Independent Review Panel

Decision No. 16/21

In the matter of:

Ducray Lenoir Ltd.

(Applicant)

v/s

Trust Fund For Specialised Medical Care
Cardiac Centre

(Respondent)

(Cause No. 17/21/IRP)

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Decision

A. History of the case

On 29 December 2020, by way of Open National Bidding, the Respondent invited bids for the Supply, Installation, Testing and Commissioning of Angiography Machine with all necessary accessories for Cardiac Centre, Pamplemousses bearing Procurement Reference No. **TFSMC/CC/ONB/2020-2021/Q1 – CPB/51/2020**.

At the bid opening at the Central Procurement Board on 28 May 2021 bids were received from four (4) bidders. The Applicant was one of the bidders.

B. Evaluation

A Bid Evaluation Committee was set up by the Central Procurement Board to evaluate the bids received and to identify the lowest evaluated substantially responsive bid.

C. Notification of Award

On 23 July 2021, the Public Body, in response to the Invitation for Bids, informed the Applicant, that an evaluation of the bids received had been carried out and the particulars of the selected bidder are as mentioned below:

No	***Item***	***Name of Bidder***	***Address***	***Contract Price (Rs)***
1	*Supply, Installation, Testing and Commissioning of Angiography Machine including Maintenance Contract*	*Healthactiv (IBL LTD)*	*15 Des Reserves Street Cassis*	*27,690,850.00*
	Upgrade to 30 x 40 cm Detector			*1,684,150.00*
	Option 55" Medical Grade Monitor			*2,500,000.00*
			Total Value of Contract (Rs)	*31,875,000.00*

D. The Challenge

On 29 July 2021, the Applicant challenged the procurement proceedings on the following grounds:

"Equipment proposed by successful bidder does not comply to ITB 19.3 of the BIDDING DATA SHEET of this tender and does not comply to line item 1 of the Specification and Compliance sheet of this tender

Point 1: ITB 19.3 of the BIDDING DATA SHEET is a crucial clause of this tender that states that the 'Period of time the Goods are expected to be functioning (for purpose of spare parts): 10 years.'

However, the model of the equipment proposed by the successful bidder, namely the Siemens Artis Zee with PURE does not satisfy this clause. The end of life and end of support of this equipment is stated to be the year 2027 on the manufacturer's website itself. This point is further evidenced in the letter annexed to this schedule.

Point 2 : Line item 1 of the Specification and Compliance sheet of this tender states that: The offer should be for the latest, technological most advanced and current "State of the art" Model. The equipment should be dedicated for cardiac angiography investigation and interventional angiography for both adult and pediatric patients.

However, the system proposed by the successful bidder, namely the Siemens Artis Zee with PURE, was first introduced in 2008 and has never received any upgrades to two of its four major components (namely the x-ray tube and the x-ray generator) even though the manufacturer has released newer models of these components as well as newer Angiography systems since 2008. This point is further evidenced in the letter annexed to this schedule."

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E. The Reply to Challenge

On 6 August 2021, the Respondent in it's reply to the challenge annexed a letter dated 6 August 2021 from the Central Procurement Board providing material for reply to the Respondent and which stated that:

"With reference to your letter dated 30 July 2021, please find hereunder materials for reply to the Challenge made by Ducray Lenoir Ltd.

***Point 1:** ITB 19.3 of the BIDDING DATA SHEET is a crucial clause of this tender that the 'Period of time of the Goods are expected to be functioning (for the purpose of spare parts): 10 years'*

Under this ITB, bidders are expected to commit themselves in securing spare-parts inter-alia by giving full particulars, including available sources and current prices of spare parts, special tools etc, necessary for the functioning of the Goods during the period defined specified in the BDS – in the present case, 10 years.

The end of life and end of support interpretated as 2027 from the manufacturer's website, as mentioned by the applicant, cannot be used to determine the above requirement.

Compliance with ITB 19.3, for all bidders, requires the submission, in the form of an undertaking that they shall guarantee the availability of spare-parts for 10 years as from the commencement of the use of the goods by the Purchaser.

The selected bidder has guaranteed, through a letter from the manufacturer, of "the availability of spare parts for 10 years from the date of discontinuation of the model quoted."

Point 2: *Line item 1 of the Specification and Compliance sheet of this tender states that: The offer should be for the latest, technological most advanced and current "State of the art" Model. The equipment should be dedicated for cardiac angiography investigation and interventional angiography for both adult and pediatric patients.*

The above requirement is described under "Section V Schedule of Requirements", sub-section "3. Technical Specifications", table "Specification and Compliance Sheet":

The offer should be for the latest, technological most advanced and current "State of the art" Model. The equipment should be dedicated for cardiac angiography investigation and interventional angiography for both adult and pediatric patients.

This requirement is mentioned in order to prevent bidders from submitting offers for outdated machines with old/ obsolete technology, in clearer terms to avoid dumping.

This element is further emphasised under ITB 19.3 where it has been stated that the period during which the equipment is expected to be functioning, is ten (10) years "following commencement of the use of the goods by the Purchaser".

Under that requirement, the selected bidder has submitted a certificate from the manufacturer confirming that the particular model of equipment quoted "is still in production with a new platform released July 2021"."

F. Grounds for Review

On 12 August 2021, the Applicant seized the Independent Review Panel for review on the following grounds:

*"1. Item 1 of the Specification and Compliance sheet of the tender specifically provides inter alia that "The offer should be for the **latest, technological most advanced and current "State of the art" Model**.." (emphasis added)*

2. It is the Applicant's contention that the system (angiography machine) proposed by the successful bidder is not the latest and technologically most advanced system manufactured by this specific equipment manufacturer (Siemens Healthcare GmbH) for the following reasons:

(a) An angiography machine consists of 4 main components, namely:

1. X-ray tube
2. X-ray generator
3. Detector
4. Software

(b) The proposed system by the successful bidder was introduced and received its initial FDA certificate in 2008 (K 073290);

(c) The system was upgraded as per FDA certificate K 090745. The system received a software upgrade in 2009;

(d) This system was upgraded as per FDA certificate K 122644. The system received a flat panel detector upgrade in 2013.

(e) This system was upgraded as per FDA certificate K 141575. The system received a software upgrade in 2014;

(f) The system was upgraded as per FDA certificate K 181407. The system received a software upgrade, a detector upgrade, and a tube cooling unit upgrade in 2018;

(g) It is clear from the above upgrades brought to the system that the X-ray tube and X-ray generator of the proposed system have never been upgraded/ changed since 2008;

(h) The proposed model houses a 'MEGALIX' X-ray tube;

(i) As per the manufacturer's website, newer and more technologically advanced models angiography machines (such as Artis Q) have the new 'GIGALIX' X-ray tube, which was introduced in 2013.

(k) The proposed model by the successful bidder has therefore at least 2 main components, namely the X-ray tube and X-ray generator of 2008 technologies (and therefore not the latest technologically most advanced). The same manufacturer (Siemens Healthcare GmbH) has introduced newer and more advanced X-ray tubes and generators in the other families of angiography machines;

3. In light of the above, it is the contention of the Applicant that:

(a) the proposed system of the successful bidder, cannot reasonably be considered as "the latest, technological most advanced" system and the bid from the successful bidder ought to have been found as not substantially responsive inasmuch as it does not conform to all the terms, conditions, and specifications of the Bidding Documents;

(b) true it is that the bid of the successful bidder may satisfy the technical requirements but it cannot be denied that the proposed system is not "the latest, technological most advanced" which is an essential criterion for the award of the Contract. The Public Body erred by failing to make the distinction between two separate criteria.

4. It is further submitted that the tender ought to have been awarded to the next lowest bid which is technically and substantially responsive."

G. The Hearing

Hearings were held on 01 September and 06 September 2021. There is on record a Statement of Case filed by Applicant and Statement of Defence filed by the Respondent. A Statement of Reply was subsequently filed by the Applicant.

The Applicant was represented by Mr A. Calleea, Barrister at Law, whereas the Respondent was represented by Counsel Mr I. Mamoojee.

The Successful Bidder, was represented by Mr A. Oozeer, Barrister-at-Law.

Staff from the Central Procurement Board and the Chairperson of the Bid Evaluation Committee were also present.

H. Findings

POINTS IN LAWS AND PROCEDURES

The Applicant raised two points in law, viz:

(A) The Respondent failed to communicate the Statement of Defence within 7 days from the date of receipt of the application and therefore objected to same being filed.

(B) The Applicant is objecting to the 'Co Respondent's Reply and comments" from the Successful Bidder on the ground that (a) Successful Bidder is not a party to proceedings (b) there is no Co Respondent in the matter and (c) the law makes no provision for the Successful Bidder to comment and reply to the Statement of Case and/or to file such document.

The parties moved that the Panel should first hear the first point and give a ruling and which we did.

Counsel Mr Mamoojee, submitted that the Statement of Defence and/or the reply was filed with the IRP within the delay provided by law but through oversight did not communicate a copy to the Applicant.

In a ruling the Panel ruled that the Statement of Defence of the Respondent already formed part of the record and accepted same and further in all fairness and in the interest of justice postponed the hearing to Monday 6th day of September 2021 to give an opportunity to the applicant to file a reply to the Statement of Defence of the Respondent.

On 06 September, 2021, the Applicant filed a reply to the Statement of Defence.

The Respondent in its Statement of Defence, had raised a plea in limine litis to the effect that Applicant be precluded from calling witnesses (if) any at the hearing inasmuch as the application for the review was not accompanied by any witness statement as required by Law.

To a question from the Panel, Counsel appearing for the Applicant confirmed that he shall call no other witness except the representative of the Applicant Company.

We allowed the representative of the Applicant to depone on behalf of the Applicant and now we give our reasons.

The Applicant is a party to the case and being a Body Corporate has the right to call a representative to confirm the contents of its Statement of Case and reply. Had the Applicant moved to call any other person other than the representative of the Applicant, this Panel would certainly not allow as Section 45(2)(ba) provides that an application for review under Subsection (1) shall be accompanied by a statement of case and a witness statement, if any.

The Panel makes a difference between a representative of a Body Corporate and a witness statement. For the Panel an Applicant which is a body corporate has the right to call a prepose of the Applicant but not an independent witness, should it have failed to submit at the time of application for review a witness statement that introduces new facts or matters that substantially depart from the Statement of Case or otherwise substantially causes prejudice to the Respondent's conduct of its case and right to know what case it has to meet.

The second point which the Applicant raised was to object to the filling of the 'Co Respondent's reply and comments' as it was not a party to the proceedings, the Successful Bidder was not a Co Respondent in the matter and there is no provision for the Successful Bidder to comment and reply to the Statement of Case, and/or file such document.

At the hearing we allowed the 'reply and comments' to form part of the record but we agree that the Successful Bidder was not a Co Respondent as per the title of its reply and comments filed. This title is completely different to the title of the Applicant applying for review and we also agree that the Successful Bidder is not a party to the case.

It is a common practice that the IRP in all fairness informs all the parties and the Successful Bidder of the date of hearing but the Successful Bidder has a choice either to attend the hearing or it may not. At the hearing, if a Successful Bidder intends to communicate any document and/or intervene can only do so with leave of the Tribunal and our reasoning is based on Regulation 53 (3) of the Public Procurement Regulations which reads as follows:

53(3)- The Review Panel may request or allow the submission of additional statements by the parties and by other parties not participating in the application for review, as may be necessary for the fair resolution of the application for review. (*the underlining is ours*)

From the above Regulation it is clear that the Panel has a power to allow other parties not participating in the application for review the submission of statements as may be necessary for the fair resolution of the application for review.

ON THE MERITS OF THE APPLICATION:

On 29 July 2021 the Applicant had challenged the award of tender on two grounds:-

Ground 1: That the Equipment proposed by the Successful Bidder does not comply with ITB 19.3 of the Bidding Data Sheet.

Ground 2: That the Equipment proposed by the Successful Bidder does not comply with item of the Specification and Compliance Sheet of the Bidding Document which states that:

"1. The offer should be for the latest, technological most advanced and current "State of the art" Model. The equipment should be dedicated for cardiac angiography investigation and interventional angiography for both adult and pediatric patients."

However in the light of explanations provided in the letter from the CPB annexed to the Reply to Challenge dated 06 August 2021, the Applicant dropped its contention regarding Ground 1.

In the Application for Review filed at the IRP on 12 August 2021, the Applicant maintained that the Equipment proposed by the Successful Bidder did not comply with the item 1 of the Specification and Compliance Sheet of the Bidding Document.

The prepose of the Applicant has stated that the model proposed by the Successful Bidder incorporates amongst others, two components, namely the X-ray tube and X-ray generator which have been first introduced in 2008. He contends that since "newer and more advanced X-ray tube and generators in the other families of angiography machines", have been introduced by the same manufacturer the proposed model cannot be considered as the latest, technological most advanced model and is thus non-compliant.

On the other hand, the Respondent avers that:-

(i) Section V. Schedule of Requirements, Sub-section 3. Technical Specifications, Specification and Compliance Sheet, Item no. 1 "General description" provides that "the offer should be for the latest, technological most advanced and current "state of the art" Model..."

(ii) The abovementioned section and item refers to the qualitative description of the equipment required as opposed to technical and/or quantitative specifications.

(iii) As such the evaluation was carried out on the basis of the technical specifications of the "Systems Sub Sections" (Item no. 1-14) to ensure that the requirements as to technologically advanced and current state of the art model are met.

(iv) Under ITB 19.3, it is further emphasized that the period during which the equipment is expected to be functioning is ten (10) years "following commencement of the use of the goods by the Purchaser". Healthactiv (IBL LTD) (hereinafter referred to as "the successful bidder") submitted a certificate from the manufacturer confirming that the particular model of equipment quoted "is still in production with a new platform released July 2021".

(v) The Respondent further avers that the latest FDA certificate submitted by the successful bidder is dated 15th August 2018 and fulfils the requirements of Item no.6 of the general description.

(vi) The Respondent avers that both the X-Ray tube and X-ray generator were found to be compliant to the "Technical Specification". Therefore, "newer and more advanced X-Ray tube and generators in other families of angiography machines" are irrelevant and do not affect the responsiveness of the proposed model by the successful bidder in any manner whatsoever.

The Panel has at its disposal all relevant documents in relation to this Bidding Exercise, including the different Certificates mentioned in the Respondent's Statement of Reply.

The Panel finds as follows:

The Successful Bidder has proposed an Angiography Machine of make Siemens and Model Artis Zee with PURE. It has submitted a certificate from the manufacturer confirming that the particular model of equipment proposed is still in production with a new platform released in July 2021. The Respondent has submitted the required FDA certificates and there is a letter from the manufacturer guaranteeing the availability of spare parts for 10 years from the date of an eventual discontinuation of the model proposed. Moreover, during the hearing, the Respondent also submitted a 'Datasheet' document from Siemens which indicated that the Artis Zee model will stay on state of the art technology for years to come.

The Panel finds that the Section entitled – **'Technical Specification-Specification and Compliance'** of the Bidding Document is made up of a portion entitled General Description followed by detailed requirements under different components of the system required.

Under the General Description portion of the Technical Specification and Bidding Document there are eight (8) line items. Item 1 of the

General Description, which the Applicant has referred to for backing its case, is more of a generic nature and there are more detailed requirements in the other 7 Items of the General Description.

Whilst it is true that Siemens has produced a newer GIGALIX X-ray Tube as compared to the previous version called MEGALIX X-ray Tube, this issue alone cannot override the fact that the model proposed is responsive and is in compliance with the detailed requirements under the General Description and the other Technical Requirements in the Bidding Document.

The Panel is therefore of the view that the Successful Bidder is in compliance with the requirements of the Bidding Document and therefore does not accept the contention of the Applicant.

I. Conclusion

In view of the above, the Panel finds no merit in the present Application for Review and therefore dismisses the same.

H. Gunesh

(Vice-Chairperson)

R. Mungra

(Member)

V. Mulloo

(Member)

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Dated: 09 September 2021