

Decision No. 18/17

In the matter of:

Rapid Security Services Ltd

(Applicant)

v/s

Ministry of Youth and Sports

(Respondent)

(Cause No. 16/17/IRP)

Decision

A. History of the case

A.1 Title of Project:

Procurement of Security Services at Youth and Sports Infrastructures

A.2 Project Description:

The exercise consists of the procurement of Security Services at Youth and Sports Infrastructures.

A.3 Advertisement and Deposit of Bids:

Bids were invited via Government e-Procurement System through Open National Bidding from eligible and qualified bidders. Bids to be submitted online on the e-Procurement System at latest by Tuesday 28 March 2017 up to 13:25 hrs (Local Time). Bidders who submitted bids online by the closing date and time were required to decrypt and re-encrypt their bids from Tuesday 28 March 2017 from 14 16 hrs until Thursday 30 March 2017 at 13 29 hrs.

Bids were opened online on Thursday 30 March 2017, in the presence of the bidders' representatives at the Ministry of Youth and Sports, 7th Floor, Citadelle Mall, Port Louis

A.4 List of Bidders Invited:

The open national bidding was open only to citizens of Mauritius or entities incorporated in Mauritius.

A.5 List of Bidders and Prices read as out in Public Opening:

Sn	Bidder	Bid Amount (Rs) (VAT Incl.)
1	Defense Hi Tech Security Service Ltd	24,264,000
2	Rapid Security Services Ltd	19,612,800
3	Smart Security Service Ltd	22,454,640
4	Security Plus Ltd	40,083,336

B. Evaluation

B.1 Composition of the Bid Evaluation Committee (BEC) and Official status of each Member including profession:

Mr R. Dabeedyal,	Assistant Permanent Secretary	Chairperson
Mr R. Desscann,	Senior Sports Officer	Member
Mrs V. Amatah,	Office Management Executive	Member
Mrs F. Joomrattun,	Office Management Assistant	Secretary

B.2 Report on Rapid Security Services Ltd

Mrs Amatah, Office Management Executive informed that Rapid Security Services Ltd (RSS Ltd) was providing security services to the Ministry for a period of 20 months with effect from 01 August 2013. Thereafter, the contract was renewed on a month to month basis (with effect from 01 April 2015).

She submitted a copy of the Internal Control Report dated 26 May 2015, wherein the Ministry was recommended not to award contract for security services to RSS Ltd for tender exercises due to unsatisfactory service. (Annex C refers). The committee also took note of a letter dated 03 July 2015, addressed to the Public Procurement Office by the Ministry of Youth and Sports.

The Ministry had reported the company and proposed that the company be debarred from participating in procurement proceedings for a period of six months.

Based on the above, the Bid Evaluation Committee decided not to retain the bid from RSS Ltd for further evaluation.

B.3 Evaluation and Recommendation

After the elimination of the Applicant, the rest of the evaluation exercise was rather uneventful for the purposes of this exercise. However, it is necessary to summarise the Bid Evaluation Committee's findings:

- ❖ *In Technical Evaluation, Bidders Defense Hi Tech Security Service Ltd and Smart Security Service Ltd have scored 57 and 54 respectively. They are therefore retained for further evaluation.*

Bidder Security Plus Ltd has scored 39 marks [over 70] and is declared not responsive. Therefore, it will not be retained for further evaluation.

- ❖ *The financial relative score is as follows:*
 - *Defense Hi Tech Security Service Ltd- 92.50*
 - *Smart Security Service Ltd – 100*
- ❖ *Composite Score:*

			Rank
Bidder 1	<i>Defense Hi Tech Security Service Ltd</i>	$B = 92.50 \times 0.3 + 100 (1-0.3) = 97.75$	1
Bidder 3	<i>Smart Security Service Ltd</i>	$B = 100 \times 0.3 + 94.74 (1-0.3) = 96.32$	2

C. Notification of Award

The Ministry of Youth and Sports through a letter dated 20 June 2017, informed the Applicant of the particulars of the successful bidder as follows:

Bidder's Name & Address	Amount (Rs)
Defence Hi Tech Security Services Ltd – 14 Sir Maurice Martin Street, Forest Side	24,264,000 (Exclusive of VAT)

D. The Challenge

On 22 June 2017, the Applicant challenged the award on the following grounds:

- “1. *Rapid Security Services Ltd is comparatively the lowest and most responsive bidder in this tender exercise.*
2. *Our bids have ever been rejected for being higher but not for any reason whatsoever.*
3. *Rapid Security services Ltd is providing security services to various governmental and non- governmental organisations since 2001 and is complying with all the terms and conditions of the contractual agreement with all its clients.*

4. *We always give plausible explanations to all queries from all our clients and take prompt remedial actions as appropriate.*
5. *As a responsible security service provider, we always draw the attention of all our clients for their shortcomings in regards to the exposure of sites to prevailing insecurities and problems of infrastructure for remedial actions.*
6. *We have appointed Area Supervisors around the island to see whether our guards performing satisfactorily on their sites and to take prompt remedial actions such as change/replacement of guards in case of sickness and leave amongst others.*
7. *Our Area Supervisors have also a line of communication with all our clients' site managers and any problem is being dealt with forthwith.*
8. *We have also appointed a Mobile Patrol Crew to go around the island for spot checks and to report problems occurring on the sites.*
9. *We deal promptly with all the requests from our clients.*
10. *On two occasions, two known clients had recourse to Rapid Security Services Ltd to replace Defence Hitech security Services Ltd before expiry of their contract. We were made to understand by the clients that the service of Defence Hitech Security Services Ltd was not satisfactory.*
11. *We can say with conviction that Defence Hitech Services Ltd is not a better service provider than Rapid Security Services Ltd.*
12. *We firmly believe that the Ministry of youth & Sports has premeditated its decision to reject our bid in so far its Evaluation Committee has failed to take into account our explanations given in connection with any alleged shortcomings."*

E. The Reply to Challenge

On 27 June 2017, the Public Body made the following reply to the challenge:

"(i) Following repeated shortcomings noted at the various Youth centres/Sports Complexes, under your custody in the previous awards, it

has been decided that your firm should not be retained for the allocation of security services in the next tender exercise; and

(ii) the Ministry has in a correspondence to the Procurement Policy Office in July 2015, recommended that your security firm be debarred from participating in procurement proceeding for a period of six months in accordance with regulations 5(1) of the Public Procurement (Suspension and Debarment) Regulations 2008.

Consequently, in view of the above adverse records, your challenge cannot be entertained.”

F. Grounds for Review

On 03 July 2017, the Applicant seized the Independent Review Panel for review on the following grounds:

“1. Following its challenge, by way of a letter dated 27 June 2017, the Applicant was informed that its bid had been rejected on the basis of “adverse records”, namely that:

Following repeated shortcomings noted at the various Youth Centres/Sports Complexes, under your custody in the previous awards, it has been decided that your firm should not be retained for the allocation of security services in the next tender exercise; and

The Ministry has in a correspondence to the Procurement Policy Office in July 2015, recommended that your security firm be debarred from participating in procurement proceedings for a period of six months in accordance with regulation 5(1) of the Public Procurement (suspension and debarment) Regulations 2008.”

2. The Applicant states that the above grounds for rejecting its bid are not proper and fall outside the evaluation criteria set out in the bidding documents.

3. The bidding documents set out the mandatory evaluation criteria at page 41 of the bidding documents (response to Mandatory Criteria online). The Applicant states that it has complied with all these requirements. The reasons

provided by the Public Body to reject the bid of the Applicant do not fall within these criteria.

4. *The first reason given by the Public Body is misconceived and irrational.*

4.1 *The wording of the first reason underlines the fact that the reason given was, of itself, sufficient not to retain the bid. However, even if the reason given were true, which the Applicant strongly denies, this would not amount to a material deviation from the bid rendering it unresponsive. In any event, the wording also makes it clear that no proper review was carried out regarding the Applicant's bid. There is no negative marking into any alleged shortcomings disclosed in the evaluation criteria. Finally, the Public Body is relying on purported shortcomings it identified. This was not an exercise carried out by an independent party such as the Director of the Public Procurement Office. The Public Body cannot make complaints regarding shortcomings and use those complaints to refuse to retain the bid of the Applicant for award. There is a clear conflict of interest in such a situation.*

4.2 *Furthermore, the Public Body considered extraneous facts outside the bidding documents and the bid, thereby vitiating the whole process.*

4.3 *The previous contract provided that it would be for "an initial period of 08 (eight) months effective as from 01 August 2013... The Contract is renewable after the initial period of 08 (eight) months for the next 12 consecutive months, a fixed rates subject to your satisfactory performance."*

4.4 *The Applicant states that its contract was renewed after the initial period of 8 months as the Public Body had been satisfied with its performance.*

4.5 *Insofar as the alleged shortcomings are concerned, these do not form part of the evaluation criteria to be complied with. Clause 5.2 of the general conditions of contract regarding "Attending to shortcomings" provide that:*

“(a) The Employer shall give notice of the Service Provider of any shortcoming;

(b) Every time notice of a shortcoming is given, the Service Provider shall correct the notified shortcoming within the length of time specified by the Employer’s notice; and

(c) If the Service Provider has not corrected a shortcoming within the time specified in the Employer’s notice, the Employer will consider such an act as a lack of performance which could lead to the termination of part or the whole contract as a breach in the good performance of the contract.”

4.6 The Applicant states that there has been no termination of its contract and should these shortcomings have been so serious and pervasive, which the Applicant denies, the Public Body would have since long terminated the contract of the Applicant, which it has not done. Reference is also made to page 94 of the bid of the Applicant regarding absence of contract termination. In fact, additional sites were provided to the Applicant.

4.7 In the course of the previous contract, the Applicant has provided, every month, a record of the checks carried out by its Patrol Team to all the sites subject matter of the contract together with its claim. The very fact that the Public Body pay the total amount claim justifies that the Public Body is satisfied with the Applicant’s services.

4.8 It is also clear that such a reproach by the Public Body would mean that the services of the Applicant were so poor that no Ministry would accept its service. However, the Applicant’s current list of clients in section 1.3 of the Applicant’s bid clearly shows otherwise. The testimonials of the Applicant’s clients in both the public and private sector at pages 102 to 105 of the Applicant’s bid also show otherwise.

4.9 Furthermore, the Applicant provided its explanations regarding all the alleged shortcomings listed by the Public Body within the required delay and took remedial actions when necessary. It is noteworthy that the Public Body did not revert after having received the explanations.

Therefore, the Public Body must have considered that the alleged shortcomings were properly addressed.

5. *The second reason given by the Public Body is an irrelevant consideration and amounts to usurping the role of the Director of the Procurement Policy Office.*

5.1 *It is for the Director of the Procurement Policy Office to debar a bidder, after having followed the procedure set out in the Public Procurement (Suspension and Debarment) Regulations 2008. The effect of a debarment would be that no public body will consider bids submitted by such a debarred bidder. The Applicant states that it has never been debarred, let alone issued a notice of proposed debarment.*

5.2 *It is inappropriate for the Public Body to rely on its complaint to the Procurement Policy Office to reject the bid of the Applicant as it would effectively be sanctioning the Applicant on the basis of its complaint. By relying on its own complaint to reject the Applicant's bid, which complaint the Applicant has never seen nor had an opportunity to rely, the Public Body has effectively debarred the Applicant without having given an opportunity to the Applicant to respond to the complaint and therefore usurped the role of the Director of the Procurement Policy Office."*

G. The Hearing

Hearings were held on 11 and 20 July 2017. Statement of Defence of Respondent was made on 14 July 2017 and Statement in Reply of Applicant was made on 19 July 2017.

The Applicant was represented by Mr H. Dhanjee, Counsel whereas the Respondent was represented by Mr D. Bissessur, State Counsel.

The selected bidder also attended, but was not assisted by Counsel.

H. Issues

The only contentious issue is whether the Public Body was entitled to eliminate the Applicant from further participation in this tender because of the latter's past performance on the Ministry's contracts.

The Applicant has argued that only debarment can prevent a potential bidder from participating in a bidding exercise, and to be considered for award. Short of a debarment, "*repeated shortcomings*" cannot provide a valid reason for the Public Body to eliminate, without evaluation, the Applicant from this bidding exercise.

The Public Body has relied on Section 5.2 (b) of the ITB to conclude that the Applicant was not eligible for award, and that therefore, his bid should not be considered for evaluation:

"5.2 To qualify for award of the Contract, Bidders shall meet the following minimum qualifying criteria:

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(b) experience and satisfactory performance over the last three years as prime contractor in providing services on sites of similar nature as specified in the scope of service;"

The Public Body has argued that repeated shortcomings on the part of the Applicant on the Ministry's own sites amount to unsatisfactory performance for the purposes of the above Clause.

I. Findings

I.1 General

Although the Panel does not doubt the motivation of the Public Body, it must point out that the elimination of the Applicant before evaluation of his bid for reasons given by the Respondent flouts certain basic principles of public procurement.

I.2 Debarment

One of the reasons given by the Respondent for elimination of the Applicant is that *“the Ministry has in a correspondence to the Procurement Policy Office (‘PPO’) in July 2015, recommended that your security firm be debarred from participating in procurement proceeding for a period of six months in accordance with regulations 5 (1) of the Public Procurement (suspension and Debarment) Regulations 2008.”* In this respect, it is noted that:

- ❖ In a letter dated 11 July 2017, the PPO informed that *“as at 11 July 2017, Rapid Security Services Ltd is not in the list of debarred firms/suppliers”*.
- ❖ The request was for a debarment for a period of 6 months. Had the request been granted at the time it was made, in July 2015, the debarment (suspension) period would have expired by the time of submission of bids for this exercise on 28th March 2017. There is no record of any subsequent request for suspension or debarment.

I.3 Objectivity/Subjectivity

In considering its own experience with the performance of the Applicant, and making a value judgement thereon, the Public Body lacks the essential objectivity that can only be provided by an independent third party. Moreover, the PPO which has been granted powers to debar and suspend is also a centralised agency which would have similar records in regard to the performance of other potential bidders, and thus is in a position to make an informed decision in regard to debarment. The Ministry is not privileged with such an overall view.

I.4 Satisfactory/Unsatisfactory Performance

The term *“satisfactory performance”* in ITB 5.2 (b) is not defined. The Applicant has argued that *“a few shortcomings”* do not constitute unsatisfactory performance. The Respondent Ministry maintains that persistent recurring shortcomings cannot be considered otherwise.

The Panel is of the view that the Ministry has acted unfairly in deciding that the Applicant’s overall performance in the last three years was unsatisfactory, based solely on its own experience of the Applicant, ignoring thereby the

several testimonials of different Clients expressing satisfaction with the performance of the Applicant.

I.5 Information Not In Applicant's Bid

In rejecting the bid of the Applicant without evaluation, the Public Body has acted upon privileged information to which it had access, and which was not in the Applicant's bid. Moreover, it was the Bid Evaluation Committee which decided to eliminate the Applicant from the competitive exercise without evaluation, whereas this should have been considered a policy decision.

A Public Body may, for several and varied reasons, be dubious about the capacity of a bidder to perform the contract ensuing from the bidding exercise. In this case, the proper procedure to be followed is laid out in S37 (10A) (a) & (b):

(10A) (a) Where a public body or the Board-

(i) is of the view that the price, in combination with other constituent elements of the bid, is abnormally low in relation to the subject matter of the procurement; and

(ii) has concerns as to the ability of the supplier to perform the procurement contract,

it may request in writing from the supplier such information as it considers necessary.

(b) Where, after having taken into account any information furnished by the supplier under paragraph (a) and the information included in the bid, the public body or the Board still has concerns as to the ability of the supplier to perform the procurement contract, it may reject the bid.

In this case, this procedure has not been followed.

I.6 Shortcomings and Satisfactory Performance

The Applicant has not disputed the fact that several shortcomings on previous contracts have been brought to his attention. However, he states having taken corrective action as required under the respective contracts, and in certain cases, paid a penalty for these shortcomings, and should not therefore be further penalised. The Panel has noted that the Public Body has never

attempted to cancel any on-going contract with the Applicant, which would have been the appropriate measure had the said shortcomings been serious enough as to warrant elimination from a bidding exercise. In fact, the Applicant has reported that in at least one instance, his contract which was to expire had actually been extended.

J. Decision

For the above reasons, the Panel finds merit in this Application for Review, and hereby orders an annulment of the decision to award to the Selected Bidder, and further orders a re-evaluation of the bids.



(Reshad Laulloo)
Chairperson



(Virjanan Mulloo)
Member



(Mrs Christelle Sohun)
Member

Dated 01 August 2017



