



Independent Review Panel

Decision No. 03/20

In the matter of:

BlueFire Ltd.

(Applicant)

v/s

Office of the Commissioner of Police

(Respondent)

(Cause No. 03/20/IRP)

Decision



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A. History of the case

An invitation to submit a bid for training shoes with reference number **Police/IFB/2019/136 – OAB 16 of 2018/19** was advertised by the Office of the Commissioner of Police (**“Respondent” or “Public Body”**) on its online website on 28 June 2019. In response to the invitation for bids for the procurement of training shoes, the Applicant forwarded its bid dated 15 August 2019.

In response to the invitation to tender, nine bids were received on the closing date.

The bids were evaluated by a three-person bid evaluation committee set up by the Respondent. The Applicant’s bid was not retained.

B. Notification of Award

Through a letter dated 24 December 2019 the Office of the Commissioner of Police 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 given hereunder:

<i>Name of Bidder</i>	<i>Address</i>	<i>Contract Price</i>
<i>(1) Master Sport Co Ltd</i>	<i>Avenue Claude Delaitre, Pailles</i>	<i>Rs 19,071,000.00 (VAT Excl)</i>

C. The Challenge

On 30 December 2019, the Applicant challenged the notification of procurement on the following grounds:

“Bidder submitted lowest responsive bid”

D. The Reply to Challenge

On 03 January 2020, the Public Body made the following reply to the challenge and stated that:

“This is to inform you that your offer was not retained because your bid has not complied with the followings:-

<i>Description</i>	<i>Remarks</i>
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<i>Bidder/Manufacturer should provide documentary evidence that he has a turnover of not less than Rs 25m during the last 3 years.</i>	<i>Not Submitted</i>
<i>Test Certificate from an Agency which is duly accredited with (MAURITAS) or any Agency accredited by which is signatory to ILAC-MRA for midsole-polyurethane. Non-submission of same will entail automatic rejection of bids.</i>	<i>Test Certificate submitted does not made any mention that the mid sole is made up of polyurethane elastomer or light weight EVA crash pad.</i>

E. Grounds for Review

On 10 January 2020, 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 Bluefire Ltd (the Applicant) was the lowest evaluated bidder as compared to Master Sport Co Ltd;*
- (b) *The Public Body failed to appreciate that Bluefire Ltd (the Applicant) was substantially responsive inasmuch as Bluefire Ltd (the Applicant) meets all the criteria as per the tender requirement;*

F. The Hearing

Hearing was held on 31 January, 2020. The Applicant was represented by Mr I. Mamoojee together with Ms A. Luttoo, of Counsel whereas the Respondent was represented by K.A. Putchay, State Counsel. A director of the successful bidder was also present.

G. Findings

This application raises two core issues which require a determination by the Panel. First, whether the failure by the Applicant to provide a test certificate in respect of midsole of the shoes it intended to supply (if failure there was) should have resulted in its losing to the successful bidder. Secondly, whether the Applicant not having provided evidence of its finances, which is not disputed, should have been one of the reasons its bid was rejected.

From the evidence before us, oral and documentary, we note that the facts of this case are hardly disputed. The Applicant neither provided a



test certificate in the requested format nor did it provide financial statements (audited or not) in respect of its total turnover over the 3 years prior to the bid submission date. What we are called upon to decide at this review stage is whether these two facts should have resulted in the rejection of the bid of the Applicant or was the Public Body acting with impropriety in doing so. Essentially, we must determine whether these undisputed breaches by the Applicant could have been excused.

We propose to deal with the technical issue first followed by the issue about financials.

Technical compliance

In the Bid Data Sheet 11.1(i) [corresponding to the similarly numbered ITB], bidders were asked to simply provide a *'recent test certificate from an agency which is duly accredited.... as regards the following specifications laid down in the bidding document:*

- a) *Mid Sole is made up of polyurethane elastomer or light weight Eva Crash Pad with elevated heel"*

Bidders are then warned, in bold, that failure to comply with that request would entail a rejection of their bids.

Virtually all bidders did except two, including the Applicant. What the latter provided was a test certificate issued by the Guangzhou branch of SGS, China. That certificate was issued on behalf of FILA Sports (HK) Ltd – part of a multinational company and manufacturer of the shoes the Applicant intends to supply. It only depicts the density and the resilience coefficient of the sole of the shoes.

Attached to it is a cover letter by the Applicant where it effectively opines that the fact that these shoes have 'passed' the tests and looking at the data provided in the test certificate, it must follow, according to it, that the soles were composed of the required material.

This is in sheer contrast with what the successful bidder has done. It has duly requested, by itself, a test certificate from SGS's Xiamen branch for 'selected tests as requested by' and it goes without saying that the successful bidder clearly asked SGS to confirm if the sole was made up of polyurethane elastomer or light weight EVA with elevated heel, and SGS unequivocally confirmed that it was made of light weight EVA.

The case for the Applicant, as submitted by Counsel, is that this failure to provide a compliant test certificate would constitute a deviation not sufficient so as to be fatal to its bid. However, we have gone through Directive No.3 of the Procurement Policy Office ("PPO"), made in 2010



and amended in 2014, and we note the following, under the heading *Guidelines for responsiveness of bids*, paragraph (vi):

- (d) *“failure to submit type-test reports for critical equipment, as clearly specified in the bidding documents.*

In respect of type-test reports, the provisions below are to be followed:

- *Equipment which has never been tested for critical performance by an independent and well known testing laboratory shall not be accepted.*
- *In such cases, a promise or agreement by a bidder to have the equipment tested after award of a contract is not acceptable. However, major equipment suppliers normally conduct the type tests in their own laboratories. The Public Body may accept such test certificates (a) if the testing laboratory, has ISO 9000 (or its equivalent) series certification, or (b) the tests have been witnessed by technically qualified representatives of earlier clients or purchasers.*
- *Test reports to be acceptable must be related directly to the equipment offered. Test reports for a higher class of equipment are acceptable with a commitment to perform the type test on the particular equipment after the contract is awarded. Reports of critical tests conducted earlier than the date specified in the specifications should not be accepted.*

- *Failure to submit some type-test reports with a bid need not be considered as a major deviation rendering the bid nonresponsive. A valid test report could be accepted subsequent to the bid closing date **unless the bidding document specified otherwise**. For complex turnkey contracts, involving the supply of a large quantity of equipment, the critical type-test certificates, if any, should be specified in the bidding documents. **For critical equipment, all required test reports must be submitted for assessing the technical acceptance of the bid. For “less than critical” equipment, some flexibility should be allowed, provided it is possible to assess the acceptability of the equipment based on available test reports.***



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- *Type-test reports of the same or similar equipment manufactured by a licensor or associated companies are only acceptable if they are jointly and severally bound under the contract.” (our emphasis)*

Based on the evidence on record, the Panel is of the view that the composition of the Mid Sole would fall within the ‘critical’ category and in any event, the escape route that would allow *some* type-test reports to be deemed would not apply since the bidding document clearly specifies otherwise. Moreover, and in general while looking at the circumstances of this case, we also feel that allowing endless late submissions of essential documents would, if allowed to be rectified, *unfairly affect the competitive position* of the other bidders – who have complied with the clear and simple request of the Public Body to provide a specific type of test certificate on one particular matter.

On that basis, the Panel equally considers the bid of the Applicant to be non-responsive for non-compliance to a technical requirement. It follows that the Public Body has correctly rejected the bid of the Applicant.

Financial statements

Having already concluded that the bid should be rejected, we propose to address the other issue raised by the Public Body and on which a substantial part of the evidence and submissions has focused – the failure by a bidder to supply financial statements.

At the outset, we must state that we subscribe to the point made by the Applicant that this would amount to a minor omission as clearly provided for, again in the Procurement Policy Office’s Directive No.3, under the same heading but this time at paragraph (v):

*The following shall be considered as **minor omissions**: (i) non-submission of documents related to qualifications, experience and eligibility; (ii) accreditation certificates, licenses and permit to conduct business; (iii) list of equipments to be mobilized, (iv) Financial statements or Audited Accounts as applicable, (v) information regarding litigation, (vi) total monetary value of works performed in the past, and (vi) details of type of works, etc.... (our emphasis)*

This Panel sees the wisdom behind this particular part of the Guidelines of the PPO, especially when read with the preamble and the leniency to be shown to bidders in respect of documents that ‘cannot be tampered’ with such as trade licences and permits. The Applicant, in

evidence, has explained that it is part of a major conglomerate in Mauritius known as the Hyvec Group and that its total turnover, as a subsidiary, for the last 3 years has been above the Rs 25 million mark. We do not see how the fact that the Applicant being part of a major group of companies would impact the financial evaluation because we believe the Public Body should focus only on the named entity on the bid and not its parent company or ultimate beneficial owner. Groups of companies often have various companies which are asset-rich while some may be cash-rich or others may be highly indebted. We surely cannot expect Public Bodies to go beyond the company actually submitting a bid.

Be that as it may, the Applicant is right when it submits that the Public Body could have requested for the financial statements at a stage after bid submission. However, we subscribe to the Public Body's view that this would only be triggered if the bid was substantially responsive in the first place. It is common knowledge that bids are evaluated for technical compliance first before moving to the financial aspect. This particular bid of the Applicant having failed to cross the first hurdle, the Public Body had no specific duty to request the financial statements from the Applicant during the bid evaluation.

H. Conclusion

In the circumstances, we do not find merit in this Application for Review which is accordingly dismissed.



Chairperson
(H. Lassemillante)



Member
(R. Mungra)



Member
(A. K. Namdarkhan)

Dated: 06 February 2020

