



Independent Review Panel

Decision No.03/19

In the matter of:

Defence Hitech Security Services Ltd

(Applicant)

v/s

Ministry of Youth and Sports

(Respondent)

(Cause No. 02/19/IRP)

Decision

A. History of the case

On the 28th September 2018, the Ministry of Youth & Sports issued bidding documents by way of Open National Bidding for the procurement of security services at the Youth & Sports Infrastructures bearing procurement No: MYS/Q/15/2018-2019 – MYS/IFB/2018/11. The deadline for the submission of bid was on the 30th October 2018.

On the 28th October 2018, the Applicant, Defence Hitech Security Services Ltd, submitted by e-procurement its bid for the procurement of Security Services at Youth & Sports Infrastructures for the total price of Rs. 26,150,400.00 (VAT Excluded) for Lots I, II and III. Further, the Applicant offered a discount of Rs. 800,000 for all the Lots. Then, the bid price, according to the Applicant, was Rs. 25,350,400.00 after taking the discount into account.

B. Evaluation

The bids were opened on the 1st November 2018. Thereupon, the Applicant offered the lowest price. There were seven bidders. The selected bidder was found to be Rapid Security Services Ltd, who was considered by the Respondent as the most substantially responsive bidder with the highest composite score for a contract amounting to Rs. 31,622,400.00 exclusive of VAT.

During the selection process which resulted ultimately in selection of Rapid Security Services Ltd, the Ministry, requested the applicant to submit by the 11th December 2018 its tax status and the scanned copies of experience in services of a similar nature and of similar size as far as possible in each of the last three years and details of services underway or contractually, committee and names and addresses of clients who may be contacted for further information on those contracts as per template. The letter was dated the 4th December 2018.

By a letter dated 11th December 2018 sent by fax, the Applicant submitted information which would be considered, eventually by the Respondent as incomplete information.

By a letter dated 17th January 2019, the Respondent informed the Manager of the Applicant company that an evaluation of the bids has been carried out and that the Applicant's bid had not been retained for award. The Respondent mentioned the name of the successful bidder as being Rapid Security Services Ltd for an amount of Rs. 31,622,400 exclusive of VAT.

The Applicant was informed of his right to challenge the award within 7 days from the date of notification.

C. The Challenge

Feeling aggrieved by the decision of the Respondent, the Applicant challenged the said decision on the 19th January 2019 under section 43 of the Act. It averred:

1. that all requirements in the tender documents had been met and fulfilled by the Applicant;
2. that the Respondent failed to consider for the selected bidder, that the latter had no qualified security personnel as prescribed by Law
3. failed to consider that the Applicant was the lowest and most responsive bidder in that tender exercise, the non-compliance with Section 13 of the Technical Proposal by Rapid Security Services Ltd
4. that the contract or the termination of contract awarded for Rapid Security Services Ltd due to unsatisfactory services prior to its expiry dated by the Municipal Council of Port Louis, Beau Bassin and Rose Hill and the Ministry of Youth and Sports.
5. The Respondent had failed to consider the shortcomings which occurred during the contract under the said Ministry of Youth and Sports and the letter dated **03 July 2015** addressed to the Public Procurement Office to debar the Rapid Security Services Ltd for a period of 6 months.
6. Further a report from the Internal Control Report dated 26 May 2015 recommended not to award contract for security services to the said company Rapid Security Services due to unsatisfactory services.
7. The successful bidder had failed to comply with the qualification of the bidder, the eligibility criteria and the technical compliance.

By a letter dated 25 January 2019, the Permanent Secretary of the Respondent replied that the Applicant's bid had not been retained on account of:

- (a) The non-submission of evidence of security services of similar works and similar size performed for each of the last three years as per templates.
- (b) Incomplete information on:
 - (1) the site management and organization/methodology and management approach;
 - (2) manpower policy, recruitment and screening mechanism, training;



- (3) supervision and monitoring mechanism;
- (4) logistics

D. Grounds for Review

The grounds for review of the present Application are as follows:

- “1. *The Public Body ought to have been awarded the contract to the Applicant which is the lowest substantially responsive bidder.*
2. *The Applicant has submitted a bid which complies with all the requirements and criteria of the bidding documents and therefore it should have been awarded the contract being the lowest substantially responsive bidder.*
3. *The Public Body has failed to carry out a proper evaluation and assessment of the bid of the selected bidder in as much as the selected bidder does not have the major items of logistic support and strategies for the execution of the contract namely;*
 - (a) *licences and proper registered Training Centre for its personal;*
 - (b) *wireless radio communications (Internal & External);*
 - (c) *wireless clocking device for a close monitoring of security personal on each site from its control centre together with copy of licences from the authority;*
 - (d) *list of vehicles duly equipped under its name;*
 - (e) *list of equipped control rooms;*
 - (f) *list of trained security guards proposed for execution of the contract for different sites.*
 - (g) *Proposal of strategies plan in case of any emergency on site for rapid response*
 - (h) *no qualified security personal as prescribed by law.*
4. *The Public Body has failed to take into consideration the shortcomings of the selected bidder which occurred during the provision of security services for the same Ministry by virtue of an Internal Control Report dated 26th May 2015 wherein the same Ministry recommended not to award contract for security services to the Applicant for tender exercises due unsatisfactory service. (vide IRP Decision 18/17 – Rapid Security Services Ltd v/s Ministry of Youth and Sports CN16/17/IRP). In the circumstances, given that selected bidder’s contract terminated on 30th October 2017, the selected bidder failed to satisfy the minimum qualifying criteria of ITB 5.2(b) – Section II Bidding Forms – experience and satisfactory performance over the*

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last three years as prime contractor in providing services on sites of similar nature as specified in the scope of service and failed to comply with ITB 3.2.4, 3.3.3 and 3.3.7 Section V – General Conditions of Contract.

5. *The bid of the selected bidder fails to meet the requirements of the bidding documents in that:*

(a) ITB 13 – Technical Proposal of Section II Bidding Forms;

(b) ITB 5.1(d), (c), (i) and (k), ITB 5.2(b), (c) of Section II Bidding Forms;

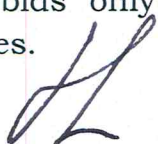
(c) ITB 3.2.4 (Eligibility Criteria), 3.3.3, 3.3.4, 3.3.7 (Qualification and Experience) of Section V – General Conditions of Contract; and

(d) ITB 3.4.3 and 3.4.4 (Technical Compliance) of Section V – General Conditions of Contract, have not been complied with. Therefore, the bid of the selected bidder should have been declared non-responsive and be rejected.

6. *The Public Body's failure to address the specific grounds raised in Applicant's challenge dated 19th January 2019 in its letter dated 25th January 2019 in reply amounts to an admission of the said grounds, especially having regards to the transparency which should prevail throughout the procurement process, including consideration of the challenge. By simply stating that the Applicant's bid was not retained for two alleged reasons, does not in any way address the grounds raised by the Applicant in its challenge dated 19th January 2019.*

The Respondent, in its Reply to the Statement of Case, has stated that:

- (1) the contract for the provision of security services were not renewed on the 31 October 2018 as there had been several reports and cases of unsatisfactory services
- (2) the Applicant had been requested to submit information on evidence for security services on similar works and size as far as possible performed for the last three years as per templates specified in the bidding document. Applicant failed to provide same.
- (3) a number of documents were submitted online under heading "Other Documents". The incomplete information was too vague and imprecise
- (4) The evaluation of bids was carried out according to the criteria and methodology set up in the bidding document taking into account all documents furnished by bidders in their bids only, independent of external report on unsatisfactory services.


The Applicant then submitted its Reply to this stance by the Respondent and essentially averred that its bid was substantially responsive, that the bid of the Successful Bidder was not so because it had not given a mandatory undertaking and this major omission could not be cured by the Respondent requesting submission of further documents from the Successful Bidder. Accordingly, the latter's bid should have been rejected.

E. Findings

Communication and exchange of documents between parties

Before we deal with the merits of the present application, we would like to address the concerns raised by the public body when the proceedings before us were initiated with particular focus on the deadlines to submit what would amount to the pleadings before us; statement of case of an applicant, the reply of the public body and the reply to the latter by the applicant. We note that this issue has also been made part of the reply by the public body.

The Respondent public body's supervising officer had quite forcefully made the point in a letter sent to our fellow entity, the Procurement Policy Office, and since he copied the Panel in his letter, it ought now to be made part of the record of these proceedings. We hope the following will therefore help and be of great import to litigants appearing before us in future.

We find it useful to reproduce the self-explanatory provisions of the Public Procurement Act 2006 (the "Act") and Public Procurement Regulations 2008 (the "Regulations") that govern submission and, more importantly, exchange of statements between the parties- the emphasis added is ours.

Section 45 of the Act

"(2B) (a) The unsatisfied bidder shall, at the time of his application for review, submit to the public body a copy of the application together with the documents specified in subsection (2).

(b) The exchange of information and particulars relating to the statement of case and witness statement referred to in subsection (2A) shall be carried out in such form and manner as may be prescribed."

Paragraph 55 of the Regulations

"55. Reply and comments on application for review by Independent Review Panel

(1) For the purposes of section 45(2B)(b) of the Act, the public body shall, not later than 7 days from the date of receipt of the copy of the application, particulars, statement of case and witness statement, forward its reply and comments thereon to the Review Panel, with copy to the applicant.

(2) On receipt of the copy of the reply and comments referred to in paragraph (1), the applicant may, within 7 days of the date of receipt, submit his reply and comments thereon to the Review Panel, with copy to the public body.”

The inescapable conclusion from these provisions is that a party should communicate its pleadings (as well as any other documents referred to in the Act and Regulations) simultaneously to the Panel **and to the other party or parties**. We understand that, in the past, previous Panels had been forwarding pleadings to the relevant parties but this was more of a courtesy and we invite litigants before us to abide by what is provided in the law. In the present matter, the Applicant lodged its case on 31st January 2019 and it was only on the 4th February 2019, when our staff faxed the Application for Review to the public body, in order to obtain the documents the Panel is entitled to receive, that the Ministry was made aware of the Application for review. Officially, it only received a copy of the Application on 6th February 2019 when the Ministry’s reply was due on 7th February 2019, that is, on the very next day.

Of course, we have had to take into account such delays and given ample time to the Ministry to put in its reply and to the Applicant to settle its final pleading yet we cannot emphasise enough the need to abide strictly with the deadlines set out in the law and those prescribed. Litigants should be aware of the firm deadline to render judgment which is 30 days and we would not wish that there be an irreconcilable conflict between our duty to act fairly towards all parties before us and give them ample opportunity to settle their pleadings and our duty to this nation to render swift adjudication in cases brought before us.

In addition, it is essential that selected bidders, who more often than not accept our invitation to be represented at hearings, be provided by the two ‘main parties’ with the pleadings in good time for them to retain counsel, if necessary. They are not to be ambushed the moreso that, so often, points of law are raised by Applicant’s at a late hour and we find ourselves in the impossibility of allowing intervening parties more time because of the suspension of the procurement proceedings lapsing.

This is ever more important when, as has happened in this case, either party moves for a postponement and the matter was heard on 25th February 2019 with our Decision being due by 1st March 2019.

On a side note, we note that, in his letter copied to us, the supervising officer of the Ministry also raised concern about the suspension we had ordered in this matter and its impact. We would like to place it on record that we are the quasi-judicial body called upon to oversee all procurement proceedings where there is any application by an unsuccessful bidder. We order a suspension solely on the basis of what the Act provides: a *prima facie* case disclosed in the Application for review placed before us and we will not be influenced by other considerations.



Evaluation of Technical Proposal

We now turn to an analysis of the two bids relevant in the present Application.

According to the Bidding Document, Bidders had to submit a Technical Proposal and a Financial Proposal. The Technical Proposals were to be evaluated under the following five Technical Criteria and with a total marking of 70 marks:

1. Company Profile and Experience
2. Site Management and Organization/Methodology and Management
3. Manpower Policy, Recruitment and Screening Mechanism, Training
4. Supervision and Monitoring Mechanism
5. Logistics

Moreover, *“The minimum pass mark for the Technical Evaluation shall be **50 (fifty)** and only those bids having scored at least the pass marks shall be retained for further evaluation. Bids having scored less than the pass marks shall be declared non responsive.”*

The expected content under each of these technical criteria as well as other required information related to the Technical Proposal were given at Section 13 -Technical Proposal, of the Instruction to Bidders and we are of the view that these were far from being ambiguous.

Submission in respect of the Applicant’s bid.

According to the Respondent, and as conveyed in its Reply to the Statement of Case of the Applicant, the Bid Evaluation Committee was unable to determine the Applicant’s capability to execute the contract satisfactorily in case of award because the information submitted with respect Site Management, operation, manpower and logistics was incomplete. Consequently, the Applicant obtained only 19 marks out of 70, thus failing to qualify, as the pass mark was 50 out of 70. Having failed the technical evaluation, the Applicant’s bid was not retained, whilst the Selected Bidder, which scored 70 out of 70 was retained for financial evaluation.

In its subsequent Reply, the Applicant has maintained that it submitted all needed information and the Bid Evaluation Committee ought to have found out that the Applicant obtained the pass mark for technical evaluation and its Bid should have been retained for further evaluation.

The Applicant also pointed out that in a previous procurement exercise for similar services and with the same Respondent, the Applicant had submitted for this procurement exercise subject matter of case before the IRP, the same information as was provided in the previous procurement exercise and it scored 57 marks and its bid was retained for further evaluation (vide IRP – Decision No.18/17 – Rapid Security Services Ltd v/s Ministry of Youth and Sports CN16/17/IRP).



During the hearing on 25th February 2019 and upon cross examination, the Chairperson of the BEC has given us a breakdown of marks allotted under the different technical marking criteria and the BEC's methodology for evaluation and marking. When cross examined on the big difference in the 19 on 70 obtained by the Applicant in the present bid evaluation and the 57 out of 70 marks obtained by the Applicant in June 2017, for a similar exercise, the Chairman of the BEC has stated that the 2017 Bid Evaluation was done by a different Bid Evaluation Committee and he could only comment on the present Bid Evaluation.

Findings in respect of the two relevant bids

In order to determine the propriety of the bid evaluation process, the Panel has scrutinised relevant documents at its disposal, namely

1. The Bidding Document
2. The Bid Evaluation Report
3. The Bid of the Applicant
4. The Bid of the Selected Bidder
5. The Bid Evaluation Report dated June 2015, for the previous Bidding Exercise

Whilst the Applicant does submit information under the different Technical Criteria, the Panel finds that the required information is not always apparent at first nor are the documents 'forthcoming'. In fact, the information is seldom provided in the expected format and would, in our view, fall short of expectations, in certain aspects, at the very least. Nevertheless, we do agree that a substantial amount of relevant information can be extracted from the documents submitted 'en vrac' by the Applicant and it might then be possible for marks to be allocated under the different heads.

In complete contrast, the Selected Bidder's technical submission is more comprehensive and relevant information can be extracted for evaluation purpose with much less difficulty, so to speak.

However, we note that even then, some information was not submitted by the Selected Bidder in the expected format. The Bid Evaluation Committee has systematically awarded it full marks under each technical criteria, leading to a total score of 70 out of 70. Any shortcoming should indeed be considered in the allocation of marks; Full marks, as the Selected Bidder has seemingly enjoyed, should only be given in case of perfect submissions.

Even though this does not unduly influence our Decision, the Panel has also gone through and has noted the marks awarded under the same technical criteria in the June 2017 bid submitted by the Applicant. As eloquently put by the Chairman of the Bid Evaluation Committee in the present matter, it was a different Bid Evaluation Committee, set up by the same Public Body, but led to a total technical score of 57 out of 70 marks- thus achieving the pass mark of 50.



We could posit that, since the breakdown of mark under each of the five technical criteria (sub-criteria) are few, it allows for a higher degree of subjectivity in the evaluation, this could partially explain the significant difference of marks for the same type of exercise (a total 19 marks under the present exercise compared to 57 marks under the June 2017 exercise).

We will now focus on the marks allocated in the present matter. The table of marking system and marks obtained by the applicant is given hereunder.

| Details of Technical Evaluation Markings (for security services) | | Marking of Applicant |
|--|-----------|----------------------|
| | Max Marks | |
| Company Profile and Experience (Marks for the criterion and sub-criteria to be inserted by the Employer) | | |
| Experience in providing security services to businesses/companies that are comparable in size, profile and security requirements to the Public Body. | 12 | 2 |
| Client References | 3 | 0 |
| Sub Total (A) | 15 | 2 |
| Site Management and Organization/ Methodology and Management Approach (Marks for the criterion and sub-criteria to be inserted by the Employer) | | |
| Methodology and site management for efficient security services | 10 | 3 |
| Organizational chart & Key personnel | 5 | 2 |
| Sub Total (B) | 15 | 5 |
| Manpower Policy, Recruitment and Screening Mechanism, Training (Marks for the criterion and sub-criteria to be inserted by the Employer) | | |
| Recruitment mechanism | 5 | 2 |
| Specific training (customer service and working in premises that are comparable in size, profile and security requirements to the Public Body) | 5 | 2 |
| Sub Total (C) | 10 | 4 |
| Supervision and Monitoring Mechanism (Marks for the criterion and sub-criteria to be inserted by the Employer) | | |
| Supervisory structure to monitor Security Guards. | 5 | 2 |
| Number of random night checks and day checks per site | 3 | 1 |
| Mechanism for reporting of incidents | 2 | 1 |
| Sub Total (D) | 10 | 4 |
| Logistics (Marks for the criterion and sub-criteria to be inserted by the Employer) | | |
| Details of fleet of vehicles & deployment for rapid response | 8 | 1 |
| Number of control centers operational island wide on a 24-hour, 7 days a week basis. | 7 | 1 |
| Communication tools of security personnel | 5 | 2 |
| Sub Total (E) | 20 | 4 |
| TOTAL MARKS-Technical (A+B+C+D+E) | 70 | 19 |

The Panel notes that there is a pattern of low marking as regards the Applicant's bid which is not always warranted. The following two instances are given by way of example.

1. Criteria - Company Profile and Experience

The Applicant has obtained only 2 marks out of 12. The panel is of opinion that it should have scored more under that count since it was founded in 2006 and has since been providing security services to numerous clients

including different Government Institutions and Parastatal Bodies. Such information is available in the Applicant's Bid. The BEC based its marking only on information submitted for the last three years only instead of considering the Applicant's total experience. Experience and satisfactory performance over the last three years is only a parameter to qualify for award as specified under clause 5.2 of the ITB. The total experience of the Bidder must be considered, in our view.

2. Criteria - Logistics

The number of vehicles, control centres and communication tools as submitted respectively by the Applicant and the Successful Bidder are almost equivalent. The Applicant has been awarded only 4 marks out of 20 whilst the Successful Bidder has obtained 20 marks out of 20. The Applicant has also committed to buy additional telephones if awarded the contract, which is permitted under the present Bidding Documents. As such, we are surprised by the considerable gap between the markings allocated.

As a result of the above findings, the Panel is of the considered view that a review of the markings should be carried out by a different Bid Evaluation Committee.

Undertaking by Selected Bidder about salaries of its personnel

At the hearing of 25th February 2019, the Applicant has heavily relied on the argument that the undertaking, as required by a number of clauses and ITBs in the Bidding Documents, was not given by the Selected Bidder in a timely manner. The Ministry's response was that it was given at its request and this was appropriate since it had the power to request such an undertaking even though it is required by some of the ITBs, including ITB 12.1 (about online submission of documents comprising the bid) which applies at the time of submitting the bid itself. The Respondent ministry argued that it was not a major omission and it could obtain it under ITB 27.

We will leave determination of such a question to another day since we were baffled to find that the Selected Bidder had indeed submitted the undertaking (at page 28 of its bid) and this seems to have escaped the attention of the Bid Evaluation Committee.

Previous 'record' of bidders and 2017 Decision by the IRP

The Applicant, in its statement of case, has also relied on the previous Decision of the Panel from 2017, referred to above, in which the applicant

was none other than the successful bidder in the present one, and in which the successful bidder was the Applicant itself. It argues that the successful bidder this time around was the subject of adverse comment from the Ministry and this should be taken into account by us when determining the present application.

We have read with much interest the Decision of the previous Panel and we do not agree with the submission of the Applicant that this should influence our findings here. On the contrary, the Ministry's unbiased decision is a testimony to what the Panel stated in 2017 namely that the Ministry should consider all bids from any tenderer unless the latter is clearly debarred from submitting bids - even though the Ministry may have a personal preference or dislike for any particular tenderer based on past dealings.

Our fellow entity, the Procurement Policy Office guides the Central Procurement Board and public bodies in the procurement process through its directives and it, or ministries or the CPB, also maintain what we could describe as a 'black lists' of bidders debarred from participation. It follows, therefore, that having been on such lists in the past cannot mean that a bidder should be now prohibited from participation in procurement proceedings. Accordingly, we can only agree with the previous Panel's views that unless a bidder is so blacklisted, his bid should be given due consideration and evaluated with a fresh outlook, as it were. The same ought to, in our view, apply to any adverse reports issued by the Ministry several years prior. Grounds 4 and 5 therefore fail.

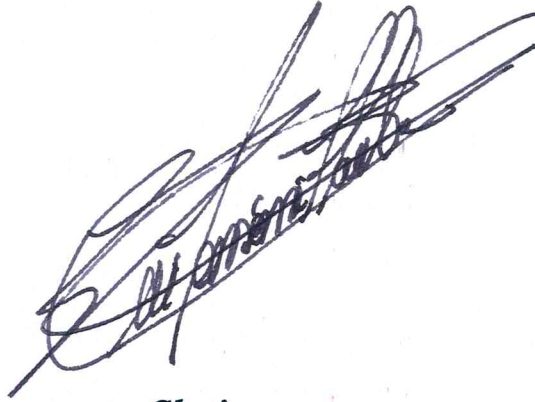
On a final note, in respect of Ground 6, we must to some extent agree with the Applicant in respect of the adequacy of the Ministry's response to its challenge. However, we do not subscribe to the argument that the Ministry made any admissions or that this Panel is somewhat bound by what occurred at challenge stage. The procedure under section 43 of the Act is the first stage of review, and the Panel is the upper-tier and we are of the opinion that any deficiency or defect at challenge stage, by both sides, can be addressed and appropriately dealt with during the review proceedings before us.

Conclusion

In view of the above, we hereby order that the bids be re-evaluated taking into account the comments we have made with regards to the markings.

Since the Policy Office has issued a directive that when this Panel orders re-evaluation of bids, it is to be done by a differently constituted Bid Evaluation Committee, we need not make this a component of our Decision.





Chairperson
(H. Lasse Millante)



Member
(R. Mungra)



Member
(A.K. Namdarkhan)

Dated: 1st March 2019

