



Independent Review Panel

Decision No. 06/21

In the matter of:

Ducray Lenoir Ltd

(Applicant)

v/s

Ministry of Health and Wellness

(Respondent)

(Cause No. 06/21/IRP)



Decision

A. History of the case

On 20 August 2020, the Ministry of Health and Wellness (the “**Respondent**”, “**Public Body**” and “**Ministry**”) invited bids through Open National Bidding for the Supply, Installation and Commissioning of Mobile C-Arm with Flat Panel Detector for Orthopaedic Surgery for 5 Regional Hospitals bearing Procurement Reference No: **MHPQ/EQ/2020-2021/Q9**. On 23 September 2020, the Applicant submitted its bid on the closing date of submission of bids.

There were two items (types of detectors) to bid for. Seven bidders, six of which submitted offers for both items and one bid for only one item. Some bidders provide more than one offers for an item. As such, there were 9 offers from seven bidders encompassing both items.

B. Evaluation

A Bid Evaluation Committee (“**BEC**”) was set up to evaluate the bids received and identify the lowest evaluated substantially responsive bid that met the qualification criteria. The BEC completed the bid evaluation report on 23 November 2020.

C. Notification of Award

On 05 February 2021, the Public Body in response to the Invitation for Bids informed the Applicant, that an evaluation of the bids received has been carried out and the particulars of the Successful Bidder are as mentioned below:

Bidder & Address		
The Managing Director IBL Ltd – HealthActiv 15 Reserves Street Les Salines, Port Louis Tel No: 203 3500 Fax No: 203 3505		
Description		
	ITEM 1 – C-Arm with Flat Panel Detector of size at least 20x20 cm (Offer A)	ITEM 2 – C-Arm with Flat Panel Detector of size at least 30x30 cm (Offer A)
Quantity:	3 units	2 units
Make:	SIEMENS	SIEMENS
Model:	CIOS Alpha	CIOS Alpha

Origin:	Germany/China	Germany/China
Unit Price:	Rs 4,630,464.00	Rs 5,444,980.00
Total Price:	Rs 13,891,392.00 (exclusive of VAT)	Rs 10,889,960.00 (exclusive of VAT)
Maintenance Cost per year:	Rs 310, 000	Rs 310,000

D. The Challenge

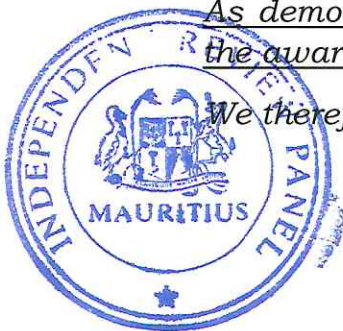

On 11 February 2021, the Applicant challenged the procurement proceedings on the following grounds:

“Our bid is fully technically responsive and the total cost of our bid for this item, including maintenance cost for 8 years (as per required in the tender), is less than that of the total cost of the awarded bid.

	Item 1 – C-Arm with Flat Panel Detector of size at least 20x20 cm.	
	<i>Our bid</i>	<i>Awarded bid</i>
<i>Quantity</i>	3 units	3 units
<i>Make</i>	PHILIPS	SIEMENS
<i>Model</i>	Zenition 70	CIOS Alpha
<i>Origin</i>	The Netherlands/USA	Germany/ China
<i>Unit Price</i>	Rs 4,998,000.00	Rs 4,630,464.00
<i>Total Price</i>	Rs 14,994,000.00 <i>(exclusive of VAT)</i>	Rs 13,891,392.00 <i>(exclusive of VAT)</i>
<i>Maintenance cost per year</i>	Rs 60,000	Rs 310,000
<i>Maintenance cost for 8 years</i>	Rs 480,000	Rs 2,480,000
<i>Total cost of bid (including maintenance for 8 years)</i>	Rs 15,477,000.00	Rs 16,371,392.00

As demonstrated in the table, our bid is Rs 894,892.00 cheaper than the awarded bid.

We therefore believe that we should be awarded item 1 of this tender.”

E. The Reply to Challenge

On 17 February 2021, the Public Body made the following reply to the challenge and stated that:

“2. It has been found that the financial evaluation of the technically responsive bids for Item 1 was not carried out properly

3. The Bid Evaluation Committee has erroneously taken the unit price for Item 1 (Offer A) as Rs4,630,464 instead of Rs 4,670,464 as quoted by the selected bidder and the amount of Rs310,000 exc of VAT as yearly maintenance charges for each unit, when in actual fact, the selected bidder has quoted a total amount of Rs 310,000 exc of VAT per unit as maintenance charges for eight years.

4. Following review of the financial evaluation, the price quoted by the selected bidder i.e IBL Ltd-Health Activ is as follows:

Price quoted for equipment per unit (Offer A)	Rs4,670,464 exc of VAT
Price for 3 units	Rs14,011,392 exc of VAT
Total maintenance charges for 8 years for the equipment per unit (Offer A)	Rs310,000 exc of VAT
Total maintenance charges for 8 years for the equipment for 3 units	Rs930,000 of VAT
Total price for 3 units inclusive of total maintenance charges for 8 years (Offer A)	Rs14,941,392 exc of VAT

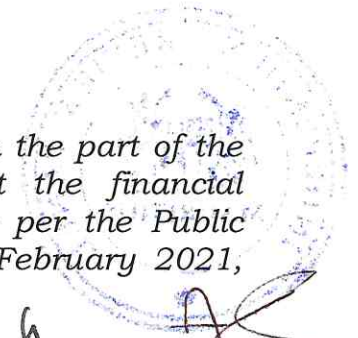
5. Accordingly, the selected bidder i.e IBL Ltd – HealthActiv remains the lowest evaluated substantially responsive bidder for Item 1(Offer A).”

F. Grounds for Review

On 23 February 2021, the Applicant seized the Independent Review Panel for review on the following grounds:

“1. Applicant’s grounds for review:

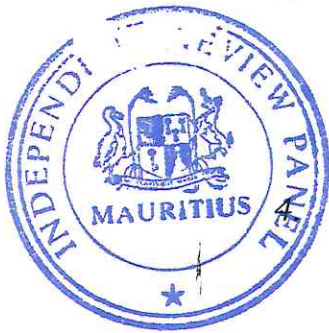
There have been serious laches and/or faults on the part of the Bid Evaluation Committee when carrying out the financial evaluation of the bids for Item 1 inasmuch as per the Public Body’s own admission in its letter dated 17th February 2021, inter alia:



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[Handwritten signature]

- (a) *the financial evaluation of the technically responsive bids for Item 1 was not carried out properly;*
- (b) *the Bid Evaluation Committee has “erroneously taken the unit price for Item 1 (Offer A) as Rs 4,630,464 instead of Rs 4,670,464 as quoted by the selected bidder and the amount Rs 310,000 exc of VAT as yearly maintenance charges for each unit, when in actual fact, the selected bidder has quoted a total amount of Rs 310,000 exc of VAT per unit as maintenance charges for eight years.”*
2. *True it is that in its letter dated 17th February 2021, the Public Body informed the Applicant that following a review of the financial evaluation (after the Bid Evaluation Committee has faulted), the price quoted by the successful bidder remained the lowest evaluated substantially responsive bidder for Item 1, the Applicant avers that in view of the laches and/or faults admitted to have been committed by the Bid Evaluation Committee, the bid evaluation process is tainted with important irregularities, which cast serious doubt on the reliability of the whole tender exercise. In view of the amateurism shown by the members of the Bid Evaluation Committee concerning this procurement exercise, there may have been other financial or technical mistakes made by the Bid Evaluation Committee, of which the Applicant is unaware.*
3. *Additionally, the Applicant is not aware whether the other unsuccessful bidders have been made aware of the laches and/or faults on the part of the Bid Evaluation Committee, which would have given them the opportunity to challenge the award and/or apply for review to this Panel.*
- In view of the laches and/or faults admitted to have been committed by the Bid Evaluation Committee for item 1, it cannot be excluded that similar laches and/or faults have also been committed for item 2.*
5. *The Applicant avers that for the sake of transparency, in the public interest and to avoid any perception of bias, the decision of the Public Body should be annulled.”*



G. The Hearing

This matter has been heard by the Panel in unprecedented circumstances because of the lockdown situation. It was fixed for a hearing on 17 March 2021, with our decision due by 24 March 2021.

However, neither a physical hearing nor a hearing by audio-visual means was possible.

Determination of the matter has, fortunately, been made possible by virtue of regulation 57(1) of the Public Procurement Regulations 2008 (“PPR”). It sets out the default procedure before the Panel and reads:

“57. Hearings

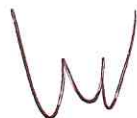
- (1) *At the request of the applicant for review or on its own initiative, the Review Panel may, where it deems appropriate, conduct a hearing.”*

On virtually every occasion the Panel has been called upon to determine an application for review, Applicants have requested for a hearing and the Panel has acceded to those requests. However, the current sanitary crisis has made it impossible to follow the normal course.

We are very grateful to the parties and their legal representatives to have agreed that the Panel determines the matter ‘on papers’. We have, thus, the benefit of the Statements by the Applicant and Respondent, written submissions on their behalf and all the documents customarily provided by the Ministry, including all documents and information available to the BEC and the Ministry for them to arrive at the selection of the successful bidder.

The Applicant was represented by Mr Adil Calleea instructed by Mr Z.Hatteea whereas the Respondent was represented by Mrs A. Faugoo-Boolell instructed by State Attorney. Counsel on both sides submitted written submissions on 22 March 2021 [with further submissions filed, as agreed, by the Ministry on 23 March 2021 in response to matters raised by the Applicant in its Statement of Reply filed on 22 March 2021]

As ever, the Successful Bidder had been invited to attend the hearing fixed on 17 March 2021. In the circumstances, it was also invited to offer submissions and participate to the hearing ‘on papers’.



H. Findings

We have set out the very lengthy grounds for review above and do not propose to reproduce them anew but we find that Grounds 1 and 2 essentially invite the Panel to review the whole evaluation process because of the two mistakes the Ministry has admitted making in the financial evaluation in respect of item 1. Ground 3 sets out the Applicant's concern about its fellow unsuccessful bidders and whether they were made aware of the alleged blunders of the Ministry under item 1. Ground 4 is a suggestion that, if the Ministry made mistakes under item 1, it could have happened for item 2. Ground 5 is an 'umbrella' ground for review praying the Panel to annul the selection of IBL as Successful Bidder.

We have carefully reviewed all the documents pertaining to the evaluation of the bids and the process followed by the BEC and for reasons that will become apparent below, we shall refrain from making specific comments on the technical and financial aspects of the evaluation process.

However, we will address, for clarity, some of the points raised by the Applicant and the Respondent in their Statements of Case.

First, we have mistake in the very price quoted by the Successful Bidder which was off by some Rs 40,000. IBL had quoted Rs 4,670,464 per unit for item 1 but the BEC somehow input the figure Rs 4,630,464 in its report. Ultimately, we find that it was rather an embarrassing mistake than a material one. The Applicant, the next lowest bidder, quoted Rs 4,998,000 and, thus, the error by the BEC was not significant in the conclusion of the report.

More embarrassing, however, was the blunder about the maintenance costs. Sequentially, the Ministry issued the Bidding Documents and at page 49 (item 1) and page 50 (item 2) forcefully asked bidders to give a yearly breakdown (a table) of maintenance cost running up to 'Year 8', then a total for those 8 years per unit and then another total for all the units under each item. Then, the BEC made a typographical error that applied to every bidder in its report by typing in the heading (of one column in the financial evaluation section) 'Cost of Maintenance (per year)'. Then, the Ministry, when notifying unsuccessful bidders, reprised this error and triggered this whole challenge ending up before this Panel. Once again, this is very embarrassing but had no




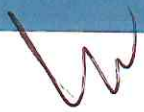
influence, in the end, on the evaluation since the mistake occurred in respect of every bid.

We do not propose to make any pronouncement on the fact that the Applicant failed the technical evaluation for item 2 since it offered a 26 cm x 26 cm detector when the minimum requirement was a 30 cm x 30 cm one.

The main issue in this present case, the Panel finds, is about abnormally low bids. Our legal framework and practice until December 2020, for the procurement of goods, has been such that challengers were not in a position to know what bids would qualify as abnormally low since they had no knowledge of the costs estimates. We, the Panel, are in receipt of such information through, *inter alia*, the bid evaluation report. Having seen troubling matters therein, we invited parties to offer submissions on abnormally low bids. We set out below our determination on the issue.

The Panel has had ample opportunity and has issued detailed decisions late in 2020 in respect of abnormally low bids – a consideration that existed in our law but was often overlooked until the Procurement Policy Office clarified the matter in its Directive No.46 issued in early April 2020. In both **Golden Valley Sonalall JV v FAREI Decision 07/20** and **RSL Security Services Ltd v Ministry of Health and Wellness Decision 08/20** (the present Respondent), the Panel thoroughly analysed the issue of abnormally low bids and we see no reason to depart from these decisions. In early December 2020, the PPO, issued Directive No.52 that provides a very detailed and step-by-step process to be followed in respect of Goods contracts, and supersedes Directive No.46.

This bid evaluation report having been completed on 23 November 2020, the least one could expect was that Directive No.46 would have been followed. Moreover, nothing prevented the Ministry to re-open, if it felt it warranted, the evaluation process to comply with the later Directive No.52 since it notified the award on 05 February 2021 when the later Directive was in force. Be that as it may, the BEC, on the face of its report, completely omitted mention of its consideration, if there was any, of Directive No.46 and the issue of abnormally low bids. Once again, the Ministry of Health and Wellness has acted in clear breach of section 37(10A) of the Public Procurement Act 2006 (“PPA”) by failing to follow the requirements of Directive No.46, couched in mandatory terms, and also failing, to a lesser extent, to apply



Directive No.52 as from 02 December 2020. The BEC (and perhaps, the Ministry in the end) should have asked itself whether it had concerns on the pricing of IBL (and of Ducray Lenoir, for that matter).

The bids of both the Applicant and the Successful Bidder fall into the abnormally low category under Directive No.46 which uses costs estimates minus 15% as a benchmark. The costs estimates chosen and fixed by the Ministry before the bids were submitted dictated the remaining process and they led to the consideration of abnormally low bids as provided for in the law.

The Panel is also of the view that the bids of the Applicant and of the Respondent are very likely to fall into the abnormally low bids 'risk zone' as per Directive No.52 of the PPO. Be that as it may, the BEC disregarding the binding Directive No.46 and, therefore, breaching multiple provisions of section 7 of the PPA and its section 37(10A).

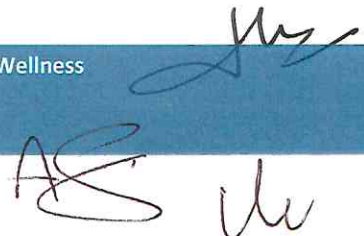
The Applicant is, therefore, unfortunately, correct when it complains that: *"In view of the amateurism shown by the members of the Bid Evaluation Committee concerning this procurement exercise, there may have been other financial or technical mistakes made by the Bid Evaluation Committee, of which the Applicant is unaware."*

Grounds 1 and 2 must succeed. This also addressed Ground 4, indirectly.

In respect of Ground 3, we do not feel it appropriate to speculate as to what would have been the challenge of other unsuccessful bidders. All we can say is that the Applicant would have been the only one feeling aggrieved since it was the closest in terms and, as we have seen, also an abnormally low bid.

Ground 5 is a cause of some difficulty. The Applicant has limited itself to seeking the annulment of the decision of the Ministry – that is, the decision to select IBL as the successful bidder. Admittedly, under section 46(10) of the PPA, we can order such annulment without more or we may order a re-evaluation to be carried out by a differently-constituted bid evaluation committee with new members.

Even though we feel a re-evaluation is more than warranted here, we decline to exercise our discretion to order such a re-evaluation and simply annul the decision of the Ministry and invite it to decide between a re-evaluation by a newly set-up bid evaluation committee

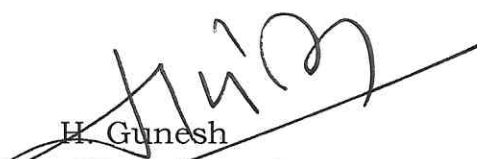


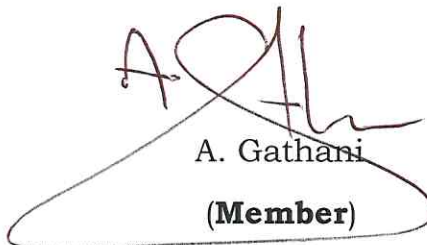
applying *inter alia* Directive No.46, or to simply restart the whole procurement exercise.

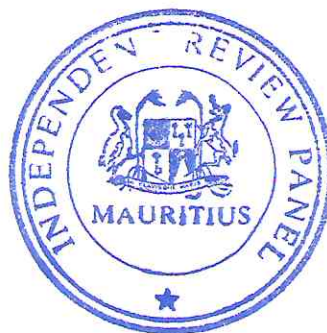
If re-evaluation is to be chosen, we invite the Ministry to seek the guidance of the Central Procurement Board and/or the Procurement Policy Office on the application of Directive No.46, especially, on whether to deem multiple offers for one specific item as multiple bids or a single bid since this is very likely to have marked impact on the mathematical determination of the 'lowest normal price'. Similarly, it would be advisable for public bodies to refrain from group 'items' together in their bid evaluation reports to be better able to apply Directive No.46. For instance, here, bids for items 1 and 2 were merged into a total and since a bidder bid for only one item, this would necessarily lead to an erroneous 'lowest normal price'.

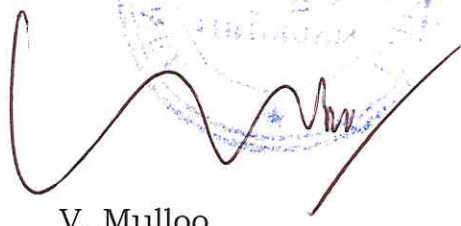
I. Conclusion

In the circumstances, we annul the decision of the Ministry to retain the Successful Bidder's bids and remit the matter back to the said Ministry for it to decide what course of action it will take.


H. Gunesh
(Ag. Chairperson)


A. Gathani
(Member)




V. Mulloo
(Member)

Dated: 24 March 2021