Independent Review Panel

Decision No. 02/19

In the matter of:

COMO Construction Ltd

(Applicant)

v/s

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

(Respondent)

(Cause No. 01/19/IRP)

Decision

A. History of the case

An invitation for bids by the Ministry of Education and Human Resources Tertiary Education and Scientific Research ("the Employer") for the procurement of the 'Construction of Additional Classroom and Other Facilities at Seegoolam Torul Government School Rose Belle (Ref No: MOEHTESR/works/ONB 133/2017-2018) was issued on 4th July 2018.

The Applicant was one of the bidders who submitted bids on 7th August 2018, which was the closing date for submission of Bids. Bids were opened on the same day.

B. Notification of Award

The Ministry of Education and Human Resources, Tertiary Education and Scientific Research through a letter dated 21 December 2018, informed the Applicant that its Bid had not been retained and the particulars of the successful bidder were as follows:

Description	***Name of Selected Bidder***	***Address***	***Contract Price***
Construction of Additional Classroom and other facilities at Seegoolam Torul Government School Rose Belle	*Safety Construction Co. Ltd*	*Royal Road, Camp de Masque Pavé*	*Rs 23,655,250.00 exclusive of VAT and including a contingency sum of Rs 1.5M*

C. The Challenge

On 21 December 2018, the Applicant challenged the procurement on the following ground:

"Not qualified despite being lowest responsive bidder"

D. The Reply to Challenge

On 27 December 2018, the Public Body made the following reply to the challenge:

The bid of the Applicant was the lowest, but the Bid Evaluation Committee did not find it responsive bid due to the following non-compliances to the requirements of the bidding document:

(i) Applicant did not propose any Site Agent as prescribed in the bidding document;

(ii) Applicant had proposed a Plumbing Technician with qualification Diploma in Mechanical and Electrical Engineering instead of Level 3 IVQ Advanced Diploma in Plumbing (City & Guilds of London Institute) or NC Level 4 in Plumbing (MITD/MES) or any other alternative qualification to the above;

&

(iii) Applicant had proposed a Plumbing Technician with no sufficient experience."

The selection of the lowest evaluated substantially responsive bidder by this Ministry is as per Section 40 of the Public Procurement Act 2006."

E. Grounds for Review:

On 03 January 2019, the Applicant seized the Independent Review Panel for review on the following grounds:

1. By way of letter dated 27th December 2018, the Applicant was informed by that, the Bidder has not proposed any Site Agent as prescribed in the bidding document;"

It is the Applicant's view that the fact a Site Agent has not been proposed should not warrant the rejection of the Applicant's bid. On the other hand, it ought to be considered as a minor omission. Besides, the Applicant has proposed one Mr Hassen Soobrattee.

More so, the Employer itself mentioned in its letter dated the 27th December 2018, that the Applicant's bid was the lowest. However, at no point in time did the Employer did make any request to the Applicant to submit necessary information or documentation to rectify such non-material non-conformity. The Employer could have asked for clarification.

Basing upon 'Directive no.3 - Determination of Responsiveness of bids (30th April 2010)',it is important to note that a material deviation, reservation, or omission is one that, if accepted , would affect in any

substantial way the scope, quality or performance of the works specified in the contract.

The Applicant is of the view that it would not at all affect the scope, quality or performance of the works specified in the contract.

Also, it will not limit in any substantial way, inconsistent with the bidding document, the Employer's rights or the bidder's obligations under the proposed contract or if rectified, it would unfairly affect the competitive position of other bidders presenting substantially responsive bids.

According to the Applicant, there will not be any effect under the proposed contract. In addition to that, any rectification made, would not affect the competitive position of other bidders which have presented substantially responsive bids.

2. By the way of the same letter, the Applicant had also been informed that, the Applicant had proposed a Plumbing Technician with qualification Diploma in Mechanical and Electrical Engineering instead of Level 3 IVQ Advanced Diploma in Plumbing (City & Guilds of London Institute) or NC Level 4 in Plumbing (MITD/MES) or any other alternative qualification to the above;)" and that the Bidder had proposed a Plumbing Technician with no sufficient experience.

It is the Applicant's view that it had abided to 'ITB 6.3 Qualification of Bidders' while proposing Mr Hemanduth Rathoa as the Plumbing Technician. The Applicant had attached Mr Hemanduth Rathoa's CV as stated in the Bidding Documents.

F. The Hearing

The hearing took place on 23 January 2019. The Applicant was represented by Counsel Mr N. Malleck and Mr B. Oozeerally. The Respondent was represented by Mrs S. Beekarry-Sunassee, Ag. Assistant Parliamentary Counsel and the successful bidder, through its proposé, as well were present.

Apart from the statement of case and reply filed, both parties filed their respective written submission. This Panel also had the opportunity to hear oral evidence of witnesses, namely Messr. H. Rathoa and Mr Y. Moco (Director of Applicant's Company) called by the Applicant and Mrs Bedacee-Dindoyal, Assistant Permanent Secretary and Chaiperson of the Bid Evaluation Committee, called by the Respondent. Both the Applicant and the Respondent filed further written submissions on 24th January 2019.

G. Findings

The issues to be considered are:

(i) Whether the Applicant's bid included a Site Agent or not. In case, no Site Agent had been proposed, whether this issue ought to be considered as a minor omission or not.

(ii) Whether the Applicant's proposal of a Plumbing Technician was in accordance with the requirement of the Bidding Document or not.

1. Site Agent

One of the key staff needed on the project was a Site Agent, on a full time basis. The Applicant contends that it did submit the C.V of Mr Hassen Soobrattee as Site Agent in its bid and even if this was not the case, as stated by the Respondent, this omission ought to be considered as a minor omission.

The Panel examined the Bidding Document and more particularly Clause 6.3, where it is provided that in order to qualify for award of the contract the bidders **shall** (the underlining is ours) meet the minimum qualifying criteria, as more fully detailed in the Instructions To Bidders, ITB Clause 6.3(d), which makes provision for key personnel and amongst others it is clearly mentioned that there should be a Site Agent on a full time basis. The Bidders were also under obligation to submit recent signed C.V's of the proposed personnel and their respective signed agreements for the deployment on the contract.

The Applicant has admitted that it did not specifically mention in its bid who was the Site Agent on a full time basis. A detailed scrutiny of the Applicant's bid also revealed that there was no mention of who was the Site Agent proposed and the C.V and signed Agreement of Mr. Hassen Soobrattee were in fact not included in the Applicant's bid. Moreover, in view of the word **shall** in Clause 6.3 and Sub-Clause 6.3(d). The Panel agrees with the position of the Respondent that failure to propose a Site Agent is not to be considered as a minor omission, but it is a fatal one.

2. Plumber Technician

The Applicant had proposed the name of Mr Hemanduth Rathoa as Plumbing Technician. The Respondent did not retain this name on the ground that Mr H. Rathoa did not have the prescribed qualifications nor had the requisite to perform as Plumbing Technician. Mr Rathoa holds a Diploma in Mechanical and Electrical Engineering and not Plumbing. At the hearing Mr Rathoa during examination in chief stated that he has a higher qualification than that required and has about 30 years of experience in looking electrical and mechanical works. In cross examination he admitted that he has not worked as Plumbing Technician but has supervised such works. According to the Respondent, it did not retain the name of Mr H. Rathoa as Plumbing Technician as his experience detailed in the C.V related more to site inspection and consultancy works rather than actual plumbing works. This Panel after having gone through all the evidence available on record and after hearing Mr H. Rathoa is of the opinion that in fact Mr Rathoa does not have a profile as specified in the bid documents. (ITB 6.3(d).

H. Decision

In light of the above the Panel finds no merit in this Application and sets the same aside.

Vice-Chairperson

(H. Gunesh)

Member
(R.Mungra)

INDEPENDENT REVIEW PANEL MAURITIUS

Member
(A.M. Gathani)

Dated 30/01/19.