



Independent Review Panel

Decision No. 08/19

In the matter of:

Keep Clean Ltd

(Applicant)

v/s

**Ministry of Education and Human Resources, Tertiary
Education and Scientific Research**

(Respondent)

(Cause No. 07/19/IRP)

Decision

A. History of the case

The case relates to an invitation to tender by the Ministry of Education and Human Resources, Tertiary Education and Scientific Research for the construction of a staff toilet block at Swami Sivananda Government School, Tyack (Procurement Reference No. MOEHRTESR/Works/ONB 141/2017-18). Bids were invited on 07 August 2018 and were received on 11 September 2018. The list of Bidders and Prices as read during bids opening were:-

<i>Bid No.</i>	<i>Name of Bidder</i>	<i>Bid Amount (Incl. of Contingencies and Excl. of VAT) (Rs)</i>
1	<i>R.N Building and Services Co. Ltd</i>	<i>1,924,600.00</i>
2	<i>Safety Construction Co. Ltd</i>	<i>3,601,050.00</i>
3	<i>Keep Clean Ltd</i>	<i>3,170,000.00</i>

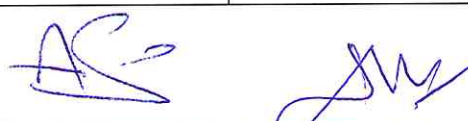
B. Evaluation

The Bid Evaluation Committee for this bidding exercise after bid evaluation concluded that Safety Construction Ltd is the only substantially responsive bidder and therefore recommended award of the contract to them.

C. Notification of Award

Through a letter dated 16 April 2019 the Ministry of Education and Human Resources, Tertiary Education and Scientific Research notified the Applicant that an evaluation of the bids received has been carried out and its bid has not been retained for award. The particulars of the successful bidder, are as follows:

Description	Name Selected Bidder	Address	Contract Price (Rs)
<i>Construction of Staff Toilet Block at Swami Sivananda Government School, Tyack</i>	<i>Safety Construction Co. Ltd</i>	<i>Royal Road, Camp de Masque Pave</i>	<i>Rs 4,141,207.50 inclusive of a contingency sum of Rs 170,000 and VAT</i>



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D. The Challenge

On 22 April 2019, the Applicant challenged the procurement on the following grounds:

“The procurement award must be made to the lowest evaluated substantially responsive bidder. The Applicant contends that the selected bidder is not the lowest evaluated substantially responsive bidder for the procurement exercise.”

E. The Reply to Challenge

On 26 April 2019, the Public Body made the following reply to the challenge and stated that:

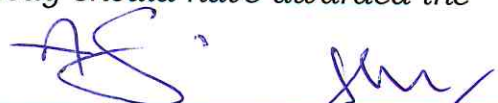
- “(i) The Electrical Technician proposed by Keep Clean Ltd as Key Personnel possessed only 8 months experience instead of 5 years, as stipulated in ITB 6.3(d) of the Bidding Document. Therefore, the bid of Keep Clean Ltd, was not responsive.*
- (ii) The contract has been awarded to the selected bidder having submitted the lowest evaluated substantially responsive bid as per Section 40 of the Public Procurement Act 2006.”*

F. Grounds for Review

On 02 May 2019, the Applicant seized the Independent Review Panel for review on the following grounds:

- “(a) The Public body failed to take into consideration the fact that Keep Clean Ltd was the lowest evaluated bidder as compared to Safety Construction Co Ltd;*
- (b) The Public Body failed to appreciate that Keep Clean Ltd was more substantially responsive to the bidding documents as compared to Safety Construction Co Ltd;*
- (c) The Public Body erred in finding that the ‘Electrical Technician’ proposed by Keep Clean Ltd ‘possessed only 8 months’ experience when in truth and in fact, the said ‘Electrical Technician’ possessed a ‘minimum 5 years’ experience’ in accordance with the requirements of ITB and BDS 6.3(d).*

For all the reasons given above, the Public Body should have awarded the bid to Keep Clean Ltd.”



G. The Hearing

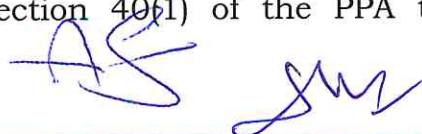
Hearing was held on 22 May 2019. There was on record, a Statement of Case, a Statement of Defence and written submissions filed by both parties.

The Applicant was represented by Mr. A. Sookhoo, Barrister, whereas the Respondent was represented by Mrs. R. Vydelingum, Principal State Attorney and Miss Pem, State Counsel.

H. Findings

Counsel for the Applicant has in his submissions before the Panel and in his written submissions, stressed on the following:

- (a) Applicant's bid was lowest
- (b) Applicant's bid was substantially responsive as pursuant to Clause 6.3(d)(5) of the ITB the Electrical Technician proposed by the Applicant indeed had a minimum of 5 years experience.
- (c) The Respondent misdirected itself by looking at the 8 months in isolation when the personnel's C.V taken as a whole speaks for itself and demonstrates 5 years experience in the relevant field, because ITB 6.3 (d)(5) reads as "One registered Electrical Technician with a minimum of 5 years experience..." but did not specifically mention that the 5 years experience should be as Electrical Technician.
- (d) That the award of the contract on the 15th April 2019 was unlawful for the following reasons:
 - (i) Pursuant to Section 40(1) of the Public Procurement Act 2006 ('the PPA'), an award of contract shall only be made after the steps outlined in Section 40 (3) and 40 (4) have been complied with;
 - (ii) Whilst the step under Section 40(3) of the PPA (i.e notification) is subject to the prescribed threshold criteria, the step under Section 40(4) of the PPA is not subject to the said criteria; and it is not disputed that a challenge had indeed been lodged within 7 days, hence the Respondent was not empowered pursuant to Section 40(1) of the PPA to award the contract.



The Applicant is therefore moving that the Application for Review be allowed and the bids re-evaluated.

The Respondent in its Statement of Case in reply to the Statement of Defence of the Applicant raised 3 points in law, viz:-

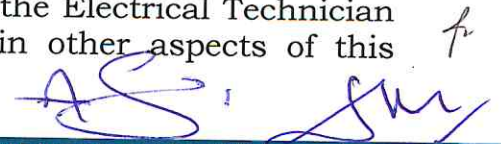
- (a) Notification to Successful Bidders and Unsuccessful Bidders is provided for in respect of contract above the threshold value of Rs. 15 million and is governed by Section 40 (3) of the Public Procurement Act. In the present case the notification was not warranted as the contract value was below Rs. 15 million.
- (b) Certificate of urgency may be resorted to by a Public Body in case procurement proceedings are still ongoing and the IRP has suspended the proceedings following an appeal made to the IRP by an aggrieved bidder. This is applicable for procurement above the threshold value of Rs. 15 million.
- (c) The cancellation of procurement proceedings and issue of the Certificate of Urgency by the Ministry are not warranted because the contract value is below the prescribed amount of Rs. 15 million and challenge and subsequent application for review were made after the entry into force of the procurement contract.

On the merits, the Respondent has mainly averred that:-

- (a) The Applicant was not retained as the Successful Bidder as it's bid was not the lowest evaluated substantially responsive bid;
- (b) The Applicant was not technically responsive to the requirements more specifically spelt out for Key Personnel; and
- (c) Applicant had proposed an Electrical Technician who possesses 8 months of working experience as Electrical Technician instead of 5 years as required by ITB 6.3 (d) (5) of the bidding document. The rest of his experience was as Electrician.

The Panel had the opportunity to hear Mr N. Appasamy, a representative of Applicant and Mr Y. Munbodh, Deputy Permanent Secretary and Mr A.D. Gunnuck, an Engineer who deponed on behalf of the Respondent.

The Panel shall in the first instance determine whether the Applicant has complied with Instructions to Bidders more specifically Clause 6.3 (d)(5) of the ITB, regarding the experience of the Electrical Technician proposed for the project, before venturing in other aspects of this Application.



In the bidding documents Clause 6 of the ITB provides for qualification of Bidders and 6.3 provides that to qualify for award of the contract, bidders shall meet the following minimum qualifying criteria, amongst others, ITB 6.3(d) (5) Key Personnel **one Electrical Technician** with minimum 5 years' experience holding:

- (a) Level 3 IVQ Advanced Diploma in Electrical Installation (City & Guilds of London Institute) or
- (b) Level 3 Diploma in Engineering- Electrical & Electronic Engineering (City & Guilds of London Institute) or
- (c) NC Level 4 in Electrical Installation Works (MITD/MES) or
- (d) NTC Level 2 in Electrical Installation Works (MITD/MES) or
- (e) any other alternative qualification to the above.

The Panel also noted that at ITB 6.3(d)(6) there is in addition provision for at least one experienced **Electrician** holding:

- (a) NTC Level 3 in Electrical Installation works (MITD/MES) or
- (b) NC Level 3 in Electrical Installation works (MITD/MES) or
- (c) Level 2 Certificate in Engineering – Electrical & Electronics Technology (City & Guilds of London Institute) or
- (d) any other alternative qualification to the above.

The Panel further noted that in the CV of the proposed Electrical Technician, it is clearly stated that his experience as Electrical Technician is from February 2018 onwards. His earlier experience is as Electrician.

Mr Y. Munbodh and A.D. Gunnuck, who deponed on behalf of the Respondent explained the difference in level of responsibilities of the Electrical Technician and the Electrician and their related qualification and experience requirements. They stressed on the fact that the Electrical Technician needed should have a minimum of 5 years experience as Electrical Technician and not as general experience as Electrician.



After having consulted all the related documentation and hearing the arguments submitted on behalf of Applicant and Respondent respectively, this Panel is of the view that it was mandatory that the Electrical Technician should have a minimum of 5 years experience as Electrical Technician.

The very fact that the Applicant itself proposed an Electrical Technician with 8 months' experience, the Bid Evaluation Committee in our opinion, rightly decided not to retain the Applicant for further evaluation.

I. Conclusion

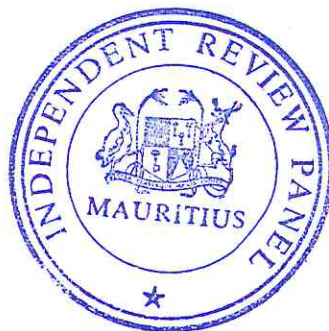
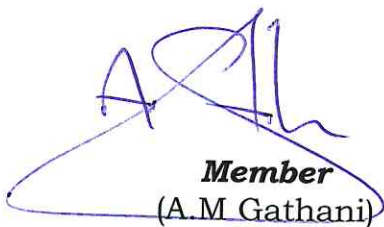
The Panel is of the opinion that on the issue of Electrical Technician, the Respondent has made out its case and therefore there is no need to consider the other issues raised by the Applicant.

This Application is therefore dismissed.

Vice-Chairperson
(H. Gunesh)



Member
(A.M Gathani)



Member
(R. Mungra)



Date: 28 May 2019

