

AWARD OF THE BID PROTEST COMMITTEE
IN THE BID PROTEST OF BID IFB #2- 2016
“FOR OPERATIONS SERVICES FOR HAAGS BOSCH SANITARY LAND FILL”
BY
THE JOINT VENTURE
(Cevons Waste Management, Ground Structures Engineering & Ivor Allen)
AGAINST
THE MINISTRY OF COMMUNITIES
(The Procuring Entity)

Reasons for review

On the 12th July, 2016 Mr. Morse Archer representing the Joint Venture Consortium comprising himself, Ivor Allen and Charles Ceres requested a review of the award of the contract for Operation Services at Haags Bosch Sanitary Landfill. The Complainants raised four reasons for review namely-

1. low price- that the contract should not in this case have been awarded to the lowest evaluated bid considering the effects of low price,
2. technical competence-that the joint venture have put together the more technically qualified and experienced team,
3. operation methodology-that the joint venture has put forward the most efficient system to operate the landfill, and
4. past performance-that BK International and Puran’s Joint Venture have done a terrible job at managing the landfill for over five years.

Summary of Facts

This claim concerns the Ministry of Communities project - Operation Services at the Haags Bosh Sanitary Landfill Facility. The duration of the contract is for one year and the scope of the project is to deliver waste to the site, and the disposal of it, utilizing at least a landfill compactor, bulldozer, track loader, and an excavator and also to cover the exposed waste with a layer of clay or alternative materials at the end of each day. Five bids were received and were evaluated by an Evaluation Committee comprising Mr. E. McGarrell, Permanent Secretary, Ministry of Communities, Mr. K. Alleyne, Senior

Environmental Officer, EPA and Mr. S. Ganesh, Project Manager Donor Programme, Ministry of Public Infrastructure. Bids were received from H. Nauth & Sons (G\$158,029,200), Jagmohan/Nabi Joint Venture (G\$ 279,199,008), Ivor Allen/Cevons Waste Management Inc./Ground Structures Engineering Consultants Inc. Joint Venture (G\$263,400,000), Puran Bros. Disposal Inc. (G\$221,400,000) and STP Investment (G\$178,800,000).

Out of the five Bidders only Ivor Allen/Cevon Waste Management Inc./Ground Structures Engineering Consultants Inc. and Puran Bros Disposal Inc. were deemed responsive because they satisfied the criterion of operating at least one landfill. As they were the only two responsive Bidders, the remaining deciding factor was operations cost. The Evaluation Committee recommended Puran Bros Disposal Inc. because their operations cost was lower than Ivor Allen/Cevon Waste Management Inc./Ground Structures Engineering Consultants Inc. This recommendation was supported by the National Procurement and Tender Administration Board and approved by Cabinet who offered a no objection to the award of the contract to Puran Bros. Disposal Inc.

After being informed of their loss, the Complainants, in correspondence to the procuring entity, the Ministry of Communities, requested a review of the award of contract to Puran Brothers Disposal Inc. They were informed by the procuring entity that they were unsuccessful with their bid because it was not the lowest evaluated. The Complainants, dissatisfied with this response, wrote to the National Procurement and Tender Administration Board seeking a review. The request for review was forwarded to the Bid Protest Committee. On the 26th September, 2016 the Committee held a hearing into the matter.

Decision

After conducting a hearing into the complaint the Bid Protest Committee (the Committee) has decided to reject the complaint. The procuring entity-the Ministry of Communities is advised to continue with the procurement process. The Committee's reasoning is set out below.

1. Low price

The method employed in this procurement process was open tendering and this procedure is laid out in the Procurement Act, Cap. 73:05. It is a procedure which is designed to solicit a competitive price that also satisfies the evaluation criteria of the procuring entity. Section 39 (1) states that "the procuring entity shall transmit to the Evaluation Committee all tenders timely received from the contractors or suppliers". The Evaluation Committee then according to section 39 (2) "shall using

only the evaluation criteria outlined in the tender documents evaluate all tenders, determine which bidder has submitted the lowest evaluated tender and convey its recommendation to the procuring entity". Section 39 (3) further states that-

The procuring entity shall, if it agrees with the Report of the Evaluation Committee, publicly disclose the name of the lowest evaluated bidder and if the procuring entity disagrees with the decision of the Evaluation Committee, the procuring entity shall issue an advisory recommendation to the Evaluation Committee regarding which bidder should be the lowest evaluated bidder, which recommendation the Evaluation Committee shall observe.

Additionally, section 39 (6) (a) states that "All evaluation criteria for the procurement of goods, works and services in addition to price, will be qualified in monetary terms and the tender will be awarded to the lowest evaluated". Furthermore, section 42 (1) states "Subject to sections 39 (8) and 40, the tender that has been identified as the lowest evaluated tender shall be accepted".

Apart from the law which is binding on all parties, the Bidding Documents which all Bidders purchased states in Section II paragraph 32.1 "The Contracting Agency shall use the criteria and methodologies listed in this Clause. No other evaluation criteria or methodologies shall be permitted". Paragraphs 32.4, 32.5, 33.1, 34.1 and 34.3 all speaks about the lowest evaluated bid. For instance, paragraph 33.1 which deals with comparison of bids clearly states that "The Contracting Agency shall compare all substantially responsive bids to determine the lowest evaluated bid" in accordance with the evaluation process. Para 36.1 is even clearer. This clause deals with the award criteria. It states-

The Contracting Agency shall award the Contract to the Bidder whose offer has been determined to be the lowest evaluated bid, in accordance with ITB 32.4 and is substantially responsive to the Bidding Documents, provided further that the Bidder is determined to be qualified to perform the Contract satisfactorily.

Section 39 (4) (c) explains what a responsive bid is. It states, "the Evaluation Committee may regard a tender as responsive only if it conforms to the requirements set forth in the tender documents". Therefore, a responsive bid is one that aligns with the criteria set out in the Bidding Documents. In this particular case both the bids of the Joint Venture and Puran Bros Disposal Inc. were deemed to be responsive by the Evaluation Committee. In other words, after assessing each Bidder against the evaluation criteria Puran Bros Disposal Inc. and the Joint Venture were the only two Bidders that went forward for a final determining. Thus,

the only determining factor that the Evaluators were left to consider was which Bidder submitted the lowest price. Puran Bros Disposal Inc. did. The bids were Puran Bros G\$18,450,000 (per month) and the Complainants', G\$21,950,000 (per month).

It should also be noted that Mr. Gordon Gilkes, the architect of the engineer's estimate, stated that Puran's bid was sufficient to successfully complete the project. Additionally, the procuring entity by way of written response to the Complainants dated 24th September, 2016 clarified that 'the operation service contract is a fixed price contract for one year and is subject to performance standards. No price increase is contemplated'. This was also endorsed by Mr. Gilkes in his oral testimony at the hearing. Therefore, whatever are the effects of a too low bid price are for the procuring entity to deal with along with the awardee.

2. Technical Competence

With respect to the assertion that the Complainants made about having the best team, the Committee considers this to be subjective. It is human nature for every bidder to have confidence in themselves and their team and would regard their own as better. This Committee agrees that the Joint Venture has a stellar team. However, the Evaluation Committee concluded that both Puran Bros. Disposal Inc. and the Complainants have the minimum years required for operating a landfill as well as their key staff possess the minimum experience asked for. The Evaluation Committee also noted that at the time of evaluation although Puran Bros Disposal Inc. had a Site Manager they did not submit a named technician. They further noted that the Complainants did not submit a sworn affidavit for their listed technician. Nevertheless, the conclusion of the Evaluation Committee shows that the critical criterion, with respect to experience, were for Bidders to have experience in operating at least one landfill. Apart from the Complainants and Puran Bros Disposal Inc., all the other Bidders failed this critical test and were deemed non responsive. Therefore, although the Complainants and Puran Bros Disposal Inc. both received a 'No' for failure to produce a site technician at the time of the evaluation this was not detrimental to their bids.

The criteria as it relates to experience were-

- (1) general construction experience- experience with construction contracts in the role of contractor for at least the last five years;

- (2) maintenance experience- experience with heavy earthworks equipment maintenance contracts in the role of contractor for at least the last three years; and
- (3) specific operations experience- minimum experience as operator in operation and maintenance of at least one (1) landfill.

As it relates to personnel the Bidding Documents asked for-

- (1) site manager with a total work experience of ten years and a total of five years' experience in similar works, and
- (2) technician with a total work experience of five years and a total of two years in similar works.

The above criteria did not ask for extensive experience but instead set out the minimum experience required. Though long years of experience will always be desirable, it was not a requirement for this project.

It should also be noted that the evaluators did not use a point system which would have ranked Bidders against each other thus determining who was better based on the amount of scores gained. For this evaluation a yes or no system was used. Therefore, as long as a Bidder had the minimum requirement they received an automatic qualification. As admitted by the procuring entity the evaluation was not to assess the best but rather to determine who satisfied the minimum requirements and as section 5 of the Procurement Act dictates, the Evaluation Committee must use the criteria outlined in the Bidding Documents.

In relation to the Complainants' assertion that they were at a disadvantage when asked to get a sworn affidavit from Mr. John Thompson, the Committee pointed out that this was not necessary. Firstly, the letter Mr. Emil McGarrell, Permanent Secretary (Ministry of Communities) wrote on 29th March, 2016 asked all Bidders to 'Submit a sworn affidavit from each personnel proposed, indicating that he/she will be available to work full time on site for the duration of this contract'. The letter did not say to produce your personnel in person. Secondly, section 97 of the Evidence Act, Cap. 5:03 states that "any oath or affidavit required for a purpose in Guyana may be taken or made in any place out of Guyana before any person having authority to administer an oath in that place." This affidavit could have been drawn up and notarised in Mr. Thompson's jurisdiction.

3. Operation Methodology

The Complainants assert that their planned use of High Density Polyethylene (HDPE) plastic as a daily cover for the landfill is 'the most efficient system to operate the landfill'. However, while this may be so, operation methodology was not listed in the evaluation criteria.

Every procuring entity is empowered by law to determine the criteria by which Bidders will be assessed and such criteria must be followed by the Evaluators. As section 5 of the Procurement Act states "Every supplier or contractor wanting to participate in procurement proceedings must qualify by meeting such criteria as the procuring entity considers appropriate." Additionally, section 39 (2) states that "the Evaluation Committee, shall using only the evaluation criteria outlined in the tender documents evaluate all tenders, determine which bidder has submitted the lowest evaluated tender." The mandatory requirement to only use the criteria of the procuring entity is also echoed at Section III, page 33 of the Bidding Documents which states that-

This Section contains all the criteria that the Contracting Agency shall use to evaluate bids and qualify Bidders. In accordance with ITB 32 and ITB 34, no other factors, methods or criteria shall be used. The Bidder shall provide all the information requested in the forms included in Section IV, Bidding Forms.

ITB 32 deals with the evaluation of bids and states clearly in para 32.1 "The Contracting Agency shall use the criteria and methodologies listed in this Clause. No other evaluation criteria or methodologies shall be permitted." Para 32.2 of the Bidding Documents list what factors the Contracting Agency shall consider and listed as a factor is 'the evaluation criteria indicated in Section III, Evaluation and Qualification Criteria" (para 32.2 (f)).

The evaluation criteria listed in Section III are (1) Key Staff Requirements, (2) Contractor's Operation Equipment, (3) Evaluation of Financial Proposal, (4) Eligibility, (5) Historical Contract Non-Performance, (6) Financial Situation and (7) Experience. Nowhere in Section III of the Bidding Documents was operation methodology listed as part of the criteria.

While it would have been ideal for the procuring entity to include operation methodology in the criteria and assess how each bidder would have managed the landfill (since this is instrumental to the success of the project), it is clear that the procuring entity did not consider it appropriate for this specific project.

Further, Part VI of the Bidding Documents deals with 'Operation Service Requirements for HBSLF, Guyana'. Para 2 of this Part states that-

The provisions contained in these Operation Management Requirement are intended to supplement the Conditions of Contract and the Contract in general for the purpose of providing greater specificity of the Operation Services that the Contractor shall perform.

This Part adds to the conditions that will be set in the Contract. As stated above it supplements the conditions of the Contract. It is this Part that will tell the awardee of the Contract what must now happen to effectively perform the Contract. Whatever is mentioned in this Part is telling the bidder in great detail what the project entails and what they must now do. It is in this Part that the need for daily cover is mentioned specifically at paras 9.5. and 9.5.2. Para 9.5.2 states two sources of materials available to cover the landfill daily. Namely clay materials available from the construction of the landfill and alternative daily cover materials (ADC). In relation to ADC, the Bidding Documents stated that ADC materials is encouraged as this is one way to promote good hydraulic connection throughout the waste.

Bidders, not the Evaluation Committee, were left to decide what materials to use as a daily cover, either the traditional clay or ADC materials. Operation methodology was never meant to be a part of the criteria. Therefore, it would have been erroneous for the Evaluation Committee to consider the Joint Venture's submission on this as a criterion.

4. Past Performance

All Bidders were assessed on historical contract non-performance (history of non-performing contracts within the last three years prior to the deadline for submission of bids and pending litigation). The requirement further stated that the criterion must be met by a single entity or as a partner to a past or existing joint venture, consortium or association (Section III, 2.1 of the Bidding Documents). The Evaluation Committee deemed both the Complainants and Puran Bros. Disposal Inc as satisfying this criterion.

The Complainants advanced the argument that Puran Bros Disposal Inc. should have been disqualified as a result of their past performance. They specifically argued that the Joint Venture of BK International and Puran Bros Disposal Inc. was a national disaster and embarrassment since the Government of Guyana was forced to terminate that contract in 2016. Further, as a result of the failed project 'Puran Bros are trying to delink from their Joint Venture partner BK Int'.

In response the procuring entity, through its representatives Mr. McGarrell and Mr. Gordon Gilkes, informed the hearing that it did not attribute the failure at Haags Bosch to Puran Bros Disposal Inc. because they became aware of non-cooperation between the parties of that Joint Venture. They also said that the procurement process did not exclude anyone and if a Bidder was once part of a Joint Venture they would be assessed individually.

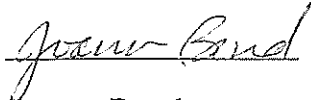
Mr. Lakenauth Puran on behalf of Puran Bros Disposal Inc. in addressing the Committee disclosed that their Joint Venture with BK International won the contract for operations services at Haags Bosch in 2009. However, the Joint Venture broke down shortly after when Mr. Puran's attempts to contact Mr. Brian Tiwari of BK International proved futile. In illustrating this breakdown, Mr. Puran informed the hearing that they had initiated a court action against BK International for breach of the terms of the Joint Venture contract. He further added that in December 2011 the Inter-American Development Bank (IDB) recognising that the site was not being operated and managed as expected terminated funding of the project. Further, by way of letter dated 21st March 2014 sent by Puran Bros Disposal Inc to the then PS of the Ministry of Local Government and Regional Development, requested to have their names removed from all documents and contracts relating to the project at Haags Bosch, citing years of disagreement and non-participation in the project. Mr. Puran further added that press releases were done informing the public that his company was not involved in the project. He further added that letters were sent to Mr. McGarrell informing him that the company was no longer involved in the landfill site.¹

The Committee was guided by the evaluation report which stated that all bidders met this qualifying requirement of having no history of non-performing contracts within the last three years and pending litigation. Additionally, based on the testimony of Puran Bros Disposal Inc. it is clear that they were not actively involved in the last Haags Bosch project and did all that was reasonable to remove themselves from the Joint Venture. Further, the supporting testimony of representatives of the procuring entity confirmed that because they were aware of the breakdown they did not deem them ineligible.

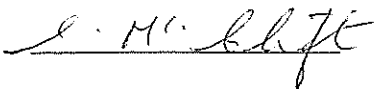
¹Supporting documents were produced at the hearing.

5. Conclusion

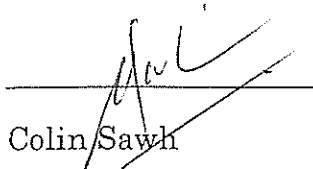
Based on the above reasoning the Bid Protest Committee finds that the evaluation criteria were followed by the Evaluators. Puran Bros Disposal Inc.'s bid was not only responsive but it was the lowest evaluated bid.



Joann Bond
Chairperson



Archibald Clifton
Member

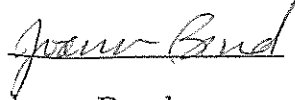


Colin Sawh
Member

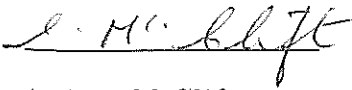
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5. Conclusion

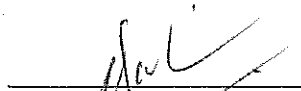
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30th September 2016