Independent Review Panel

Decision No. 11/19

In the matter of:

FTM (Mauritius) Ltd

(Applicant)

v/s

Trust Fund For Specialised Medical Care (Cardiac Centre)

(Respondent)

(Cause No. 08/19/IRP)

Decision

A. History of the case

On the 29th April 2019, the Trust Fund for Specialised Medical Care invited the submission of bids for a Heart Lung Machine by way of letter bearing the procurement reference number **FTSMC/CC/RB/16/2018-2019**. The closing date was Monday 20 May 2019. The bids would be opened by the Public Body at the Cardiac Centre. On the 20th June 2019, the notification letter specifying that the award for the bid had been awarded to LEMEX Products Ltd for a total amount of Rs 6,600,000 was received. The Applicant applied for review in its statement of case dated 24 June 2019. The application was filed to the Independent Review Panel on the grounds that the bid value of the Applicant was Rs 4,991,000.00 as compared to that of LEMEX Products Ltd, the successful bidder amounting to Rs 6,600,000.00. The Applicant's bid was the lowest one.

The Applicant met all the criteria including the Technical Requirements within the tender. So, the Applicant's bid was substantially responsive. In this case, it is noteworthy that the value of the procurement contract does not exceed the prescribed threshold as set in Regulation 38(3) of the Procurement Regulations 2008. "For the purpose of Section 40(3) of the Act, the prescribed threshold is 15 million rupees." A notification of Award of the contract to LEMEX Products Ltd had been issued by the Public Body, here the Respondent. Thereupon, the Applicant applied under Section 45 (1)(c) of the Public Procurement Act. "An unsatisfied bidder shall, subject to Section 39(5) be entitled to ask the Review Panel to review the procurement proceedings when after the entry in force of the Procurement Contract, the value of which is above the threshold prescribed by Regulation but does not exceed the prescribed threshold referred to in Section 40(3) he is not satisfied with the procurement proceedings on a ground specified in Section 43(1)". In the present matter, the procurement contract had already entered in force. The issue before the Panel is to decide upon the remedy which may be awarded by the Panel as spelt out in Section 45(10) of the Act (10).

The Review Panel may dismiss an application for review or may, if it determines that there is merit in it, order one or more of the following remedies:

S45(10)(D) "recommend payment of reasonable costs incurred in participating in the bidding process when a legally binding contract has been awarded which in the opinion of the Review Panel, should have been awarded to the Applicant."

In this case, the above Section and Subsection are applicable. At this stage, the Panel cannot prohibit the Public Body from acting or deciding in an unauthorised manner or from following an incorrect procedure. The Panel cannot recommend the annulment in whole or in part of any unauthorised Act or decision of the Public Body. It cannot recommend a re-evaluation of the bids, or a review of the decision of an award, specifying the grounds for such recommendation. The contract has been awarded.

However, the test is

(1) whether the legally binding contract award to LEMEX Products Ltd ought to have been awarded to the Applicant and

(2) what are the reasonable costs incurred in participating in the actual bidding process.

An examination of the first limb or the test is bound to consider the principle of responsiveness and the technical compliance. These requests are mentioned in Clause 10 of the Bidding Documents Technical Compliance. It provides that:

"Bidders shall submit along with their bids documents, catalogues and any other literature to substantiate compliance with the required specifications and to qualify deviations if any with respect to Purchaser's requirements. The Specifications and Performances Requirements and Compliance Sheet details the minimum specifications of the goods items to be supplied. The specifications have to be met, but no credit will be given for exceeding the specification."

Directive No.3 (Determination of Responsiveness of bids (as amended)), Section 2(iv) further provides that

"**ITB 29.2:** A substantially responsive bid is one that meets the requirements of the Bidding Document without material deviation, reservation, or omission. A material deviation, reservation, or omission is one that,

(a) If accepted, would

(i) Affect in any substantial way the scope, quality, or performance of the Works specified in the Contract; or

(ii) Limit in any substantial way, inconsistent with the Bidding Document, the Employer's rights or the Bidder's obligations under the proposed Contract; or

(b) If rectified, would unfairly affect the competitive position of other Bidders presenting substantially responsive bids."

The Guidelines for the determination of responsiveness of bids read:

"..... in order to ensure that a thorough check of the substantive responsiveness of all bids is carried out, a Table of Substantive Responsiveness to Commercial Terms and Table of Substantive Responsiveness to Technical Requirements should be prepared. The tables should list all major conditions for Commercial Terms and all major conditions for Technical Requirements which the bidders must meet for their bids to be considered substantially responsive. The responsiveness of each bid received should then be checked against this list, and its conformance or partial conformance, or non-conformance to each item should be entered in the tables. Bids which fail to conform to any of the major conditions should normally be considered non-responsive and should be rejected."

1. Material Deviation

Item 2.8 of the Technical Requirements required that "each pump must have independent control system using high contrast display".

In light of the Bid Evaluation Committee's ("BEC") observations that "each pump does not have an independent control system...it has a single system with a rotary knob on the control panel.....," it is submitted that the alternative proposed by the Applicant failed to meet the required standard.

Material Omission 1

Item 3.3 of the Technical Requirements required that "the bidder should quote an additional set of all accessories for the above-mentioned modules as an option". In relation thereto, the BEC observed that the set of accessories submitted by the Applicant was incomplete.

Material Omission 2

Item 5.8 of the Technical Requirements required that the system overview "should consist of Override Key". In relation thereto, the BEC observed that the Applicant failed to state whether in its bid, the system overview consisted of an Override Key.

Material Omission 3

Item 7.1 of the Technical Requirements required that the biomedical test equipment should include a "suitable digital tachometer for measuring RPM of the pumps". In relation thereto, the BEC observed that the Applicant failed to submit brochures to that effect.

The Applicant's admission at paragraph 12 of its Statement of Reply to the effect that its brochures did not mention the Digital Tachometer is further highlighted.

These material omissions result is the non-responsiveness of the Applicant's bid which has far reaching consequences. The BEC has no obligation to request clarification when a bid is not substantially responsive. This summarizes the contractual situation as specified in Section 7 of the Invitation of bids and the Non-conformities, Errors and Omissions. Directive 3 – ITB 30-2. Several questions were put to the Public Body regarding the obligation to request clarifications. The simple answer is that there is no such obligation here due to the unresponsiveness of the bid of the Applicant.

B. Notification of Award

Through a letter dated 20 June 2019 the Trust Fund For Specialised Medical Care (Cardiac Centre) notified the Applicant that the following the bidding exercise carried out by the Trust Fund For Specialised Medical Care for Procurement of Heart Lung Machine **(TFSMC/CC/RB/16/2018-2019)**, the contract has been awarded as follows:

Item No	*Description*	*Physical Unit*	*Quantity (Unit)*	*Name of Bidder*	*Address*	*Total Amount (Excluding VAT) (Rs)*
1.	*Supply, Installation, Testing and Commissioning of Heart Lung Machine with all necessary accessories*	*Unit*	*1*	*LEMEX PRODUCTS LTD*	*BON AIR, MOKA*	*6,600,000.00*

C. Grounds for Review

On 24 June 2019, the Applicant seized the Independent Review Panel for review on the following grounds:

1. *"The decision of the Trust Fund for Specialised Medical Care (Cardiac Centre) to consider Lemex Products Ltd as the successful bidder and to award the tender for the procurement of Heart Lung Machine to the latter, is manifestly wrong, unfair, unreasonable and untenable inasmuch as:-*

    (a) FTM (Mauritius) Ltd's bid is to all intents and purposes is technically responsive;

    (b) the bid value of FTM (Mauritius) Ltd on the awarded item was Rs. 4,991,000.00/- as compared to that of Lemex Products Ltd which amounted to Rs. 6,600,000.00/-

    (c) the bid of FTM (Mauritius) Ltd was in circumstances the lowest evaluated substantially responsive bid;"

D. The Hearing

Hearings were held on 16 July 2019. Written submissions were made from both Applicant and Respondent on 16 July 2019. Additional written submissions were further submitted by Applicant on 21 July 2019.

The Applicant was represented by Messrs. Vencadasmy and Sunasee, of Counsel while the Respondent was represented by Mr Mamoojee, Miss Luttoo and Mrs. Cheekhoory, of Counsel.

E. CONCLUSION

The end result is that there is no merit in the present Application for Review. So the Panel cannot exercise its discretion and recommend the payment of reasonable costs incurred in participating in the bidding process. We cannot conclude that a legally binding contract should have been awarded to the Applicant. Reasonable Costs will not be ordered in favour of the Applicant as provided by Section 45 (10) (2) of the PPA 2006. This Panel notes that the Applicant has not established the amount of reasonable costs incurred in participating

in the bidding process. However, the Panel will not dwell upon that issue as the non-responsiveness of the Applicant's bid vitiates the entire process

Chairperson
(H. Lassemillante)

Member
(A.K. Namdarkhan)

Member
(V. Mulloo)

INDEPENDENT REVIEW PANEL MAURITIUS

Dated: 02 August 2019