Independent Review Panel

Decision No. 07/20

In the matter of:

Golden Valley Sonalall JV

(Applicant)

v

Food and Agricultural Research and Extension Institute (FAREI)

(Respondent)

(Cause No. 10/20/IRP)

Decision

INDEPENDENT REVIEW PANEL MAURITIUS

A. History of the case

The Food and Agricultural Research and Extension Institute ("FAREI" or "Respondent" or "Public Body") invited bids for the design, supply, installation, testing and commissioning of 10 hydroponic greenhouses, complete with fertigation system and civil works, to be located in Melrose.

This was an open advertised bid and there were 6 bidders who submitted their bids by the 16th July 2020. These included the Applicant, Golden Valley Sonalall Ltd JV and the successful bidder, JV New Horizon Builders Ltd/Blychem Ltd.

Since FAREI had indicated to the Central Procurement Board that the project cost would be above Rs 15 million – making it a major contract for FAREI – the evaluation of the bid was carried out under the aegis of the CPB. The CPB reference was CPB/03/2020.

B. Evaluation

A Bid Evaluation Committee (BEC) was set up by the CPB for the evaluation of bids received. The BEC issued its report on 5th August 2020.

C. Notification of Award

Through a letter dated 17th August 2020, the Public Body notified the Applicant that an evaluation of the bids received has been carried out and its bid had not been retained for award. The particulars of the successful bidder are as given hereunder:

Bidder's Name	Address	Contract Price excl. of VAT - MUR
JV New Horizon Builders Ltd./Blychem Ltd.	Renganaden Seeneevassen Avenue, Palma, Quatre Bornes	23,716,385.00

D. The Challenge

On 24th August 2020, the Applicant challenged this selection on the following grounds:

"We consider the price quoted by JV New Horizon Builders Ltd./Blychem Ltd does not meet all requirements and specification as mentioned in bid document as the price quoted is relatively low nearly fifty percent of the estimated project value.

With our experience, the price quoted by the JV New Horizon Builders Ltd./ Blychem Ltd may result to variation or may not complete the project at this price, taking into consideration the following below:

1) Greenhouses Structure V/S connected-tunnels/bi-tunnels

In our bid we have quoted for a ***Greenhouse structure*** *and not connected tunnels or bi-tunnels.*

*There are big differences between these two types of structure (**greenhouse v/s connected-tunnels/bi-tunnels**). The requirement of the employer is for a Greenhouse.*

2) Entrance hall with disinfection Mat.

Due to problem of biosecurity in Mauritius and high proliferation of viruses, we have provided an entrance hall of 2mx 3m with a sliding door of 2mx2m and a double leaf door (1mx2m)x2 to allow insect free zone and also the entrance hall is equipped with a disinfectant mat to prevent virus cross contaminant entering the greenhouse via footwear.

3) Circulation Fan

In each greenhouse we have catered for two circulation fan which is as important as an extractor fan as we have justified in our bid. We have a high humid and high temperature local tropical climate which is even higher inside a greenhouse, affecting the yield; thus the importance for a circulation fan which is used to mix the inside air to give an optimum inside climate condition before the air is being extracted by the extractor fan.

4) UV Sterilizer

With our past experience with customers in nearby region of the project nearby Melrose we have encountered bacteria in water supply which is harmful for greenhouse production. A UV Water sterilizer very important, and we have offered it in our bid.

We consider the above-mentioned points are very important for the proper functioning of a modern greenhouse and these may have been omitted by the successful bidder namely JV Horizon Builders Ltd./Blychem Ltd."

E. The Reply to Challenge

On 28th August 2020, the Public Body made the following reply to the challenge and stated that:

"1. The amount mentioned in the bidding document is not the estimated project value but the budget available for implementation of the project. The bidder has quoted MUR23, 716,385 exc. VAT and meets all the requirements specified.

2. Green House Structure

The lowest Evaluated Substantive Bidder has proposed Green House Structure as per the tender requirements.

3. Entrance Hall

The lowest Evaluated Substantive Bidder has satisfied the minimum design requirement for the provision of a double leaf door as per Subsection I (VI) under Section 4 – Employer's Requirements.

4. Circulation Fan

Extractor fan(s) has been specified in Subsection I (V) under Section 4 – Employer's Requirements for the extraction of inside air. The lowest Evaluated Substantially Responsive Bidder has complied with the minimum requirement.

5. The lowest Evaluated Substantially Responsive Bidder has also made provision for the installation of a UV Sterilisation System."

F. Grounds for Review

On 4th September 2020, the Applicant seized the Independent Review Panel for review on the following grounds:

"1. The price quoted by the lowest bidder is relatively low (almost 50% of the estimated project value). Respondent in reply stated that the amount in the bidding document is not estimated project value but the budget available for implementation of the project. This is misleading and unfair. Further the bidding document ought to have disclosed the evaluation criteria. The bidder was not in a position to differentiate between the weightage in respect of design and financial proposition.

2. The lowest bidder could not by any means propose a design in respect of a proper Greenhouse but would refer to connected tunnels or bi-tunnels.

3. *Entrance Hall:- The design submitted by the lowest bidder although satisfy the basic requirements to be able to control the problem of Bio Security which has become a major issue in Greenhouses in Mauritius.*

4. *Circulation Fan: The system of air circulation within the Greenhouses as proposed by the lowest bidder does not take into consideration the high humidity and high temperature which is a major problem in Greenhouses in Mauritius."*

G. The Hearing

A Hearing was held on 21st September 2020. There was on record a Statement of Case and a Statement of Reply, by Applicant and Respondent respectively.

The Applicant was represented by Messrs M Ragobur and R Mootoosawmy as well as Dr Mrinal Ragobur and was assisted by Mr Ashok Jugnauth, instructed by Mr Attorney D. Cowreea while the Respondent was assisted by Mr Dinay Reetoo, Principal State Counsel, instructed by State Attorney.

The successful bidder sent representatives to attend the hearing.

H. Findings

Points *in limine litis*

We propose to address the points taken by FAREI *in limine litis* before addressing the merits of the case.

FAREI has set forth two preliminary points in its Statement of Reply: 1) that the Applicant has failed to set forth a detailed and factual statement and (2) that the Application is misconceived.

For convenience, we reproduce below the relevant parts of Statement of Case of the Applicant:

"The Applicant being aggrieved and dissatisfied with the response received to his challenge under S43 of the Public Procurement Act 2006 is hereby applying to the Independent Review Panel for a review of the decision not to allocate the project of Design, supply, installation, testing and commissioning of 10 hydroponic greenhouses complete with Fertigation system and civil works at Melrose (Ref No. CPB/03/2020) on the following grounds:

1. *The price quoted by the lowest bidder is relatively low (almost 50% of the estimated project value). Respondent in reply stated that the amount in the bidding document is not estimated project value but the budget available for implementation of the project. This is misleading and unfair. Further the bidding document ought to have disclosed the evaluation criteria. The bidder was not in a position to differentiate between the weightage in respect of design and financial proposition.*

2. *The lowest bidder could not by any means propose a design in respect of a proper Greenhouse but would refer to connected tunnels or bi-tunnels.*

3. *Entrance Hall:- The design submitted by the lowest bidder although satisfy the basic requirements to be able to control the problem of Bio Security which has become a major issue in Greenhouses in Mauritius.*

4. *Circulation Fan: The system of air circulation within the Greenhouses as proposed by the lowest bidder does not take into consideration the high humidity and high temperature which is a major problem in Greenhouses in Mauritius.*

The Applicant in conclusion states that the bidding document of Design, supply, installation, testing and commissioning of 10 hydroponic greenhouses complete with Fertigation system and civil works at Melrose would not mean that bidder should fulfil only the basic requirements. The lowest bidder has just satisfied only the basic requirements which is open therefore to apply for variation."

In the first part of his submissions, where he focused on the points *in limine*, Mr Reetoo took us through section 45 of the Public Procurement Act 2006 (the 'Act') namely, subsection (3)(b) and he argued that the case of the Applicant is frivolous and should be dismissed. In support, he reiterated that the Grounds for Review as included in the Applicant's Statement of Case did not state a detailed legal and factual statement. Moreover, he argues, FAREI was even left in the dark as to what the Applicant wanted in terms of relief sought and he confessed that FAREI had some difficult in even replying to the four Grounds for Review as couched in the Statement of Case of Applicant.

We do agree that the Applicants Statement of Case was not in the usual format used by litigants before and it was not as detailed as those statements the Panel has been favoured with over the years. However, we do feel that the Applicant has done just about enough to cross the 'threshold' of providing a detailed legal and factual statement. The only observation we would add is that applicants should ensure that the relief they seek, pursuant to section 45(10) of the Act, is clearly spelt

out in their statements of Case, perhaps as 'prayers' at the end of the statements. In this matter, it is only after an interpretation exercise that the Panel, as well as FAREI, was able to deduce what exactly was the relief sought by the Applicant namely, the relief to be found at section 45(10)(c); *"recommend a re-evaluation of the bids or a review of the decision for an award, specifying the grounds for such recommendation;"*

Mr Jugnauth also suggested section 45(10)(b) could find its application but we do not feel that there is any other unauthorised act or decision of FAREI that we are being called upon to recommend the annulment thereof. Be that as it may, it goes to show how important it is for applicants to indicate clearly, in their statements of Case, what relief they seek and not leave it to the Panel to have to infer and draw conclusions based on the other parts of their statements. There may, however, be situations where we do have to go beyond what has been indicated by an applicant in his statement of Case but this is not such a case.

It also does not appear to us that the Respondent, in submissions, pressed further the point that the application was, on the whole, misconceived other than the fact that it was unclear what the Applicant was seeking in terms of relief.

Accordingly, we set aside the preliminary points raised by FAREI and shall proceed to determine the application on the merits.

Before doing so, we would wish to seize this opportunity, where we have been asked to dismiss an application for being frivolous, to set out our understanding of the interaction of the Act and the Public Procurement Regulations 2008 (the "Regulations") on the matter.

Section 45(3)(b) empowers the Panel to retain the whole of a security deposit should it dismiss an application for review for being frivolous. This is repeated at regulation 51(2) of the Regulations. Regulation 56 of the Regulations, entitled 'Dismissal of Application for Review', sets out, in much detail, when the Panel may dismiss an application for review- admittedly, for reasons other than it being devoid of merit.

For convenience, we reproduce below, sequentially, section 45(3) of the Act and Regulations 51(2) and 56 of the Regulations:

*"**(3)** Where the Review Panel determines that the application was frivolous, the deposit made shall be forfeited."*

*"**(2)** The security deposit shall be forfeited where the Review Panel dismisses the application as frivolous."*

"56. Dismissal of Application for Review
An application for review may be dismissed for -

(a) failure to comply with any of the requirements of sections 43 to 45 of the Act, and these Regulations;

(b) setting forth allegations that do not state a valid basis for an application for review, or that do not set forth a detailed legal and factual statement;

(c) having been filed in an untimely manner, either at the initial level of review by the public body, or with respect to deadlines for filing an application for review by the Review Panel; or

(d) contract implementation or administration instead of contract award."

In legal jargon, the word 'frivolous' may not necessarily convey exactly the same meaning as in general parlance. In fact, we find that it may be useful and relevant to mirror the definition of the term 'frivolous' used by the civil jurisdictions in our administrative law setting. In the case of **Kross Border Corporate Services v Kolanda Reddy 2016 MRC 8**, His Honour N. Ohsan-Bellepeau as he then was provided a detailed analysis of what amounts to frivolous cases and statements that would warrant early striking out of pleadings – a remedy broadly equivalent of dismissal by the Panel. The then Master & Registrar provides a thorough analysis of the local and foreign cases on the matter which is line with later judgments of the Supreme Court (*vide* **Modaykhan v SBM (Bank) Mauritius Ltd 2017 SCJ 350**). 'Frivolous', in civil cases, is to be understood as meaning a case that is 'groundless, with little prospect of success'. We believe that, in the Panel's jurisdiction, 'frivolous' would, equally, mean an application for review that is hopeless and not properly arguable, that is baseless and has no reasonable chance of succeeding.

This brings us to Regulation 56 whose grounds for dismissal seem to us to be very strict ones and applicants bringing an action falling within the description contained in that Regulation have been guilty of a very grave breach of the Act. They have either failed to observe the strict time-limits, have brought a hopeless case about contract implementation and not procurement, have failed to observe the challenge and review steps under sections 43 to 45 of the Act, or have brought a vague statement of case. We are of the view that the legislator intended, for the efficient and fair running of the procurement function of Government, that such challenges to procurement proceedings should be dismissed outright because they either are baseless or they are brought in an untimely manner with the effect that

entertaining them would unduly impact and delay governmental action. This latter consideration is also, in spirit, reflected in the need for the challenge stage to adhere to strict timelines and for this Panel to adjudicate matters and give its judgments expeditiously- within 30 days of an application for review under section 45.

Accordingly, it is the presently-constituted Panel's view that 'frivolous' cases, warranting dismissal as well as the forfeiting of the whole of the security deposits paid by applicants, are, first and foremost, those cases that fall foul of Regulation 56 of the Regulations. We will leave it to another day to determine whether there might be cases that are of such a nature as being frivolous but may not necessarily be captured by the detailed sub-paragraphs of Regulation 56.

Merits

Grounds 2,3 and 4

We propose to deal with Grounds 2,3 and 4 of the Grounds for Review first and we shall address them together since, broadly, they make the overarching claim that the Applicant's bid was better than the one submitted by the successful bidder. In short, the thrust of the Applicant's case and submissions before the Panel was that the solution proposed by the successful bidder were not greenhouses but connected tunnels or bi-tunnels. Furthermore, the Applicant argues that the successful bidder's solution was not appropriate for the Mauritian climate and context – specifically, in terms of the number of fans and the design approach in respect of the entrance hall which could lead to bio-security concerns.

In support of its case, the Applicant has explained how its proposed design solution would protect against viruses and disease, how its inclusion of circulation fans in addition to the excavator fan required by FAREI would help against humidity and other environmental hazards and conditions, and how its design could handle cyclonic winds - while FAREI's requirements was for greenhouses that can withstand *'basic wind speed of 100km/hr minimum'*. The Applicant thus argues that the Panel should not only look at the minimum requirements, or what it terms basic requirement in its Statement of Case, and the Bid Evaluation Committee ("BEC") was expected to make a deeper and more qualitative assessment of the design solutions of bidders.

FAREI's response is essentially that it proceeded in full conformity with the bidding documents it had issued, the BEC evaluated the bids in accordance with those Bidding Documents and the successful bidder was the lowest-priced technically responsive bid. In essence, there was a set of minimum requirements and all bids that met those minimum requirements were then evaluated on the financial side.

At the end of the hearing, the Panel had drawn the attention of all parties to page 50 to 57 of the Bidding Document, which is entitled 'Section 4. Employer's Requirements' and set out, in quite some detail, the Employer's (FAREI's) requirements. Moreover, we drew attention to page 25 of the Bidding Documents, ITB 33.3(b) which sets out the technical evaluation criteria. A perusal of the Bidding Documents reveals that the approach taken by the BEC is the appropriate one and is in line with the Bidding Documents: FAREI had a set of minimum requirements when it floated the tender, the various proposals were then evaluated and it was checked whether they met the said minimum requirements. If in the affirmative, the financial evaluation was undertaken and the lowest-priced bid that met the technical criteria was selected. This, we hold, is what was expected of the BEC in accordance with the Bidding Documents.

The Applicant would want the BEC to, in effect, go above and beyond the requirements set by the 'client', FAREI, in the Bidding Documents and we do not agree that this is within the remit of the BEC.

It could be the case that the Applicant's design solution would be a better one in the context of the Mauritian climate and agriculture and we are confident that FAREI will be held to account for their choice of technical criteria and its minimum requirements but the fact remains that the Applicant has simply submitted a bid that was above requirements and dearer by some Rs 5 million as opposed to the successful bidder which submitted a bid meeting the requirements of the public body, and has won the award. It cannot be for the CPB and its BEC to make a more qualitative assessment than expected and which could lead to selection of bids that are above the requirements of the public body. Similarly, it is not for us, the administrative tribunal, to direct the BEC to depart from the Bidding Documents' evaluation criteria. We also feel that this is not the forum for such arguments as to whether the minimum requirements of FAREI are wanting or are insufficient. We appreciate the fact that the Applicant has brought forward such a point and we are thankful to Mr Jugnauth for his eloquent submissions on how, essentially, the people should get value for money but this is not within the Panel's jurisdiction.

In this respect, Grounds 3 and 4 must fail.

We now turn, briefly, to Ground 2 which is a suggestion that the successful bidder in fact proposed a tunnel or bi-tunnel design and not a greenhouse. FAREI denies this in its Statement of Reply. Mr Reetoo, in the course of his cross-examination of Mr Ragobur, the representative of the Applicant, has rightly and ably put the question as to why the Applicant was under this impression. The response was that since the winning bid was only for some Rs 23 million, it was clear that it could not be a greenhouse design.

We can expeditiously deal with this Ground 2 by stating that, upon reading the Bid Evaluation Report and the bid of the successful bidder, it is clear that it is a greenhouse design that has been proposed by the successful bidder.

Accordingly, Ground 2 must also fail. As such, we do not propose to rely on the undated expert report- a comparison between greenhouses and tunnels- issued by Itai Dangur, the Israeli consultant of the Applicant, since it is not relevant to a live issue before us given our findings on Ground 2.

At this stage, we wish to address another point made by Mr Jugnauth, belatedly, on behalf of the Applicant. He takes issue with the qualifications of the BEC members and questions whether they were suitable to assess the bids in a design-supply tender for greenhouses. This was not part of the Grounds for review, or challenge under section 43 for that matter. We have allowed the point to be raised and we are thankful to Mr Reetoo and FAREI to have replied and submitted on the issue.

During the hearing, we have been favoured, by the Applicant, with a number of academic documents describing the different branches of engineering (civil, mechanical, agricultural and structural, amongst others). Mr Reetoo, on behalf of FAREI, undertook to send us the credentials of the members of the BEC and the Scheme of Service of the post of Agricultural Engineer at the Ministry of Agro-Industry and Food Security issued by the Public Service Commission. Upon reading the documents and in line with the evaluation criteria contained in the Bidding Documents, criteria we have alluded to above, we find no reason to doubt that the BEC members were qualified to assess the bids in line with the Bidding Documents.

Ground 1

We now turn to the remaining Ground for Review which takes issue with the pricing of the successful bidder in that it appears to be relatively low when compared to the 'estimated project value' and that FAREI, in its reply at challenge stage, stated that the figure indicated in the Bidding Documents was not the estimated project value but was the budget. The latter point is reiterated in the Statement of Reply of FAREI before us, at review stage. Much in terms of submissions and testimony was made before us on what the figure of Rs 40 million was and the witness on behalf of FAREI, the Team Leader of the BEC, repeatedly indicated that this was the project budget.

At one stage, we queried from the parties whether the Panel could assume the Rs 40 million as being the 'estimated cost'. Mr Jugnauth, quite forcefully, suggested that the Panel could not imply sums if the

BEC had not followed the proper procedure. Mr Reetoo, on the other hand, was of the view that the Rs 40 million could be used and, in such instance, both the Applicant and the successful bidder would be considered as having submitted bids that were abnormally low. What we find most surprising in respect of this issue is FAREI's witness testimony on the point; we must here state that we only suggested the figure of Rs 40 million because we had read the Bid Evaluation Report and, in its section 7, the figure of Rs 40 million is clearly stated to be *'as per ITB 1.1., the project cost'* as well as the project budget and, when they were analysing the application of the CIDB Act, that figure was also described by BEC members as the 'project value' for Grade E Contractors. Therefore, we are in the presence of three descriptions for that sum, with two of them being of great import for the present purposes.

It seems to us probable that the BEC had in mind the sum of Rs 40 million as the project cost but, in the course of the hearing before us and in drafting the Statement of Reply before us and reply to challenge under section 43, FAREI and the CPB had lost sight of this fact, somehow.

It is a matter of much regret that such an important and basic factor given first consideration in countless of bidding processes done by the CPB and its predecessors has been the subject of much debate before us. Equally, we find it very unfortunate that it was for the Panel, during the hearing, to remind the public body and the BEC, of section 37(10A) of the PPA, of the accompanying Directive No.46 issued by the Procurement Policy Office ("PPO") on 8th April 2020 and of how significant is the need to have in mind a clearly defined 'estimated cost' when evaluating bids. It seems that the exercise provided for in the law was not methodically followed by the BEC. We feel it is, therefore, appropriate to set out our understanding of how section 37(10A) of the Act must be applied. It reads:

"(10A) (a) Where a public body or the Board –

(i) is of the view that the price, in combination with other constituent elements of the bid, is
abnormally low in relation to the subject matter of the procurement; and

(ii) has concerns as to the ability of the supplier to perform the procurement contract,

it may request in writing from the supplier such information as it considers necessary."

Furthermore, the Directive No.46 issued by the PPO on 8th April 2020, binding on public bodies and the CPB pursuant to sections 6 and 7 of the Act, provides:

"Pursuant to section 37(10A) of the Public Procurement Act (2006), which provides for the procedure to be followed for the evaluation of bids in case of abnormally low bids, public bodies shall consider a bid as abnormally low, where it is lower than the updated estimated cost by 15% or more.

2. This directive takes effect immediately."

We find that the BEC went on to evaluate the bids without clearly setting out how the mechanism under section 37(10A) of the Act was applied as well as the binding Directive of the PPO. It did not even have a clear 'updated estimated cost' in mind, in breach of the Directive. The result might have been that what were abnormally low bids (for instance, both the Applicant and the successful bidder using an assumed estimated cost of Rs 40 million) were not properly probed pursuant to section 37(10A) of the Act.

Were we to assume that Rs 40 million was the estimated cost applicable, here, we would then need to determine whether the other provisions under section 37(10A) have been met. Mr Reetoo, rightly, conceded that it appears from the Bid Evaluation Report that the question of the ability of bidders to perform was not specifically addressed, at all. However, he suggested that the very fact that all four bidders (including both the Applicant and the successful bidder), which had made it to the final (financial) evaluation because they were technically compliant, it must be implied that the BEC had no concerns as to their ability to perform.

Even though we are minded, and this is stretching the argument very thin, to assume the sum of Rs 40 million as the estimated cost, we are not prepared to subscribe to the submission made on behalf of FAREI, even though it is pragmatic and compelling. If the BEC has not carried out the exercise of determining what could amount to abnormally low bids pursuant to Directive No.46, has not asked itself whether it has concerns about the ability of any such bidders submitting abnormally low bids and asked for clarifications if it felt they were warranted, we cannot create this series of steps out of a vacuum. The BEC was simply oblivious and failed to observe section 37(10A) and the Directive, and this cannot be rescued.

We cannot stress enough the importance of a clear record and proper procedure being followed by bid evaluation committees, whether appointed by the CPB or public bodies, to ensure the integrity and fairness of the whole public procurement system. These rules, policies and directives made by the PPO, among the many other documents the latter regularly issues, are there to ensure consistency in the approach

used to evaluate bids. Public bodies and the Board should ensure strict and 'visible' compliance with those. It is not expected that litigants and this Panel should carry out interpretation exercises or make inferences to be able to conclude if the process was fairly and properly followed, like we have had to do here.

Accordingly, Ground 1 must partially succeed in that the procedure to assess abnormally low bids was not followed.

I. Conclusion

We, therefore, feel it is warranted to remit the matter back to FAREI for a differently-constituted bid evaluation committee to carry out the evaluation anew with the direction that a clear 'updated estimated cost' be defined and, abnormally low bids, if any, are to be dealt with in accordance with section 37(10A) of the Act.

A. K. Namdarkhan
(Member)

A. Gathani
(Member)

R. Mungra
(Member)

Dated: 5th October 2020