

**Notice of Decision of Level 2 Authority after reviewing the appeal
submitted under
“Procurement of Consulting Services for Preparation and
Implementation of Resettlement Action Plans (RAP) and
Preparation, Supervision of Implementation of Livelihood
Restoration Plans (LRP) for the Transmission Line Alignment of
Electricity Transmission Project (ETP)**

MCA-N/ETP/QCBS/010”

This is to notify all Consultants that the Secretariat has received Level 2 Authority decision on the protest/bid challenge submitted under “Procurement of Consulting Services for Preparation and Implementation of Resettlement Action Plans (RAP) and Preparation, Supervision of Implementation of Livelihood Restoration Plans (LRP) for the Transmission Line Alignment of Electricity Transmission Project (ETP) - MCA-N/ETP/QCBS/010”.

Decision of the Level 2 Authority:

The decision of Level 2 Authority is attached.

As per Rule 5.1.3 Bid Challenge System of MCA-Nepal “The Level 2 Authority decision will be: (a) Final and binding on all parties to the Appeal with no further recourse (including but not limited to writs) available in any other forum, or jurisdiction” and decision of Level 2 Authority will be implemented by the MCA-Nepal Procurement Manager no later than six (6) Business Days from the date the Level 2 Authority decision is sent in accordance with **Rule 5.3**.

As per Rule 5.1.4 of the Bid Challenge System of MCA-Nepal the Suspension of this procurement process will be automatically lifted immediately after this decision of Level 2 Authority decision is sent by the Secretariat.

Attachment: Decision of Level 2 Authority

Decision of Level 2 Authority

**LEVEL 2 AUTHORITY DECISION
ON
APPEAL TO LEVEL 1 DECISION: REVIEW OF BID
CHALLENGE**

**Procurement of Consulting Services for Preparation and
Implementation of Resettlement Action Plans (Rap) and
Preparation, Supervision of Implementation Of Livelihood
Restoration Plans (LRP) For The Transmission Line Alignment
Of Electricity Transmission Project (ETP)**

Procurement Ref. No.: MCA-N/ETP/QCBS/010

LEVEL 1 AUTHORITY: MCA-Nepal Executive Director

**CHALLENGER/APPELLANT: Environment and Resource Management Consultant
(P) Ltd. (ERMC)**

LEVEL 2 AUTHORITY MEMBERS:

1. Keshav Bahadur Thapa
2. Rameshwar Lamichhane
3. Shyam Sunder Mishra

5 August 2022



1. PROCUREMENT BACKGROUND DETAILS

S. No.	Events	Date
(i)	Publication of Notice: Procurement of Consulting Services for Preparation And Implementation of Resettlement Action Plans (RAP) And Preparation, Supervision of Implementation Of Livelihood Restoration Plans (LRP) For The Transmission Line Alignment Of Electricity Transmission Project(ETP)	08 March 2022.
(ii)	Receipt of Proposals from: <ul style="list-style-type: none"> (a) Environment and Resource Management Consultant (P) Ltd. (ERMC) (b) SA Infrastructure Consultants Pvt. Ltd. (SAICPL), India in Joint Venture with BOTEK Bosphorus Technical Consulting Corporation (BOTEK), Turkey and GOEC Nepal (Pvt.) Ltd. (GOEC), Nepal and Total Management Services Pvt. Ltd. (TMS) Nepal in association with WeKreate International (Pvt.) Ltd. (WEKI), Nepal and Map Nepal Engineering Consultancy (P) Ltd. (MNEC), Nepal as a form of Sub - Consultant. (c) GOPA International Energy Consultants GmbH with Consulting Services for Social and Infrastructural Development (CSSID) (P) Ltd., Kathmandu, Nepal and GEOCE Consultants (P.) Ltd., Kathmandu, Nepal and Subcontractors (d) EcoCon Serv Environmental Solutions (Eco Con Serv), Egypt in Joint Venture with SILT Consultants (P) Ltd. (SILT), Nepal and in Association with Consulting Services or Social and Infrastructural Development (P) Ltd. (CSSID) , Nepal 	15 April 2022
(iii)	Notification of Results of Technical Evaluation Issued to all Consultants	8 June 2022
(iv)	Request for Debrief by ERMC	9 June 2022
(v)	MCA-Nepal response to request for Debrief	13 June 2022
(vi)	ERMC submission of Bid Challenge/Protest	14 June 2022
(vii)	Comment submitted by the Interested Party	21 June 2022
(viii)	Level 1 Authority decision on the Bid Challenge/Protest	28 June 2022
(ix)	Appeal submitted by Challenger on Level 1 Authority Decision	5 July 2022
(x)	Formation of Level 2 Authority	22 July 2022

2. BRIEF ON BID CHALLENGE AND PROCEEDINGS

2.1 Bid Challenge/Protest by ERMC on Result of Technical Evaluation

ERMC submitted their Protest/Bid challenge to the Level 1 Authority on June 14, 2022 for review of the Technical Evaluation for procurement of consulting service for Preparation and Implementation of Resettlement Action Plans (RAP) And Preparation, Supervision of Implementation Of Livelihood Restoration Plans (LRP) For The Transmission Line Alignment Of Electricity Transmission Project (ETP).

The protest mentions that the Sub-consultants, not fulfilling the mandatory requirement to satisfy the specific experience requirement mentioned in Section III Qualification and Evaluation Criteria, 3.7.4.2 and its subsequent Clarification dated March 31, 2022 (S.No. 18) should not be qualified and the proposal submitted by the firm with the sub-consultant should be non-responsive and should not be considered in detail evaluation of technical proposal.

2.2 Level 1 Authority Decision

Level 1 Authority (MCA-Nepal Executive Director) rejected the Protest/Bid challenge made by ERMC as mentioned below:

“Level 1 Authority concludes that this protest/bid challenge is without basis and upholds the decisions and actions taken by MCA-Nepal and rejects the protest/Bid Challenge on Consulting Services for Preparation and Implementation of Resettlement Action Plans (RAP) and Preparation, Supervision of Implementation of Livelihood Restoration Plans (LRP) for the Transmission Line Alignment of Electricity Transmission Project (ETP). “

2.3 Appeal

ERMC 's (Challenger) Appeal on the decision of Level 1 Authority is as follows:

- Disqualify the firms with sub consultant which fail in mandatory requirement of Selection Procedure in Evaluation of Technical proposal. Financial Proposal of only qualified firms should be open,
- TEP has violated procurement rules as it has violated provision regarding experience of sub-consultant in evaluation of Technical Proposal. Other consultants have been benefitted by de facto relaxation of the provision of the RFP. By strict observance to the provision of the RFP challenger has suffered, otherwise it could have strengthened its Technical Proposal by joint effort with other sub consultant. We will suffer in future during evaluation of Financial Proposal as with association we could have proposed all national experts and our Financial proposal could have been more competitive. The violation of provisions of Selection Procedures deprived us from enjoying equal footing with other firms which submitted the proposal.

2.4 Formation of Level 2 Authority and it's proceedings

On 22 July 2022 MCA-Nepal Secretariat decided and informed that as per Rule 4 Bid Challenge System (BCS), the following three individuals were selected from the Master List of experts to review and decide on the appeal:





Keshav Bahadur Thapa
 Rameshwar Lamichhane
 Shyam Sunder Mishra

On 25 July 2022 the MCA-Nepal Secretariat arranged a meeting with Level 2 Authority and provided information on the available documents related to the Challenge, the venue and the duration for conducting the proceedings. In the meeting Level 2 Authority prepared and submitted Procedural Guideline to be adopted by the Authority as required by BCS Rule 5.1.1. The Level 2 Authority started the work from 27 July 2022.

3. ERMChallenge AND APPEAL SUBMISSIONS

The submission made by ERMChallenge in support of their Challenge and/or Appeal is as follows:

- "MCA-Nepal fails to comply with the "Procurement Rules" Section III. Qualification and Evaluation Criteria, 3.7. Qualification Table, 3.7.4.2 General and Specific Experience, Note 1", which is violation of Procurement Action. The procurement authority neglected these important aspects. This clause provides for mandatory requirement and without fulfilling which a firm cannot be responsive and should be rejected out rightly before entering into detail technical evaluation".
- "Firms associated with other firms passed the technical evaluation, though these firms were not meeting the minimum requirements of Sub-Consultant. The Challenger believes that the requirement prescribed has been overlooked during the Technical Evaluation. This would cause the Challenger tremendous loss as they could not strengthen their consortium, as aimed due to their adherence to the evaluation criteria. Further, the Challenger states that they will have negligible harm".
- A firm without any prior experience of this size and complexity should not win the Contract.
- "The violation on procurement guidelines of MCC was unforeseen and it didn't help to provide equal ground to all firms who submitted the proposal. If the constriction on sub-consultants was not sought in the RFP document, we would have strengthened our consortium which would have help us get better positions on the technical evaluation. Since the sub-consultants were needed to be qualified for the similar assignments, which was further clarified in the Clarification I as explained earlier, we could not strengthen our consortium as aimed".
- Under this point, the Challenger has claimed that it is their **belief** that those sub-consultants who did not have right credentials for this complex and challenging job should have been disqualified during the technical evaluation.
- Requests the Level 2 Authority to review and decide in favor of them in accordance to all clauses and regulation as per RFP ITC Clause 5.4, ITC Clause 35.1, RFP Section III. Qualification and Evaluation Criteria: 3.7 Qualification Criteria (3.7.4.2 General and Specific Experience), Mandatory Criteria (MUST Meet) and its clarification (Point 18 of final clarification) and Program Procurement Guidelines - Pl.A2.13, P6.2 and Pl.B1.11.





- “Must meet at least one specialized requirements” is certainly a mandatory requirement. The Clarification explains in detail that requirement 3.4, 1.1 to 1.5 should be fulfilled for a sub-consultant to be qualified. If the sub-consultant is disqualified their proposed manpower and other input will not be considered in the evaluation and the proposal submitted by the consultant will also be non-responsive.
- Appeal should be carefully and seriously considered by the Level 2 Authority to disqualify the firms with sub consultants which fail in mandatory requirement of Selection Procedure in Evaluation of Technical Proposal. Financial Proposal of only qualified firms should be opened.
- TEP has violated procurement rules as it has violated provisions regarding experience of sub-consultants in the evaluation of the Technical Proposals. Other consultants have been benefitted by de facto relaxation of the provisions of RFP. By strict observance to provisions of RFP, challenger has suffered, otherwise it could have strengthened its Technical Proposal by joint effort with other sub consultant. We will suffer in future during evaluation of Financial Proposal as with association we could have proposed all national experts and our Financial Proposal could have more competitive. It is due to non-strict observance of provisions of Selection Procedure by TEP. Level 1 Authority also failed to notice this. The violation of provisions of Selection Procedures deprived us from enjoying equal footing with other firms who submitted the proposal.

4. COMMENT SUBMISSIONS FROM SAICPL,INDIA IN JOINT VENTURE WITH BOTEK, TURKEY; GOEC, NEPAL AND TMS, NEPAL IN ASSOCIATION WITH WEKI, NEPAL AND MNEC), NEPAL AS SUB-CONSULTANTS¹

The Consultant as per Bid Challenge System Rule 1.6 joined and participated in the process by filing Comments to the Secretariat and copied to the Challenger with submissions as follows:

- The Challenger has violated the process of protest rule of MCA-Nepal. Protest should be filed in right time otherwise it should be considered as influence activities and should attract the Section I. Instruction to the Consultant (ITC) clause 22.2. In our opinion, the Bid Challenger attempted misinterpretation of RFP clauses and the Clarifications.
- “The Protest does not clearly show that the Challenger will suffer irreparable harm if the Challenged Procurement is not suspended; it is clearly stated that the sub-consultants experience was not considered for evaluation. Page 47 of RFP states Mandatory Criteria as “NONE” and page 55 of RFP clearly states that sub consultant experience shall not be considered for evaluation except a part of methodology. Hence, it is all equal ground for all the participated bidders. The Bid Challenger’s misinterpretation of the RFP Clauses and subsequent clarification should not be valid.

¹ SA INFRASTRUCTURE CONSULTANTS PVT. LTD. (SAICPL), INDIA IN JOINT VENTURE WITH BOTEK BOSPHORUS TECHNICAL CONSULTING CORPORATION (BOTEK), TURKEY AND GOEC NEPAL PVT.) LTD. , (GOEC), NEPAL AND TOTAL MANAGEMENT SERVICES PVT. LTD., (TMS) NEPAL IN ASSOCIATION WITH WEKRETE INTERNATIONAL (PVT.) LTD. (WEKI), NEPAL AND MAP NEPAL ENGINEERING CONSULTANCY (P) LTD. (MNEC), NEPAL AS A FORM OF SUB – CONSULTANT

5. LEVEL 1 AUTHORITY SUBMISSIONS AND DECISIONS

The Level 1 Authority's submissions and decision with regard to the Bid Challenge and or Appeal are as follows:

- The clause 3.7.4.2 (RFP Section III. Qualification and Evaluation Criteria) provides the provision of approval of the specialized Sub-Consultant by MCA-Nepal. It does not state any specified criteria to be fulfilled by the Sub-Consultant, but states "If the Consultant is proposing a sub consultant to carry out a particular task (specialized requirement related to experience requirement stated under 3.4, 1.1 to 1.5) under this assignment, then the Consultant must submit the experience certificate of the Sub-Consultant in support of the Sub consultants technical capacity and experience to perform the intended task to be sub-consulted, for MCA-Nepal approval.
- If a consultant is qualified to carry out all the specialized requirements of the assignments, they can do by themselves. All the Consultants has fulfilled the requirements stated under Section III. 3.7 Qualification Table.
- A Consultant may associate with a Sub consultant who not necessarily will be in charge of undertaking specialized tasks. A Sub consultant may provide to the Association for example: (i) experts, (ii) logistic support, (iii) office space and equipment in Nepal, (iv) vehicles, (v) knowledge of local languages, (vi) knowledge of cultural aspects and business environment and (vii) similar inputs etc.
- The Challenger failed to provide clear and convincing evidence on (i) which Sub-consultants (by name) will undertake specialized tasks requiring the submission of experience certificates and (ii) the list of specialized tasks to be undertaken by Sub consultants, and (iii) evidence-beyond Challenger's opinion- that such sub consultants are not qualified for undertaking such tasks.
- RFP does not provide any provision that if Sub-Consultant is not qualified the Consultant shall be disqualified.
- With no detailed information, specific provisions and supporting evidence which would disqualify a Consultant if the associated Sub-Consultant is not qualified, the Level 1 Authority is unable to accept the relief sought by the Challenger, which is to proceed to reject the technical Proposals submitted by all other Consultants and Sub consultants participating in the procurement process, and in such a way depriving MCA-Nepal of the benefits of a strong and healthy competition.
- The Challenger has claimed that the firms associated with other firms passed the technical evaluation, though these firms were not meeting the minimum requirements for Sub-Consultant. The Challenger believes that the requirement set are being overlooked during the Technical Evaluation. This would cause the Consultant tremendous loss as they could not strengthen their consortium, as aimed due to their adherence to the evaluation criteria. Further, the Consultant states that they will have negligible harm.

- The submitted Challenge/protest does not clearly describe how the Challenger may sustain “tremendous loss” when MCA-Nepal Technical Evaluation Panel has determined the proposal submitted by the Challenger as the Top Ranked amongst all submitted technical proposals.
- The scores obtained by each Consultant is independent of the sub-consultants qualifications. The Sub-Consultant is required to be evaluated if they were proposed for specialized requirement for an intended task to be sub-consulted by the Consultant and the submission is for MCA-Nepal approval
- The claim of the Challenger is without any merit and Level 1 Authority concludes that, all relevant criteria of the RFP were used and consistently applied during the technical evaluation. Thus, all Consultants were able to equally participate with or without any Sub-Consultant. The Challenger has not suffered or will suffer loss or injury because of the MCA-Nepal procurement actions as the Challenger has emerged as the top ranked Consultant.
- The Challenger’s claim that a firm without any prior experience of this size and complexity has been selected to win the Contract is inaccurate and without any substance. No information or evidence on the Challenger’s claim has been submitted, thus MCA-Nepal cannot accept the Challenger’s statement that a firm with no experience in implementing contracts of this size and complexity could win this contract.
- There is no violation of any procurement guidelines of MCC as the procurement was strictly carried out as per the provision of RFP and MCC Program Procurement Guidelines. There was no constraint stated in the RFP for any Consultant for association with any Sub-Consultant and the Challenger cannot make MCA-Nepal responsible for not being able to establish a satisfactory (for the Challenger) association with a Sub-Consultant. Further, as the sub-consultants experience cannot be scored during the technical evaluation, and the requirement stated under 3.7.4.2 for sub-consultants only requires MCA-Nepal approval (or rejection) of the proposed Sub-Consultant, the Consultant’s claim that they could have improved their scoring by adding the experience of the Sub-Consultant is without any regard to RFP Section III Qualification and Evaluation Criteria.
- There is no provision in the RFP that prevents the Consultants to associate (as JV or Sub-consultancy agreements) with other Consultants as they may consider needed to enhance their capabilities. Furthermore, P1.B.1.11 of the MCC Program Procurement Guidelines encourages Bidders and Consultants to have associations between them. Except the challenger, no other consultant has the wrong understanding of the provision of the RFP.
- The RFP does not include any provision, which states that if the Sub-Consultant does not have right Credential (not defined by the Challenger), the Consultant will be disqualified. Section III. Qualification and Evaluation Criteria, 3.4 Evaluation Criteria, Note 2, below the table, states “Sub-Consultant experience shall not be considered for Evaluation, except as part of methodology”, Since, all Consultants are evaluated based on their own credentials, there is no question of “no right credentials” and thus there should not be any disqualification.
- The Level 1 Authority considers that the Challenger erroneously submitted a protest with the intention to disqualify any one or all other firms without any substantive grounds or evidence.



The acceptance of such arguments without any evidence could deprive MCA-Nepal of the benefits of healthy competition harming the interest of MCA-Nepal and other participants in the procurement process and will be contrary to MCC PPG. MCA-Nepal has acted in accordance with the provisions of the RFP and evaluated all the submitted technical proposals not considering the experience of the sub-consultants in the evaluation as per the RFP requirements and, hence, disqualify the protest, based on the following BCS provisions.

- As per Rule 1.3 of the BCS, for a Protest to prevail a Challenger must prove by clear and convincing evidence that (a) the Procurement Action (i) violates the Procurement Rules; or (ii) is arbitrary or capricious or characterized by an abuse of discretion; and (b) the Challenger has suffered or will suffer loss or injury because of the Procurement Action.
- Further, as per Rule 2.1.2 (a) and after reviewing the submitted challenge the Level 1 Authority has decided to reject the Protest because the Challenger has failed to meet its burden of proof under Rule 1.3
- Further, the Level 1 Authority finds that the evaluation processes and the technical evaluation report results are consistent with the evaluation requirements laid out in the Request for Proposal document and that there were no flaws in the process to necessitate rejection of technical evaluation report.

Level 1 Authority Decision

The Level 1 Authority concludes that this protest/bid challenge is without basis and upholds the decisions and actions taken by MCA-Nepal and rejects the protest/Bid Challenge on Consulting Services for Preparation and Implementation of Resettlement Action Plans (RAP) and Preparation, Supervision of Implementation of Livelihood Restoration Plans (LRP) for the Transmission Line Alignment of Electricity Transmission Project (ETP).

6. MCA –Nepal RESPONSE TO APPEAL

MCA-Nepal in their Response to the Appeal have referred the following provisions of the RFP and the MCC Program Procurement Guidelines (PPG):

- Eligible Consultants (RFP:ITC 5.4)
- Joint Ventures or Associations (RFP:ITC 5.6)
- Inconsistencies with MCC PPG (RFP:ITC 35.1)
- 3.7 Qualification Table ,Sub Clause 3.7.4.2 General and Specific Experience of Sub-consultant experience(RFP)
- MCC PPG (P₁.A.2.13) General provision regarding use of SBD's made available by MCC
- Subcontracting (PPG; P6,2)
- Associations Between Consultants (PPG:P₁.B.a.11)

Further the Response to the Appeal mentions the following with regards to the Appeal issues:

- 1) Provision 3.1 of Bid Challenge regarding consideration of only the matter presented to Level 1 Authority





(a) *an Appeal may only allege that the decision of the Level 1 Authority was inconsistent with the Procurement Rules or was in some way clearly erroneous; and (b) the Level 2 Authority review is limited to a review of the record before the Level 1 Authority, except that a Challenger or Interested Party may introduce new evidence on appeal (i) if the Challenger or Interested Party establishes that such evidence could not have been obtained by all reasonable diligence before commencement of the Level 1 Authority's review, or (ii) on the basis of some other exceptional circumstances, in each case as determined by the Level 2 Authority.*

- 2) No Evidence or clarity is provided by the Challenger on how MCA-Nepal hampered the ability of the Consultant to strengthen its Technical proposal by joint effort with other sub consultants. No provision in the RFP or PPG is designed to hamper the ability of the Consultants to form associations. The fact that other consultants were able to reach JV and or Subconsultancy agreements under the same provisions of the RFP lead to conclude that the entire protest and appeal submitted by the Challenger is strongly based on (i) misinterpretation of the RFP provisions and (ii) a deliberate attempt to disqualify other consultants that may have submitted (or not) a more competitive financial proposal. MCA-Nepal considers this attempt to be against the conceptual framework of the PPG which mandates "free and fair competition".
- 3) No evidence or clarity on how MCA-Nepal could have hampered the possibility of the Challenger to recruit and propose *all national experts* in their proposal is provided. Thus, the allegation that "we will suffer in future during evaluation of financial proposal" cannot be substantiated as the decision of recruiting national or international experts is exclusively under the Challenger's control.
- 4) The allegation that the Challenger has been deprived of equal footing with other firms cannot be sustained as the Challenger attained the highest score amongst all firms that submitted Proposals for this procurement. Furthermore, the Challenger has failed to provide clear and convincing evidence supporting its claims that the selection procedures have been violated by evaluating other consultants who had formed association with sub-consultants and had submitted their proposals
- 5) The Level 2 Authority is limited by MCA-Nepal Bid Challenge System only to review the record before the Level 1 Authority, and therefore, Level 2 Authority is not mandated under BCS to evaluate technical proposals and/or to disqualify firms or to instruct MCA-Nepal which financial proposals to open/not to open.
- 6) The Challenger is submitting the Appeal based on their *belief/assumption* that all other Consultants have proposed Sub-consultants to carry out a particular task (specialized requirement related to experience requirement stated under paragraphs 3.4, 1.1 to 1.5 of the RFP), which is incorrect. Further, there is no provision in the RFP to evaluate any Sub-Consultant **who has not been proposed** to carry out a *particular task* (specialized requirement related to experience requirement stated under 3.4, 1.1 to 1.5).





- 7) The TEP Panel has carried out the evaluation of all proposals in strict compliance with the provisions of the RFP and MCC PPG.

Response request to Level 2 Authority is as follows:

- a. Reject the appeal submitted by the Challenger and uphold the order passed by the Level 1 Authority,
- b. To declare that the procurement actions of MCA-Nepal complies MCC Program Procurement Guidelines and criteria under RFP.

7. LEVEL 2 AUTHORITY FINDINGS FROM THE DOCUMENTS

The Level 2 Authority findings and assessment is based on the study of the provisions and information given in the followings documents with regards to the Bid Challenge; Level 1 Authority Decision on the Bid Challenge; Challenger's Appeal to Level 1 Authority Decision and MCA-Nepal Response to the Appeal.

- Request for Proposal Documents
- Clarification issued by MCA Nepal to Consultants during procurement process,
- Notification of Result issued to the Consultants,
- Request for debriefing on Technical Evaluation Result
- Clarification response by MCA-Nepal to the request for debriefing on Technical Evaluation Result
- ERMC Protest on result of Technical Evaluation,
- Level 1 Authority Decision of Bid Challenge
- Challenger's (ERMC) Appeal
- Comment on Appeal
- MCA-Nepal response to Appeal submitted by ERMC,
- MCA-Nepal Bid Challenge System and
- MCC – Program Procurement Guideline

The findings detailed below is focused on the matters related to Bid Challenge/Appeal and provisions made in the related documents with regards to the Challenge and the procurement requirements to be complied.

7.1. Request For Proposal Document

(i) ITC General (b) "Associate" means any entity that is a member of the Association that forms the Consultant. A Sub-Consultant is not an Associate firm.

(ii) ITC General (cc) "Personnel" means Key Professional Personnel and additional staff provided by the Consultant, or by any Sub-Consultants, or Associates that are assigned to perform the Services or any part

(iii) ITC General (ll) "Sub-Consultant" means any person entity with whom the Consultant subcontracts any part of the Services

(iv) ITC 5.2: A Consultant may be a private entity, certain government-owned entities (in accordance with *MCC Program Procurement Guidelines* as described





in ITC Sub-clause 5.5) or any combination of such entities supported by a letter of intent to enter into an agreement or under an existing agreement of association in the form of a joint venture or other associations.

- (v) ITC 5.4: Consultants must also satisfy the eligibility criteria contained in the MCC PPG governing MCC-funded procurements under the Compact. In the case where a Consultant intends to join with an associate or sub-contract part of the Contract, then such associate shall also be subject to the eligibility criteria set forth in this RFP and the MCC PPG.

(vi) ITC 24: Evaluation of Technical Proposal

24.1. The TEP shall evaluate the Technical Proposals on the basis of their responsiveness to the Terms of Reference, applying the evaluation criteria, sub-criteria, and point system specified in Section III.

(vii) ITC 35: Inconsistencies with MCC Program Procurement Guideline

35.1 The Procurement that is the subject of this RFP is being conducted in accordance with and is subject in all respects to the MCC Program Procurement Guidelines. In the event of any conflict between any section or provision of this RFP (including any Addenda that may be issued to this RFP) and the MCC Program Procurement Guidelines, the terms and requirements of the MCC Program Procurement Guidelines shall prevail, unless MCC has granted a waiver of the guidelines.

(viii) 3.4 Evaluation Criteria

A Proposal will be rejected if it does not earn a total minimum score of 320 points. A Proposal may be rejected, at the discretion of the MCA Entity, if the firm does not satisfy the mandatory criteria as per table below. In addition, Proposals may be rejected, at the discretion of the MCA Entity, if any of the Key Personnel fails to satisfy the mandatory requirements.

The Consultant will be rejected if its Proposal does not clearly demonstrate that meets the following Minimum Mandatory Criteria:

Mandatory Criterion 1 NONE

(ix) Section III. Qualification and Evaluation Criteria

Note:

2. Sub-Consultant experience shall not be considered for Evaluation, except as part of methodology.

(x) 3.5 Determination of Responsiveness

The MCA Entity's determination of a Proposal's substantial responsiveness is to be based on the contents of the Proposal itself. For purposes of this determination, a substantially responsive Proposal is one that materially conforms to the requirements

of the RFP without material deviation, reservation, or omission. A material deviation, reservation, or omission is one that:

- (a) if accepted, would:
 - (i) affect in any substantial way the scope, quality, or performance of the Services specified in the RFP; or
 - (ii) limit in any substantial way, inconsistent with the RFP, the MCA Entity's rights or the Consultant's obligations under the proposed Contract; or
- (b) if rectified, would unfairly affect the competitive position of other Consultants presenting substantially responsive Proposals.

Any deviations for mandatory criteria/requirements shall be considered material deviation. All other deviations shall be scored below the minimum technical threshold and in a manner consistent with the evaluation framework established in Sub-section 3.6 below.

Provided that a Proposal is substantially responsive, the MCA Entity may waive any nonmaterial nonconformity in the Proposal.

Provided that a Proposal is substantially responsive, the MCA Entity may request that the Consultant submit the necessary information or documentation, within a reasonable period of time, to rectify nonmaterial nonconformities in the Proposal related to documentation requirements.

- (xi) 3.7.4.2 General & Specific Experience (under Sub-Consultant column)
Must meet at least one specialized requirement stated below as note #1:

Note: 1. Experience of Sub-Consultant: The Sub-Consultant must satisfy the Specific Experience requirements for the task for which the consultant is proposing the sub-consultant. The Consultant must submit the required experience certificate of the Sub-Consultant in support of the intended task to be sub-consulted for MCA-Nepal approval. 2. The Consultant must satisfy requirements under 3.7 Qualification Table to be awarded the Contract.

7.2. Clarification issued by MCA-Nepal to Consultants during the procurement process

Following clarification was sought from MCA-Nepal with regards to experience compliance by the Sub –Consultant with reference to Section III Table 3.7.4 General and Specific Experience:

Please clarify “The Sub Consultant for the assignment has to meet one specialized experience. Does this mean that the sub consultant should meet any one of the evaluation criteria mentioned in heading 3.4 of Section III.

Clarification / Reply of MCA-Nepal

“ If the Consultant is proposing a Sub consultant to carry out a particular task (specialized requirement related to the experience requirement stated under





3.4.1.1 to 1.5) under this assignment ,then the consultant must submit the experience certificate of the sub consultant in support of the Sub Consultants technical capacity and experience to perform the intended task to be sub-consulted for MCA-Nepal approval, This is to ascertain the proposed sub consultant has the required to carry out the specialized task under this assignment.”

7.3. MCC Project Procurement Guideline (PPG, Feb 2021)

- (i) P1.A.2.13: The MCA Entity shall use SBDs made available by MCC pursuant to Part 3. Standard Bidding Documents (SBD), whenever appropriate. In case there is no SBD appropriate to meet specific circumstance of the MCA Entity, the MCA Entity may use another solicitation document with approval from MCC. The SBDs may be modified to address Project-specific conditions, subject to approval by MCC when the change is material. Such changes shall be introduced only through the Bid Data Sheet (BDS), Appendix to Bid, or through the Special Conditions of Contract (SCC) and not by introducing changes in the Instructions to Bidders (ITB) or General Conditions of Contract (GCC).
- (ii) **P1.B.1.11 Consultants may associate with each other in the form of a joint venture, association, or sub-consulting arrangement, if so permitted in the respective RFP. The evaluation of the proposal will consider these arrangements as per the criteria given in the RFP.** The winning consultant, having won on the strength of its arrangement as above, will not be permitted to change its arrangement unless there are exceptional circumstances, and may only do so with the approval of the MCA Entity, which in turn will seek MCC approval. Failure to seek this approval will result in the rejection of the proposal or if done after the contract award rescinding the contract. The MCA Entity shall not require consultants to form associations with any specific firm or group of firms without the prior approval of MCC.
- (iii) **P6.2 All planned subcontracting arrangements by a bidder or consultant must be disclosed in response to the solicitation documents, which shall be evaluated in accordance with the evaluation criteria.** Once accepted as part of the evaluation, these arrangements cannot be modified without prior permission of the MCA Entity, which in turn must seek approval from MCC. After the contract award, if any contractor or subcontractor decides to subcontract an additional major item of goods, works, consulting services, or non-consulting services (including information systems) (deemed major if valued in excess of USD100,000) shall seek the MCA Entity’s prior written approval before proceeding.

7.4. Technical Evaluation Report

In the evaluation of Sub Factor 3.7.4.2 General and Specific Experience of Sub-Consultant, the evaluation report provides a note that the three Consultants who have proposed sub-consultant , has not stated the task for which the sub-consultant is proposed and any specific experience of the sub consultant , this point shall be clarified during contract negotiation





7.5. Technical Proposals

Study of the Technical Proposals show that out of the four consultants who have submitted their proposals for the Consultancy assignment, three Consultants have proposed Sub-consultants in their team. All the three Consultants, in their association agreement with the Sub Consultants, have not mentioned any specific task that is assigned to the Sub Consultants.

The association agreement of Consultant ECO CON SERV, Egypt in JV with SILT, Nepal and the Sub Consultant CSSID mentions "For purpose of submitting Technical and Financial Proposals for the above mentioned Project and carrying out services , if contacted."

The association agreement of Consultant SAICPL, India in JV with BOTEK, Turkey, GOEC, Nepal and TMS, Nepal and the Sub Consultants-WeKreate International, Nepal MNEC ,Nepal mentions " We will work closely with SAICPL Infrastructure to ensure that all necessary resource and management support are provided to achieve the objective of the assignment "Further the Consultant's proposal also includes "Key Expert" from the associated Sub Consultant.

The association agreement of Consultant GOPA International with Sub Consultants CSSID, Nepal and GEOCE, Nepal mentions "We confirm that we will act as Sub Contractor to GOPA for the following project." Further the Consultant's proposal also includes "Key Experts" from the associated Sub Consultants.

7.6. Bid Challenge Issue

The main issue in the ERMC's protest /bid challenge against MCA-Nepal's decision and the Technical Evaluation Report (TER) is the provision of Sub Clause 3.7.4.2 General and Specific requirement to be met by the Sub Consultant which is specified in Section III Qualification and Evaluation Criteria and included in 3.4 Qualification Table.

The Consultant ERMC (Challenger/Appellant) considers the experience requirement as mandatory requirement and mentions in case sub-consultant does not meet this mandatory requirement the proposal will be non responsive and should not be further evaluated. Further it mentions if the sub consultant is disqualified, their proposed manpower and other input will not be considered for evaluation and the proposal submitted by the consultant will also be non-responsive.

The requirement in Sub Clause 3.7.4.2 mentions that Sub Consultant must meet at least one requirement stated in the note provided for the requirement. The note mentions that Sub Consultant must satisfy Specific Experience requirements for the task for which the consultant is proposing the sub-consultant and the Consultant must submit the required experience certificate of the Sub Consultant in support of the intended task to be sub-consulted for MCA- Nepal approval.



8. ASSESSMENT

- a) The Evaluation criteria specify rejection of Proposal only if it does not demonstrate that it meets the minimum mandatory criteria. However, ITC 3.4 Evaluation Criteria clearly mentions Mandatory Criteria as none.

Section III Qualification and Evaluation Criteria Sub Clause 3.7.4.2 General and Specific Experience mentions that the Sub – Consultant must satisfy the Specific Experience requirements for the task for which the consultant is proposing the sub-consultant. However, the Consultants who have proposed to include Sub Consultants in their team have not specified any task with Specific Experience requirements for the proposed Sub Consultants. The provision of the RFP document issued to the Consultants neither mandates necessity of assigning a specific task nor prevents the Consultants to propose Sub-Consultant for the assignment without proposing any specific task to the Sub- Consultant. Therefore, proposing Sub-Consultants without assigning specific tasks cannot be considered as a deviation to the requirement of the RFP. Since no specific task is proposed for the Sub Consultants, Specific Experience requirement by the Sub-consultant cannot be considered as compliance requirement for Responsiveness. Therefore the criteria for specific experience criteria cannot be considered applicable for evaluation of Sub-Consultants, who are not proposed for any specific task by the Consultants. ITC 24.1 mentions that The TEP shall evaluate the Technical Proposals on the basis of their responsiveness to the Terms of Reference, applying the evaluation criteria, sub-criteria, and point system specified in Section III.

Further the above requirement mentions the Consultant must submit the required experience certificate of the Sub- Consultant in support of the intended task to be sub-consulted for MCA-Nepal Approval. Since the Consultants, who have proposed Sub-Consultants have not identified the task to be sub-consulted; the submission of Sub Consultant's experience certificates cannot be considered a relevant requirement for responsiveness.

Even in the case when specific task is proposed for the Sub-Consultant, the Sub Consultant's experience needs to be approved by MCA-Nepal. This clearly shows that this provision is not a ground for Consultant's proposal to be non-responsive. It is a requirement for rejection or acceptance of the proposed Sub-Consultant and hence cannot be ground for disqualification of the Consultant.

- b) It is clearly mentioned in the RFP that the Sub-Consultants shall not be considered for evaluation except as part of methodology. Further, as part of the discussed requirement of Sub-Consultants in above paragraph, the provision of 3.7 Qualification Table requires the Sub-Consultants must meet the requirements for Eligibility, Conflict of Interest, Ineligibility and Debarment, Nationality , Government Employees and Pending Litigation. As per TEP evaluation, the proposed sub-Consultants have complied with these requirements.

The Clarification provided by MCA-Nepal to the prospective Consultants at the time of bidding as per ITC 8.1 with regards to the Sub Consultant's specialized experience has clearly confirmed that if the Consultant is proposing a Sub consultant to carry out a particular task (specialized requirement related to the experience requirement stated under 3.4, 1.1 to

1.5) under this assignment ,then the consultant must submit the experience certificate of the sub consultant in support of the Sub Consultants technical capacity and experience to perform the intended task to be sub –consulted for MCA-Nepal approval, This is to ascertain that the proposed sub consultant has the required capacity to carry out the specialized task under this assignment. The clarification is considered adequate to remove ambiguity if any in the provision of the bidding document. Out of the four consultants three consultants did not consider the provision as restriction to include sub-consultant in their team without proposing any specific task to the Sub Consultant.

- c) ERMC (Challenger/Appellant) mentions that the Challenger believes that the requirement (General and Specific Experience for Sub Consultants) prescribed have been overlooked during the Technical Evaluation. This would cause the Challenger tremendous loss as they could not strengthen their consortium, as aimed due to their adherence to the evaluation criteria. Other three consultants have not considered the RFP provisions as restriction to include Sub Consultants in their team. The Technical Evaluation Report (TER) shows that the evaluation committee has not overlooked the provision of the qualification criteria. The TER mentions that the three Consultants who have proposed sub-consultant, has not stated the task for which the sub-consultant is proposed and any specific experience of the sub consultant , this point shall be clarified during contract negotiation. On the above background Challenger's (ERMC) understanding regarding the requirement of Qualification Table, 3.7.4.2 General and Specific Experience cannot be considered as a basis for declaring the other three Consultants as non responsive and rejecting them for detail evaluation as claimed by the ERMC (Challenger/Appellant).. Further the Specific Experience requirements for the task for which the consultant is proposing the sub-consultant, does not specify the type or volume to be considered as restrictive for proposing a sub consultant.
- d) As per the definition of Consultant (ITC 5.2) and ITC A-General (b): “**Associate** means any entity that is a member of the Association that forms the Consultant; A Sub-Consultant is not an Associate firm” & (II) which states “**Sub-Consultant** means any person or legal entity with whom the Consultant subcontracts any part of the services” the Sub-Consultant is not the entity to form the consultant and it has to be qualified independently for specialized requirement, if assigned to it. Therefore, the Consultant cannot be disqualified as claimed by the Challenger. Further the Association agreement between the Consultant and the Sub Consultants during the procurement stage is only an intention to subcontract for the consulting assignment but the Consultant can only sub contract when the Consultant is awarded the Contract.
- e) As per ITC General (II), “Sub-Consultant” means any person entity with whom the Consultant subcontracts any part of the Services. PPG 6.2 states “All planned subcontracting arrangements by a bidder or consultant must be disclosed in response to the solicitation documents, which shall be evaluated in accordance with the evaluation criteria”. Further P1.B.1.11 states Consultants may associate with each other in the form of a joint venture, association, or sub-consulting arrangement, if so permitted in the respective RFP. The evaluation of the proposal will consider these arrangements as per the criteria given in the RFP.

The solicitation document in this procurement is “Request for Proposal (RFP)”. The RFP permits sub-consulting arrangement and the Consultants who have proposed Sub-Consultants have signed association agreements with the Sub Consultants. The RFP also specifies the Qualification and Evaluation criteria to evaluate the Sub-Consultants. The RFP in the Table 3.7 Qualification Table requires the Sub- Consultants to meet the specified factor requirement in Eligibility (3.7.1.1 to 3.7.1.5) and the specified factor requirements in Pending Litigation) (3.7.2.1) and General and Specific Experience (3.7.4.2). As required by PPG 6.2 and P1.B.1.11, the Sub-Consultants have been evaluated as per the RFP criteria. Further except the Evaluation and Qualification, the RFP does not mention any specific sub consulting arrangement to be fulfilled with regards to Association Agreements with the Sub Consultants except that the Sub-Consultants that form the team shall not be replaced without the MCC Entity’s prior permission. The Association agreement between the Consultant and the Sub Consultants shows the intention to subcontract for the consulting assignment but the Consultant can only sub contract when the Consultant is awarded the Contract.

Based on the above assessment Level 2 Authority concludes that TEP’s evaluation complies with the provision of PPG and RFP.

9. LEVEL 2 AUTHORITY DECISION

The Level 2 Authority based on the findings and the assessment above and in accordance with the BCS Rule 5.1.2 deliver their decision on the Bid Challenge Appeal as follows:

The Level 2 Authority decides that the Consultant and Sub-Consultant cannot be disqualified.

Thus, Level 2 Authority upholds the decision of Level 1 Authority to reject the Protest/Bid Challenge on Consulting Services for Preparation and Implementation of Resettlement Action Plans (RAP) and Preparation, Supervision of Implementation of Livelihood Restoration Plans (LRP) for the Transmission Line Alignment of Electricity Transmission Project (ETP).

10. CERTIFICATION

The undersigned members of the Bid Challenge Authority 2 certify that the Decision (as set out in Section 9 above) is unanimously agreed to this by attaching their signatures below. The Authority wishes to thank Secretariat MCA-Nepal for providing the necessary documents, venue and facilities for conducting the Appeal review proceedings.



(Shyam Sunder Mishra)
Member



(Rameshwar Lamichhane)
Member



(Keshav Bahadur Thapa)
Member

Dated: Friday, August 05, 2022