



Independent Review Panel

Decision No.15/19

In the matter of:

Marce Fire Fighting Technology (PTY) Ltd

(Applicant)

v/s

**Commission for Health, Community Development, Fire
Services, Meteorology, Civil Status, Customs and Excise,
Postal Services and Judicial
Rodrigues Regional Assembly**

(Respondent)

(Cause No. 15/19/IRP)

Decision

A. History of the case

The Public Body, the Rodrigues Regional Assembly (the “Assembly”) called for bids for the ‘*Supply, delivery and commissioning of water/foam tender for the Rodrigues Fire and Rescue Services*’ on 01 April 2019 with a submission date set for 02 May 2019. This was subsequently postponed to the 14 May 2019. There were four bidders, including the Applicant, Marce Fire Fighting Technology (Pty) Ltd, a company incorporated in South Africa. The bids were opened on the 14 May 2019 and the Bid Evaluation Committee, set up by the Assembly, proceeded with the evaluation of the bids.

B. Notification of Award

Through a letter dated 13 August 2019 the Public Body 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 were communicated and were as follows:

Name of Bidder	Address	Contract Price (Rs)
<i>Crans and Co. Ltd</i>	<i>62, Pailles Road, Les Pailles, Mauritius</i>	<i>16,248,000.00 excluding VAT</i>

C. The Challenge

On 16 August 2019, the Applicant challenged the procurement on the following grounds:

“WE WERE THE LOWEST BIDDER AND FULLY COMPLIANT WITH THE TENDER REQUIREMENTS”

D. The Reply to Challenge

On 23 August 2019, the Public Body made the following reply to the challenge: *“Please find hereunder the weakness noted in your bid which have resulted to the non-responsiveness of your offer:*

Item No.	Name of Goods and Related Service	Technical Specifications and standards of the Bid Document	Your offer	Bid

4.11	<i>Towing Jaws</i>	<i>Towing Jaws with pin to be provided in front and at the rear of the chassis and in accordance with BS AU 35</i>	<i>Towing jaws provided at the rear only</i>
7.1	<i>Water/Foam Pump Type</i>	<i>- Light alloy, multi stage centrifugal pump - To specify Make and Model and to submit technical data sheet and performance curves</i>	<i>No performance curves submitted</i>
7.6	<i>Water/ Foam Pump Features</i>	<i>-Rear near side facing 100mm/140 mm suction connection with BS screw type coupling with mesh strainer and blank cap</i>	<i>No mention of mesh strainer</i>
12	<i>Elevated Emergency Lighting System</i>	<i>Shall be 8 x 42 W led type driven directly from the alternator of the vehicle</i>	<i>3 x 7,000 Lumens led lights provided</i>

”

E. Grounds for Review

On 28 August 2019, the Applicant seized the Independent Review Panel for review on the following ground:

“THE DECISION OF THE PUBLIC BODY IS UNJUST, UNFAIR, UNEQUITABLE AND UNREASONABLE”

F. The Hearing

Hearings were held on 02 September 2019 (pro forma) and 18 September 2019 (merits). The Successful Bidder was invited to attend the substantive hearing and was duly assisted by Senior Counsel, Mr Gavin Glover, appearing together with Ms S. Chuong.





The Applicant was assisted by Mr Aroughen Aran of Counsel instructed by Mr Attorney Rangasamy, while the Respondent was assisted by Mr J. Mosaheb of Counsel, instructed by Mr Attorney Abbasakoor.

G. Findings

A preliminary objection was taken on behalf of the Assembly to the effect that the legal entity prosecuting the application for review before the Panel was not the Applicant. In fact, Mr Patrice Emile, a director of Marce Engineering (Mauritius) Ltd- a Mauritian company- signed and issued the application for review with the accompanying statement of case. However, the bid was made by the South African entity, Marce Fire Fighting Technology (Pty) Ltd.

We invited submission from all counsel on the issue. In Mr Aran's contention on behalf of the Applicant and Marce Engineering (Mauritius) Ltd, the former is, to all intents and purposes, represented by the latter in Mauritius and that Mr Emile was allowed by the Applicant to bring and prosecute the present application for review. Mr Aran added that it was a Mr du Toit, an employee of the South African entity, who had signed the bid of the Applicant as submitted. The challenge under section 43 of the Public Procurement Act 2006 was by a Mr Steyn, the Managing Director of that company and it had later authorised Mr Emile, director of the Mauritian entity, to bring the application for review. A letter setting out this authorisation was provided by Mr Aran to support his submission.

For reasons that will become apparent below, we will leave to another day any discussion on whether the Panel should hold that it is a requirement that documents from abroad are to be apostilled/legalised and deposited as is the case with documents placed before us in view of the statutory duty for the Panel to seek to avoid formality in its proceedings (*vide* section 44(4) of the Public Procurement Act 2006).

The Panel notes, indeed, that the Assembly has seemingly exchanged various correspondence with the Mauritian entity and, for all intents and purposes, treated the latter as one and the same with the South African entity and titular applicant/bidder.



In fact, this most crucial document which is the notification itself, dated 13 August 2019, was addressed to the “Director” of Marce Engineering Technology Ltd of Jackaria Street Pailles. The Assembly then received the challenge dated 16 August 2019 under the hand of Mr Steyn, Managing Director of the Applicant yet it sent its reply to the challenge, dated 23 August 2019, to Jackaria Street, Pailles, this time to the “Managing Director” of Marce Engineering Technology Ltd. It seems to us that the Assembly has mixed the two entities into one that is unknown which is neither Marce Fire Fighting Technology (Pty) Ltd of South Africa nor Marce Engineering (Mauritius) Ltd.

Before that, the notification of the extension of the bid period, dated 31 July 2019, was sent to the Managing Director of Marce Engineering (Mauritius) Ltd.

When we queried Mr Mosaheb on these facts and after he sought instructions from his client, we were told that this had been done through oversight. We cannot emphasise enough the importance that public bodies should ensure strict compliance to the notification mechanism clearly set out in the law. Were it not for the stand of the Applicant that it was on notice of the award to the successful bidder and had authorised Mr Emile to bring the application, a compelling case may have been made for an annulment of the whole procurement proceedings for want of proper notification to an unsuccessful bidder.

Be that as it may, given the Applicant’s stand that it was notified and given that it has even taken the appropriate steps to challenge the award, through the letter of Mr Steyn to the Assembly, of which challenge this application for review under section 45 of the Public Procurement Act 2006 is the logical progression, we find that, on balance, the preliminary objection brought by the Assembly must be purely and simply set aside.

We will therefore proceed with our determination on the merits of the application for review.

Before we deal with the various items of the bid in issue in these proceedings, we must make a general remark on a submission that has been made on behalf of Fire Fighting as applicant. It is contended that by the very fact that it indicates ‘comply’ in its own bid document, it should be deemed as such, that is, that there is indeed compliance with any given requirement of the technical specifications. We must confess that we can hardly subscribe to such a proposition. Applicants bidding in any given bidding exercise could then provide all manner of

misleading information and simply limit themselves to a write 'comply' and expect the public bodies to agree that there is compliance. Quite the contrary, the Public Body, through its independently set up Bid Evaluation Committee ("BEC") should thoroughly examine the bids and technical specifications provided by the bidders and determine their compliance with the bidding documents. This is, of course, in line with good reasoning and, in this present matter, with ITB 19.1.

We now propose to deal, in turn, with each item of the bid which the Assembly contends has not been complied with.

Item 7.1

The reproach made against the Applicant is that it has failed to provide a performance curve as required under this item. The Assembly's witness has elaborated on this requirement and stated that as an evaluation body, it needed to know the various degrees of performance of the pumps at different levels of water pressure. In response, the witness for the Applicant, Mr Z. Kodabuckus, suggested that a performance curve could be derived, deduced from the data provided under item 7.5 which required an indication of the nominal output of water at specific levels of water pressure. To queries from the Panel Members, the witness agreed that these were the 'extreme' water pressure levels and, by that, we understand it to mean that applicants were to provide the level of water output at very low and very high water pressures. We cannot agree with the Applicant's contention that a performance curve can be derived from those two or three reference points and the BEC was placed in a position that it could not compare the pumps' performance with those offered by the other bidders.

The Applicant's statement in its Statement of Case that *'a quick glance at his (Godiva, the manufacturer of the pump in question) web site will confirm it'* is, in our opinion, of no assistance to its case and bidders should be mindful that they are the ones seeking award of procurement contracts from the public bodies and they should supply the relevant information to the latter for them to be able to choose between the bids as per the laws and rules, with equality of treatment of each bidder being paramount to ensure fairness of the proceedings. This is an added duty on public bodies handling public funds and they are not to be assimilated to shoppers who are able to go on the internet, request for brochures and book test drives or walk into a shop and choose between products on the shelves.





On a side note, the Panel drew the attention of the Applicant to the fact that it had even failed to meet the minimum level of output at low pressure and, arguably, has also failed to comply with item 7.5. This has seemingly not been picked up by Assembly in its response to the Applicant's challenge and could very well be because the BEC has indicated 'Comply' under this item in the Bid Evaluation Report. However, on the whole, this does not alter the final determination of the Panel.

Item 7.6

Under item 7.6, bidders were asked to indicate that there was a mesh strainer at the level of the pump. The Applicant did not do so. We understand from the evidence of witnesses on both side that the rationale behind this request is that the pump should be protected from foreign objects in the water flow that could make their way into the pump and cause damage to the latter. It was contended on behalf of the Applicant that since it had indicated under another item that the pump was designed to handle 'dirty water', it should be taken to mean that there was a mesh strainer as required under item 7.6 and at the level of the pump. Once again, the Panel cannot subscribe to this argument and we stress on the importance that bidders should not expect public bodies to carry out a guessing exercise or that the latter have a blanket, all-encompassing duty to ask them, as bidders, for clarifications.

Again, on a side note, the Panel has observed that under another item, item 6.4, where the Assembly did not require any indication of the presence of a mesh strainer, the Applicant did indicate but this strainer is, we gather, at the level of the water tank.

We are surprised why the Applicant failed to indicate that there was a mesh strainer at the level of the pump in compliance with item 7.6, if there indeed was one.

Item 12

This item has been the subject of much debate before us and we will address what we feel are the relevant issues that arose. Item 12 required



that bidders provide a light head which, we are told, is placed centrally on the roof of the fire truck and this light head should comprise 8 X 42W LED lights driven directly from the vehicle's alternator. This is for the clear part of item 12. The Applicant, however, offered a lighting of 3 X 7,000 lumens. There ensued extensive arguments on the equivalence of lumens and watts and we are thankful to the Applicant for having included some form of a conversion table in its Statement of Case which, sadly, does not reach 7,000 lumens and its equivalent in "W".

The witness for the Applicant, an experienced engineer and many times a member of bid evaluation committees, contended that 3 bulbs or units of 7,000 lumens each are equivalent or above the luminosity output of 8 units of 42W each. He also added that the BEC had a duty, under Procurement Policy Office Directive Number 11 not to invalidate this bid since there was clear equivalence and the criterion was met.

The Panel agrees on this duty not to turn down a bid because a given item as offered is in a unit of measurement other than the one used in the bidding document but we must stress that it was, under that same Directive, incumbent upon the Applicant to provide evidence of such equivalence to the Public Body, through documentation, or dossier, from the manufacture or independent test reports.

In addition, the Assembly's requirement was for 8 units of lighting. Its witness aptly explained that there is crucial need for 360-degree light coverage around the fire truck and the more the number of units of lighting, the more residual coverage there would be should one unit fail. In the Applicant's offer, should a lighting unit go out, this would amount to a third of lighting output being lost and 120 degrees not being lit, where if there were 8 units, only 12.5% would be lost (315-degree coverage would be maintained). The contention on behalf of the Applicant that the lighting mast can rotate and that lighting torches have also been requested and would be offer are, therefore, untenable.

Item 4.11

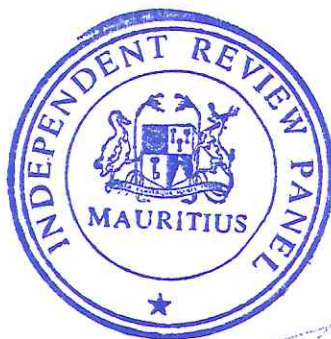
Lastly, we turn to the towing jaws requirement. The Assembly indicated that towing jaws with pin are to be provided in front and the rear of the chassis of the vehicle. Evidence was adduced to explain why a towing apparatus was necessary at both ends in view of the topography of Rodrigues. The Applicant indicated, in its bid, that it *'Two (2) heavy duty*

tow eyes... shall be mounted below the body at the rear (not lifting) of the apparatus without damage' and contends that it only made this comment since a front towing jaw was a standard feature of the vehicle.

However, since we note from the Bid Evaluation Report that the BEC had in fact indicated that the Applicant was in compliance with this item, we hold that, in the very particular circumstances of this case, it cannot now rely on any purported deviation under this item, in fairness.

H. Conclusion

In light of the above, we find that the present application for review is without merit and is hereby dismissed.



(Handwritten signature)
Vice-Chairperson
(H. Gunesh)

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Member
(A. Gathani)

(Handwritten signature)
Member
(A.K. Namdarkhan)

Dated: 26 September 2019

