



Independent Review Panel

Decision No. 03/18

In the matter of:

SamloKoyenco Steel Co. Ltd

(Applicant)

v/s

Ministry of Health and Quality of Life

(Respondent)

(Cause No. 30/17/IRP)

Decision

A. History of the case

This is a case where the Samlo Koyenco Steel Co Ltd hereinafter referred to as “the Applicant” is challenging the decision of the Ministry of Health and Quality of Life hereinafter referred to as “the Respondent” to award a contract for the procurement of medical gasses to Medical gases JV (selected bidder), through open national bidding for the period of April 2018 to 31st March 2020.

The Applicant submitted its bid on the 06th November 2017. By way of letter dated 8th December 2017, the Applicant was informed by the Respondent that its bid had been selected in relation to items No 1 to 11, 16 and 23 whereas its bid in relation to items No 12 to 15 and 17 had not been selected for award. The Applicant challenged the Respondent’s decision on the 14th December 2017 and subsequently the Respondent reply to the Applicant’s challenge on the 20th December 2017 wherein the former maintained its decision.

Feeling aggrieved, the Applicant applied for review to the Independent Review Panel pursuant to Section 45 of the Public Procurement Act.

B. Notification of Award

The Ministry of Health and Quality of Life through a letter dated 08 December 2017, informed the Applicant “*that its bid has not been retained for award in respect of the items no. 12-22.*”

C. The Challenge

On 14 December 2017, the Applicant challenged the procurement on the following grounds:

“We strongly believe that Samlo Koyenco Steel Co. Ltd meet the requirements of the Bid (more specifically in respect of the Nitrous Oxide Gas purity, quality etc) and we are at a loss when it is found that it has been selected for award for Nitrous Oxide Gas (Items 13, 14 and 15) despite being the lowest bidder as compared with Medical Gases JV Prices proposed for these three items. Please see table below:

Item No.	Description	Samlo Koyenco Steel Co. Ltd Bid Price	Medical Gases JV Bid Price	Difference
13	Nitrous Oxide Gas 0.818m ³ (equivalent to 180 gallons) cylinder pin index	Rs57,330.00	Rs244,179.00	Rs186,849.00
14	Nitrous Oxide Gas 1.727m ³ (equivalent to 380 gallons) cylinder pin index	Rs12,360.00	Rs52,176.00	Rs39,816.00
15	Nitrous Oxide Gas 242.78m ³ (equivalent to 3700 gallons) cylinder pin index	Rs6,209,379.00	Rs7,452,000.00	Rs1,242,621.00
Total Difference				Rs1,469,286.00

We therefore strongly challenge the conclusion of the evaluation carried out.”

D. The Reply to Challenge

On 20 December 2017, the Public Body made the following reply to the challenge:

“I am directed to inform you that your bid has not been retained based on the following reasons:

Items	Description	Reason for rejection
13	Nitrous Oxide gas 0.818m ³ (equivalent to 180 gallons) cylinder pin index. Purity should be ≥98%, 1% consisting of air, Impurities: H ₂ O ≤ 67 ppm. Colour of cylinder shall be pale blue for shoulder and body.	Impurities: H ₂ O ≤ 0.15 g/m ³ (≤ 201 ppm) instead of ≤67 ppm.
14	Nitrous Oxide gas 1.727m ³ (equivalent to 380 gallons) cylinder pin index. Purity should be ≥98%, 1% consisting of air, Impurities: H ₂ O ≤ 67 ppm. Colour of cylinder shall be pale blue for shoulder and body.	Impurities: H ₂ O ≤ 0.15 g/m ³ (≤ 201 ppm) instead of ≤67 ppm.
15	Nitrous Oxide Gas 242.78m ³ (equivalent to 3700 gallons) cylinder pin index. Purity should be ≥98%, 1% consisting of air, Impurities: H ₂ O ≤ 67 ppm. Colour of cylinder shall be pale blue for shoulder and body.	Impurities: H ₂ O ≤ 0.15 g/m ³ (≤ 201 ppm) instead of ≤67 ppm.

As per bidding documents, the requirement with respect to Impurities for the above three items was “Impurities: H₂O ≤ 67 ppm”.

Your offer for items 13, 14 and 15 consists of Impurities: H₂O ≤ 0.15 g/m³ (≤ 201 ppm) indicating that it exceeds the Impurities limit of H₂O ≤ 67 ppm and thus it has not been retained.”

E. Grounds for Review

On 26 December 2017, the Applicant seized the Independent Review Panel for review on the following grounds:

A. Bids in relation to Items No. 13, 14 and 15

1. The Applicant meets the requirements of the bid, more specifically in respect of purity. A report by Mr Vishwamber Gopauloo, registered Engineer, confirms same.
2. The Applicant is the lowest bidder. A difference in the bid price of the Applicant and the Co-Respondent has been reproduced below:

Item No.	Description	Samlo Koyenco Steel Co. Ltd Bid Price	Medical Gases JV Bid Price	Difference
13	Nitrous Oxide Gas 0.818m ³ (equivalent to 180 gallons) cylinder pin index	Rs57,330.00	Rs244,179.00	Rs186,849.00
14	Nitrous Oxide Gas 1.727m ³ (equivalent to 380 gallons) cylinder pin index	Rs12,360.00	Rs52,176.00	Rs39,816.00
15	Nitrous Oxide Gas 242.78m ³ (equivalent to 3700 gallons) cylinder pin index	Rs6,209,379.00	Rs7,452,000.00	Rs1,242,621.00
Total Difference				Rs1,469,286.00

3. The bids of Medical Gases (JV) ought not to have been retained inasmuch as it is a joint venture between two competitors offering exactly the same goods and services which constitute a breach of sections 41(1)(a), (b)(i)(ii), (c), 42(1)(b) and 45 of the Competition’s Act (Vide ITB 5.1(b) Joint Venture).

B. Bids in relation to Items No. 12 and 17

1. *The bids of Medical Gases (JV) ought not to have been retained inasmuch as it is a joint venture between two competitors offering exactly the same goods and services which constitute a breach of sections 41(1)(a), (b)(i)(ii), (c), 42(1)(b) and 45 of the Competition's Act (Vide ITB 5.1(b) Joint Venture at page 28 of Annexure A).*

F. The Hearing

Hearings were held on 05 and 22 January 2018. Written submissions were made on 26 January and 15 January by Applicant and Respondent respectively.

The Panel took note of the report tabled by Mr Gopauloo (witness for the Applicant). The report clearly states that the conversion rates applied (from g/m³ to ppm) are acceptable on a worldwide basis and carried out at room temperature. Mr Gopauloo concluded that the items quoted by the Applicant were compliant to the requirements of the Respondent.

In the Respondent's reply, reference was made to a table of conversion wherein the temperature was -46 degrees celsius. However, Dr Ramjuttun, Senior Officer for the Respondent stated that the table does not mention the temperature at which the test was carried out. He admitted the absence of the calculation that was applied to obtain the figures. Dr Ramjuttun later changed his version and stated that the tests are normally carried out at room temperature and produced a calculation methodology from a website which he even cannot confirm of its authenticity. The Panel observed that Dr Ramjuttun finally agreed that all the specifications about temperature and liquid or gas state were never mentioned in the bidding documents and that these do not bind the Applicant. Thus Panel is of the view that Dr Ramjuttun was inconsistent on the issue of temperature as the Chart in the Respondent's reply clearly mention -46 degrees.

The Panel took note of the testimony of Dr Abeeluck, for the Respondent. The Panel observed that all the points raised by Dr Abeeluck was never in dispute. The latter only stressed on emergency circumstances in hospitals.

Mr Foiret for the Applicant produced invoices to show that both companies forming the JV medical gases that is Gaz Industriel Ltee and Gaz Carbonic Ltd were dealing in medical oxygen. He further produced the joint venture agreement to show that the above companies were dealing in the same product prior to the formation of the JV.

It is important to note at this juncture that the testimony and evidence produced by witness Foiret for the Applicant remained unrebutted.

Section 41 of the Competition Act 2007

(1) *For the purpose of this section, an agreement, or a provision of such agreement, shall be collusive if:*

(a) *it exists between enterprises that supply of goods or services of the same description, or acquire goods or services of the same description.*

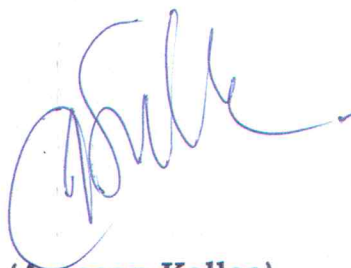
(2) *Any agreement or provision of such agreement, which is collusive under this section shall be prohibited and void.*

The Panel observed that Dr Ramjuttun admitted that the Bid Evaluation Committee did not consider the issue of collusion for a Joint Venture. Thus the Panel is of the firm belief that this is contrary to section 41 of the Competition Act 2007.

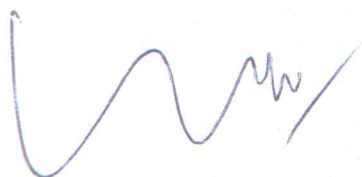
Finally, the Panel took note that during cross examination Dr Ramjuttun for the Respondent stated that the JV Medical Gases should mandatorily be disqualified for the whole tender as it did not comply with same.

G. Findings

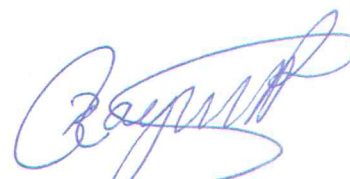
In the light of the above, the Panel therefore finds merit in this application for review and hereby orders an annulment of the decision of the Respondent to award the contract to the Selected Bidder in relation to items 12, 13, 14, 15 and 17.



(Arassen Kallee)
Vice-Chairperson



(Virjanan Mulloo)
Member



(Rajsingh Ragnuth)
Member

Dated 20 February 2018

