

IN THE INDEPENDENT PROCUREMENT REVIEW PANEL (IPRP)

**IN THE MATTER OF AN APPEAL AGAINST THE DECISION BY THE
PROCUREMENT COMMITTEE OF A PROCURING ENTITY PURSUANT TO s65
OF THE PUBLIC PROCUREMENT ACT 2004.**

BETWEEN

MAK ENTERPRISES

Appellant

~and~

MINISTRY OF EDUCATION, YOUTH AND SPORTS

Respondent

RULING

INTRODUCTION

1. The appellant appeals against the inconsistency which has taken place in the evaluating and awarding of a contract for the supply of teaching and learning materials for primary schools from the respondent procuring entity. He further complained that the contract for any of the lots must be awarded to the lowest responsive evaluated bidder. Being dissatisfied with the bidding and evaluation process and the excessive delay by the Respondent, the Manager of the appellant firm, one Mr Mohamed A Kamara wrote a letter of complaint to the Independent Procurement Review Panel, hereinafter referred to as the IPRP, against the decision.

BACKGROUND

2. The appellant firm applied for and bid for a contract to supply the respondent with teaching and learning materials on 15th July 2009, along with a number of other firms. A total of 6 lots formed part of the bidding process but this review is primarily concerned with one of those lots, which is expressed as LOT 2. As part of the bidding process, bid documents were obtained by the appellant firm. The appellant further submitted the bid documents along with some 19 other bidders with respect to LOT 2. The appellant firm attended the bid opening ceremony,

and subsequent to that bid opening ceremony, the Technical Evaluation Committee carried out an evaluation exercise into the bids submitted and identified one Musa Sharaffdeen and Sons as the most responsive and lowest priced bidder in respect of LOT 2 and recommended Musa Sharaffdeen and Sons for the award of the contract. This was on account of the finding of the Technical Evaluation Committee which concluded that bid submitted by the appellant was commercially non-responsive owing to a failure to perform on previous contracts with the respondent. He claims in his complaint that the actions of the respondent are without any procurement justification. Despite writing to the Ministry about this issue, the Ministry failed to respond to his letters.

3. However the Technical Evaluation Committee, having selected Musa Sharaffdeen and Sons as the lowest responsive bidder for the proposed award in December 2009, it was for the Procurement Committee to issue a notification of award letter which it eventually did on the 25th February 2010. Prior to the notification of award letter, the NPPA produced a report on the evaluation and recommendation for the award of contracts and that report was copied to a number of persons, most important of which were the Minister of Education Youth and Sports, the Permanent Secretary and Chairman of the Procurement Committee and the Procurement Officer. This report highlighted a number of issues which will be discussed later. It became apparent from the report produced by the NPPA *{to which we shall refer later}* that the lowest responsive bidder was not completely evaluated and selected by the Procurement Committee and consequently, the complaint by the appellant firm.

THE LAW

4. The IPRP is a creature of Statute pursuant to s20(1) of the Public Procurement Act 2004 and its decisions must be in accordance with the law. The entire procurement process in Sierra Leone is governed by this same 2004 Act and its implementing regulations of 2006. Whilst the bidding documents and other relevant documents form part of the process, their relevance for the most part is limited to that of evidential relevance. Where a procuring entity fails to comply with the relevant law as alluded to above, such procurement as conducted would be null and void. This is made expressly clear in s1(1) of the Public Procurement Act 2004 and may equally amount to a breach of the Anti Corruption Act 2008.

THE ISSUES

5. The issues for determination in this appeal are:
- i. Whether the lowest responsive bidder as identified by the Technical Evaluation Committee was either correct or lawfully justified in law.
 - ii. Whether the disqualification of the appellant for the reasons given is correct in law.
 - iii. Whether the respondent was entitled in law to exclude the appellant from further participation in process.
 - iv. Whether a Procuring Entity has power in law to debar a bidder from taking part in the procurement process.

DELIBERATIONS

6. At the start of the process, it was established that there were no preliminary reasons as to why the review had to be suspended or refused. Most importantly, the application for review was accompanied by the relevant fee as provided for in s65(2) of the Act and all deadlines had been complied with. In any event the issue of deadlines is not entirely relevant as the Procuring entity in this case has failed to issue a decision within the required time frame and even further they have issued a notification of award letter to a bidder they considered as the lowest responsive without taking appropriate steps to address the issues raised by the NPPA. They have even failed to address the issue of delays raised by the appellant in his letter to the respondent dated 25th November 2009. We are therefore satisfied that s65(1)(b) is engaged. During the review process, the panel had an opportunity of perusing a number of documents. These are listed for expediency sake.

- Letter of complaint to the IPRP dated 26th February 2010, which is marked as Exhibit A.
- Letter from the appellant to the respondent enquiring about the issue of the delay in awarding the contract some three months after bid opening and very close to the expiry of his bid security, which is marked as Exhibit B.

- Report on the evaluation and recommendations of the Technical Evaluation Committee for the award of the contract, prepared by the NPPA, which is marked as Exhibit C.
 - Bid Evaluation Analysis Report, submitted by the respondent, and marked as Exhibit D.
 - Letter of complaint to the IPRP from the CEO, NPPA dated 2nd March 2010 and copied to other interested persons, which is marked as Exhibit E.
 - Notification of Award Letter from the respondent to Musa Sharaffdeen and Sons dated 25th February 2010, and which is marked as Exhibit F.
 - Letter from the Respondent to the CEO, NPPA dated 5th March 2009 and marked as Exhibit G.
 - Letter from the appellant withdrawing from a proposed contract to the Respondent dated 3rd February 2009 and marked Exhibit H.
 - Letter of acceptance of a bid from the respondent to the appellant in respect of an earlier bid, marked as Exhibit J.
7. The appellant's primary complaint as can be gleaned from Exhibits A and B is the fact that he was dissatisfied with the continuous delay in the tender process after bid opening and the decision of the respondent to award the contract to a bidder whose bid price was **Le 178,500,000** (one hundred and seventy eight million, five hundred thousand Leones) over and above that of the appellant, and hence the higher bidder. He was particularly concerned initially that his bid security was soon to expire and the respondent had not communicated with him for almost three months after bid evaluation. In Exhibit A he had this to say: *"Also LOT 2 for Geometry Set is awarded to Musa Sharaffdeen and Sons again who is the HIGHEST evaluated responsive bidder leaving out MAK Enterprises Limited who is the LOWEST evaluated responsive bidder for that lot with a difference in price of Le 178,500,000 (one hundred and seventy eight million, five hundred thousand Leones). Musa Sharaffdeen and Sons is above that of MAK Enterprises Limited. The bid price for MAK Enterprises Limited is Le 1,827,500,000 (one billion eight hundred and twenty seven million, five hundred thousand Leones) and that of Musa Sharaffdeen and Sons is Le2,006,000,000 (two billion and six million Leones). In Ex B, he had this to say: "I have not heard from the Ministry, three months have almost elapsed after the Bid Opening on 31st August 2009 and my bid security will soon expire. Please inform me about the outcome as soon as possible"*

Consideration must now be given to these issues.

8. It is clear that the appellant has indicated two principal concerns which have been set out above. One major issue is the subject of the delay and such a delay is significant in the context of the entire procurement process particularly as subsequent events have revealed. Delays, where shown to have occurred in a procurement process are unacceptable and are tantamount to an abuse of the procurement process. This panel must consider whether the continuing delay can be shown to be occurring and if so whether such delays are justified.
9. The procuring entity in this case has failed to respond to correspondence forwarded to it and have equally failed to provide any documents from its procurement records, neither have they provided any explanations for their actions. This is unacceptable behaviour for a public entity that is funded from resources of the state. However, the IPRP is in possession of Exhibits A to J which sheds some light on the conduct of the respondent entity in these proceedings. In the exercise of its supervisory and regulatory functions, the National Public Procurement Authority is required to review decisions of such entities to ensure compliance with the applicable law and regulations. Exhibit C clearly shows that in the exercise of those functions, the CEO of the NPPA had in that document clearly, admonished the procuring entity that their actions with respect to the disqualification of the appellant and another bidder was clearly “ultra vires” and further, their actions were clearly in contravention of the law.
10. On page 3 at paragraph (iii) of Exhibit C the NPPA had this to say: *“MAK Enterprises Ltd is Le 178,500,000 (One hundred and seventy-eight million and five hundred thousand leones) below Musa Sharaffdeen and Sons for the supply of LOT No. 2 (Geometry sets) and is ranked the lowest responsive bidder when evaluated. The NPPA therefore objects to the TEC’s disqualification of MAK contrary to s35, PPA 2004, and the recommendation of Musa Sharaffdeen and Sons who is considered the second lowest responsive bidder with a price of Le178,500,000 higher. MAK Enterprises must therefore be considered by the Ministry of Education, Youth and Sports of the award of contract for the supply of geometry sets.”*
11. Further, the CEO copied the report to all relevant persons at the respondent entity. It is undoubtedly the case that the respondent is fully aware that the NPPA as the regulatory authority had raised an objection to the award of this contract to Musa Sharaffdeen and Sons as at the 21st January 2010. In that same Exhibit C, the CEO was very instructive in his advice to the respondent in particular the remedial action to be taken to remedy the defect and most importantly to comply with the law, as the decision of the TEC has not been

based on procurement rules and regulations and consequently incorrect. To proceed to award the said contract to Musa Sharaffdeen and Sons in the letter dated 25th February 2010 in defiance to the objection raised by the NPPA is not only unlawful and in breach of procurement laws but an affront to the regulatory authority. We will now proceed to the substance of the decision.

12. We are of the view that not only is there no valid explanation for the excessive delay in concluding the process and awarding this contract, no explanation has been proffered by the respondent for the delay. Correspondence from the Appellant has been ignored without any due regard to the fact that the issue of delay raised in his complaint (Ex B) was wholly legitimate. This is wholly unacceptable from a public entity which is charged with the responsibility of managing public funds in an acceptable manner. The whole essence of a procurement process is to ensure the timely and efficient disposal of all procurement related activities. **Excessive delays are costly not only to bidders but also to the Government who may have to pay a higher price which is inflation related if the procurement is to be concluded. Most importantly, needless costs are incurred and those responsible for the delays are not in a position to compensate the Government or bidders for such needless loss. Such excessive delays without any corresponding reasons advanced are clearly an abuse of the process and an unfair manipulation of the entire process. The IPRP would therefore not tolerate or encourage such delays.**

13. The IPRP has had cause to deal with the issue of delays in the procurement process in the case of **HEALTHCARE PHARMACY v MINISTRY OF HEALTH AND SANITATION**. Our views in that case as expressed are no different from the views expressed in this case. In summary delays are unacceptable and would be frowned upon by the IPRP regardless of the reason for the delay. Inordinate and excessive delays are even more unacceptable where there is no valid explanation for it and would not be tolerated.

14. We would now consider the reasons advanced by the respondent for disqualifying the appellant and awarding the contract to Musa Sharaffdeen and Sons. As we have pointed out earlier, no documents have been provided by the respondent in this case. However, we are in possession of other relevant documents which shed light on this issue. It is clear from Exhibit B that the respondent disqualified the appellant purportedly in pursuance of s35 of the Public Procurement Act 2004 and awarded the contract to the higher bidder who was Musa Sharaffdeen and Sons. Exhibit D also confirms that the appellant was disqualified for *“having failed to perform on previous contracts awarded by the*

Ministry of Education Youth and Sports". They subsequently excluded the appellant from further participation in the procurement process.

15. s35 (1) of the Public Procurement Act 2004 provides:- The **Authority** may exclude a bidder or a supplier from participation in public procurement for a minimum period of one year and a maximum period of six years after -

(a) consultation with the affected procuring entity to consider all the facts of the case;

(b) reasonable notice to the bidder or supplier involved of the cause of the proposed actions; and

(c) reasonable opportunity for the bidder or supplier to respond to the proposed action.

16. It is clear from the wording of s35(1) that it is only the **AUTHORITY** that has the power to exclude, debar or otherwise disqualify a bidder from participation in public procurement. The respondent ministry has **NO** power or authority in law, do exclude, debar or otherwise disqualify a bidder from participation in public procurement, whatever reasons they may have for doing so. Further the reasons advanced by the respondent for excluding the appellant from participation in the process are completely unjustified and are unarguable for these reasons:

a. Exhibit J on the face of it, shows that the respondent had earlier in relation to another bid, accepted a bid from the appellant for the supply of school materials to the 19 local councils in Sierra Leone, in a letter dated 25th September 2008. The letter clearly contained a requirement that the appellant was required to sign a contract with the respondent within two weeks of the date of the letter as well as other conditions.

b. Exhibit H on the face of it, shows that despite the contents of Exhibit J, the respondent had failed to sign a contract with the appellant as required by Exhibit J. This delay caused the appellant to withdraw from the proposed contract which was communicated to the respondent in Exhibit H which is dated 3rd February 2009. (some five months later).

- c. Exhibit G on the face of it, clearly shows that the respondent was aware that the appellant had withdrawn from the transaction on account of the inordinate delays in signing a contract, for which no reasons were advanced by the respondent. It took the respondent a whole month to notify the Authority that the appellant had withdrawn and most importantly the appellant had complied with the requirements of Exhibit J in submitting a performance bond.
- d. Crucially, the respondent agreed that *“no contract had been signed by either party, there is no legally binding agreement to proceed with the proposed contract. It therefore stands to reason that any of the two parties may decide to withdraw at this stage without the other claiming compensation or cost”*.
17. It therefore beyond belief that in the face of such a concession by the respondent, they may now claim that the appellant had failed to perform a previous contract, as a justification for excluding him from the process. There was clearly no award of a contract and hence no contract between the parties. In fact it is the respondent that is in breach of contract for failing to sign a contract within fourteen days. These reasons clearly do not amount to an arguable reason for debarring or otherwise excluding the appellant from participation in the procurement process. In any event the respondent has no such authority or power to debar or otherwise exclude the appellant.
18. Upon a perusal of Exhibit D, it is clearly established that the respondent sought to exclude the appellant from further participation in the process at the earliest opportunity. We are of the opinion that this was part of a concerted plan to prevent the appellant from being declared the successful lowest evaluated bidder, having realised from the outset that the appellant was the lowest responsive bidder. Excluding the appellant from the process, paved the way for Musa Sharaffdeen and Sons to become the lowest responsive bidder to be evaluated. Such conduct is a brazen attempt by the respondent to unfairly manipulate and abuse the procurement process in favour of another bidder.
19. Further we are guided by s56(1) of the Public Procurement Act 2004, which provides that: *“ The contract shall be awarded to the bidder having submitted the lowest evaluated and substantially responsive bid which meets only those evaluation criteria as specified in the bidding document”*. This provision is clearly mandatory and no deviation from it is required or justified. The Procurement Committee is **bound** by the provisions of s56 of the Public Procurement Act 2004 and its implementing regulations to award the contract to

bids that have been evaluated. However, we must point out that the Procurement Committee was put in a position in which they could not consider the appellant for award of the contract as he had been unlawfully excluded at the earliest opportunity.

20. It is clear that once it is established that the lowest responsive bidder was deprived of the opportunity of participating in the process by an unlawful act, there cannot be established actual compliance with section 56 of the Public Procurement Act 2004. Further s53(2) provides the circumstances under which bids submitted may be rejected and excluded from further evaluation and comparison. s53. (1) provides:- "Following the opening of bids, the procuring entity shall first examine the bids in order to determine whether the bids are complete, signed, whether required documents to establish legal validity and required bid security have been furnished and whether bids are substantially responsive to the technical specification and contract conditions set forth in the bidding documents".

(2) **Bids which are not complete, not signed, not accompanied by a bid security in the prescribed form, if one is required, or not accompanied by essential supporting documents such as business registration certificates, business licences and tax receipts, or are substantially non-responsive to the technical specifications or contract conditions or other critical requirements in the bidding documents, shall be rejected and excluded from further evaluation and comparison.**

21. From the above it is evident that the exclusion of the appellant from further participation in the process was wholly unfair and unlawful. There was clearly no legal basis for the decision to exclude and we so hold.

22. s56 of the Public Procurement Act 2004 cannot be read or interpreted as imposing no time limits for the award of contracts after evaluation of the bids. The wording of s56 suggests that no sooner bids have been evaluated, the contract must be awarded. Where there are no hidden motives, such excessive delays do not normally occur without good reason. Such delays in awarding contract by this respondent has occurred twice from the available records before us without any reasons being advanced for the delay. We can think of no good reasons to justify such delays. Further we are concerned that the delay in awarding the contract relates specifically to the selection of a bidder whose bid price is by no means the lowest responsive bid received. With respect to this

procurement, the appellant quoted a bid price of **Le1,827, 500,000** (one billion, eight hundred and twenty seven million, five hundred thousand Leones) whilst Musa Sharaffdeen and Sons quoted a bid price of **Le2,006,000,000** (two billion and six million Leones).

23. The bid price of Musa Sharaffdeen and Sons exceeded that of the appellant by **Le 178, 500,000** (one hundred and seventy eight million, five hundred thousand Leones). In these days of economic turmoil, a procuring entity which unlawfully rejects a lower and responsive bidder in favour of a bidder whose price is **Le178,500,000** over and above the lower bid price would have to show exceptional circumstances, in order to justify such a decision. As no reasons have been advanced by the procuring entity to justify this decision, we have come to the conclusion that the decision to accept the higher bid whilst disqualifying the lower bid is irrational and is not justified and the appeal is upheld.
24. Finally, we have analysed the contents of Exhibit E and we have concluded that there is in operation at the Ministry of Education Youth and Sports, a vendetta against the appellant. Our attention has been drawn to the fact that the appellant has an outstanding IPRP judgement in his favour which the respondent has refused to carry out. Further it appears that the appellant is being penalised for “daring” to complain about the illegalities perpetuated by the respondent. Ordinarily we would have remitted this matter back to the respondent to evaluate the appellant’s bid alongside that of Musa Sharaffdeen and Sons and then subsequently to make a decision on award of the contract following the evaluation. However in view of the evidence already before us, we have concluded that to take that course of action would be to further prejudice the rights of the appellant. This appellant has persistently been subjected to a breach of his rights by this respondent. We remain satisfied that this respondent has shown bias and acted to the prejudice of this appellant and is likely to continue to do so thereby leading to further prejudice. In the circumstances and in the exercise of powers conferred upon this panel pursuant to s65(5) of the Public Procurement Act 2004, we reach the following conclusions.

UPON carrying out a detailed review into the issues raised by the complaint, **IT IS ORDERED THAT:**

1. The Complaint is **upheld** and we find there have been excessive and unjustified delays in the tender process in relation to this procurement.
2. The decision by the Procurement Committee to select Musa Sharaffdeen and Sons for award of the contract as stated in Exhibit F is annulled.
3. The decision to debar MAK Enterprises from taking part in public procurement pursuant to s35 of the Public Procurement Act 2004 is annulled.
4. MAK Enterprises be substituted for Musa Sharaffdeen and Sons as the bidder having submitted the lowest evaluated and substantially responsive bid.
5. The contract be awarded to MAK Enterprises within **10** days of the date of this decision as the bidder having submitted the lowest evaluated and substantially responsive bid.
6. Total Costs of Four Million Leones {4,000,000.00} are awarded to the appellant.
7. This decision to be served on all interested parties and made public, forthwith.

Peter Kamaray.....
Chairman



Adrian Fisher.....
Member



Dated 11 March 2010