

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

ZENITH ENTERPRISES

Appellant

~and~

MINISTRY OF EDUCATION, YOUTH AND SPORTS

Respondent

RULING

INTRODUCTION

1. The appellant appeals against the undue disadvantage which he claims he has suffered in the evaluating and awarding of a contract for the supply of primary and supplementary readers under the World Bank project from the respondent procuring entity. He further complained about the responsiveness of his bid and being dissatisfied with the bidding and evaluation process carried out by the respondent, the Manager of the appellant firm, one Mr Abdul Karim Noah 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 primary and supplementary readers 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 4. As part of the bidding process, bid documents were obtained by the appellant firm. The appellant further submitted the bid documents along with three other bidders with respect to LOT 4. 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 Lawassa Enterprises as the lowest priced responsive bidder in respect of LOT 4 and recommended the said Lawassa Enterprises 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 technically non-responsive owing to a failure to meet the minimum technical evaluation criteria of the respondent. He claims in his complaint that the actions of the Respondent are without any procurement justification and that he had been unduly disadvantaged by the action of the Respondent. Despite writing to the Ministry about this issue, the Ministry failed to respond to his letters.

3. However the Technical Evaluation Committee, having selected Lawassa Enterprises as the technically responsive bidder for the proposed award in November 2009, it was for the Procurement Committee to issue a notification of award letter to the successful bidder which it eventually did on the 1st March 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, the 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 NPPA upheld the recommendation of the Technical evaluation committee to award the contract to Lawassa Enterprises.

THE LAW

4. The IPRP is created by 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 threefold.
 - i. Whether the technically 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 justified.
 - iii. Whether the conclusions of the technical evaluation were correct in fact and in law.

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 timeframe 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 appellant. They have even failed to address the serious issues raised by the appellant in his letter of protest dated 28th January 2010 and his subsequent response to the letter from the Respondent dated 3rd February 2010, which such response is dated 8th February 2010. 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 4th March 2010, which is marked as Exhibit A.
 - Letter of protest from the Appellant to the Respondent raising a number of issues with regard to the submission of the extended bid validity document and a conversation he had with the procurement officer and secretary to the Procurement Committee, one Mr A B Carew about the contract being awarded to Lawassa Enterprises, 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 response from the Respondent to the appellant dated 3rd February 2010, which is marked as Exhibit E.
 - Notification Award Letter from the Respondent to Lawassa Enterprises dated 1st March 2010, and which is marked as Exhibit F.
 - Letter of response to Exhibit E from the appellant to the Respondent dated 8th February 2010 and marked as Exhibit G.
 - Receipt of payment of the administrative fee by the appellant dated 5th March 2010 and marked Exhibit H.
 - Bid opening checklist submitted by appellant, marked as Exhibit J.
 - Bid opening checklist submitted by the monitoring and evaluation department of the NPPA and marked as K.
 - Bid evaluation standard forms marked as Exhibit L.
 - Bidding documents marked as M.
 - Copies of tax clearance certificate of Lawassa Enterprises submitted by the NRA and marked as Exhibit N.
7. The appellant's primary complaint as can be gleaned from Exhibits A and B is the fact that he was dissatisfied with the fact that, despite the responsiveness of his bid he appears to have been unduly disadvantaged. **More seriously is the complaint of a conversation he had with Mr A B Carew who on the one hand having written to the appellant to extend his bid validity refused to accept the extended bid validity when it was submitted and then proceeded to inform him that the contract was going to be awarded to Lawassa Enterprises, even though results had not been officially published.**
8. He further complained that according to his bid matrix records, Lawassa Enterprises did not submit a valid tax clearance certificate and samples of textbooks as stipulated in the bidding document and consequently Lawassa ought to have been disqualified immediately for non responsiveness. He further complained that Lawassa's bid price was (£478,885.61) four hundred and seventy eight thousand, eight hundred eighty-five GB pounds, sixty one pence or equivalent in Leones at (Le 2,802,993,528.75) two billion, eight hundred and two million, nine hundred and ninety three thousand, five hundred and twenty eight Leones and seventy five cents, as per the currency conversion sheet in Exhibit D, whilst his bid price remains at (Le1, 109,709.525) one billion, one hundred and

nine million seven hundred and nine thousand, five hundred and twenty-five Leones. This is One Billion Six hundred million (**Le 1,693,284**), **over and above** the bid price of the appellant. This state of affairs merit careful consideration by the panel.

9. The documents before the panel have enabled us to consider the issue of the responsiveness or otherwise of the appellant's bid in relation to that of Lawassa Enterprises. It must be pointed out from the outset that in relation to the complaint as stated in Exhibit B that on the day of bid opening Lawassa Enterprises did not submit a valid tax clearance certificate, we are of the view that there was a valid tax clearance certificate submitted by Lawassa and that complaint cannot be substantiated. **As pointed out earlier, we have received Exhibit N which is a copy of the tax receipt submitted to the panel by the NRA.** Further Exhibit K is a copy of the bid opening matrix submitted to us by the monitoring and evaluation department of the NPPA which clearly shows **there was a valid tax certificate submitted on the day in question.**
10. With respect to the claim that Lawassa Enterprises did not submit samples of textbooks as stipulated in the bidding documents, this panel has concluded that a careful examination of the bidding documents need to be conducted in order to ascertain the veracity or otherwise of the claim. The panel has clearly considered the contents of the bidding documents, Exhibit M and finds no requirements for samples to be delivered as part of the bidding process. The panel therefore considers the claim made by the appellant with respect to samples cannot be substantiated.
11. It is expedient for the panel to consider the contents of Exhibit D with a view to determining the reasons for the disqualification from further evaluation of the appellant from the bidding process. It is clear from exhibit D that the schedule of requirements, clearly stipulated what was required for bids under LOT 4. Most importantly, the criteria for evaluation of bids are set out in pages 34-37 of Exhibit M, the bidding documents. It now falls on the panel to consider whether the evaluation criteria were properly applied.
12. The panel considers it expedient to consider Exhibit L. It is clear that the bid of the appellant was considered commercially responsive. **However, the bid was considered technically- non responsive on the basis that samples submitted by the appellant do not meet the standard required for level 1-4 as set out in that document which is Exhibit L. It then became apparent that the appellant was excluded from further evaluation in the process.** The panel has considered

Exhibit M at pages 34-37 very carefully and noted the evaluation criteria as contained therein. Further, Exhibit L has given an indication to the panel as to the minimum technical evaluation criteria used to evaluate the technical responsiveness of the bid. As a matter of fair play and justice, the evaluation criteria set out at Exhibit M must correspond with the minimum technical evaluation criteria in Exhibit L.

13. We have perused Exhibit M and carefully considered its contents with that of the minimum technical evaluation criteria in Exhibit L. It is interesting to note and is of concern to us that the criteria set out at pages 34-37 of Exhibit M differ considerably in substance and form from that used in Exhibit L. In simple terms the criteria specified in Exhibit L was clearly not part of the bidding documents. We find that the criteria used in Exhibit L ought to have been disclosed in the bidding document. *It is unfair to use completely different evaluation criteria in evaluating the bid from that expressly set out in the bidding documents. Such a course of conduct results in unfairness to other bidders and cannot be encouraged.*
14. In the interest of transparency and fairness, all requisite criteria ought to be disclosed at the earliest opportunity to bidders and potential bidders in order that they may make informed decisions as to whether they wish to continue to participate in the bidding process and to encourage fair competition. In addition full and frank disclosures assist bidders to decide whether they are capable of participation in the process prior to expending costs on bidding, only to discover subsequently that they ought not to have participated.
15. It is clear from the conduct of the respondent even though not specifically complained about by the appellant, that there was considerable delay in the bidding process. It is clear that the appellant was quite unhappy about the delay in the process. 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 has considered on a number of occasions the issue of delays and where such delays are shown to be occurring, the Panel cannot simply ignore such an issue.
16. 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 has been raised in his complaint. This is wholly unacceptable from a public entity which is charged with the responsibility of managing public funds in an acceptable. 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.**

17. 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.
18. We would now consider the other issues raised in the complaint. The panel is considerably concerned that in Exhibit B, the appellant complained that when he took his extended bid security to the office of the respondent, which he had been requested to do by the respondent, it was refused by one Mr A B Carew *on the basis that the contract was going to be awarded to one Lawassa Enterprises even though the results had not been officially published.* As we mentioned earlier, the bid price of Lawassa Enterprises was also over **One Billion Six Hundred Million Leones** (Le1,600,000,000) higher than that of the appellant. Exhibit B was clearly dated 28th January 2010.
19. It is interesting to note that the respondent in its response to Exhibit B which is dated 3rd February 2010 and marked as Exhibit E confirmed that no contracts had been awarded as yet to any entity as at that time. The letter was written by the same Mr A Carew and it is significant to note that he did not seek to deny specifically that he held such a conversation with the appellant. He merely condemned the fact that the appellant had submitted the extended bid security by hand which he concluded was unacceptable. Crucially, he claimed that the evaluation report was yet to be reviewed by the Procurement Committee of the Ministry and other stakeholders before a decision was to be reached. However

the appellant further re-submitted the bid security under the cover of letter to the respondent dated 8th February 2010, which is marked as Exhibit G. There was no further response from the respondent on this issue. The only further response was to issue a notification of award letter to Lawassa Enterprises which is marked as Exhibit F.

20. The panel notes with dismay that the appellant had earlier complained of a conversation between himself and Mr Carew with respect to the contract being awarded to Lawassa Enterprises as at January 2010. In March 2010, the contract was indeed awarded to Lawassa Enterprises Enterprises for a higher bid price. We do not feel that the award of the contract to Lawassa Enterprises Enterprises was a coincidence. The panel is of the view that despite the alleged claim by Mr Carew that the evaluation report had to be reviewed by other stakeholders, he knew by virtue of his position as Secretary to the Technical and Evaluation Committee there was only one bidder left as the appellant had been disqualified from further evaluation of the bid. It was obvious at that stage that Lawassa Enterprises would be awarded the contract as they were the sole evaluated bidder.
21. We are of the opinion that the course of events outlined above indicates that the appellant was indeed unfairly disadvantaged by a course of action specifically designed to exclude him from evaluation for the contract. *No reasons have been advanced by the respondent to nullify the apparent co-incidence of awarding the contract to Lawassa Enterprises after the conversation with the appellant back in January 2010.* The evaluation criteria used to disqualify the appellant **ought to have been disclosed** to him by way of the bidding documents. It is even further remarkable that Lawassa Enterprises was considered responsive upon an evaluation criteria that was not generally disclosed in the bidding document, and most importantly at a time when the appellant had re-submitted his extended validity bid security. For Lawassa Enterprises to be found responsive upon undisclosed evaluation criteria, simply means they had prior knowledge of the undisclosed information or it was simply a coincidence. We are satisfied it was not a coincidence.
22. 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 has been improperly excluded at the earliest opportunity.

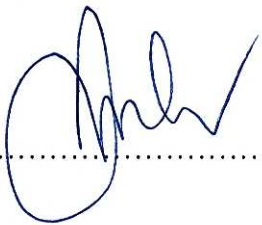
23. It is clear that once it is established that the lowest responsive bidder was deprived of the opportunity of participating in the process by an unlawful act, there cannot be established actual compliance with section 56 of the PPA 2004. Further s53(2) provides the circumstances under which bids submitted 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**". It is clear that the use of evaluating criteria not provided in the bidding documents is contrary to s53 (1) of the Public Procurement 2004 Act. It is equally clear that there is an arguable breach of s54 (1) of the Act, with respect to the possible disclosure of additional technical evaluation criteria not set forth in the bidding documents.
24. This kind of conduct does not instil confidence in to the procurement process. The evaluating criteria should be made public and transparent, in order that bidders are in no doubt as to what evaluation criteria is to be used to evaluate their bids. It cannot be acceptable for evaluation criteria to be partly disclosed in some cases or not disclosed at all.
25. 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 the appellant from the evaluation process and we so hold.
26. Ordinarily we would have remitted this matter back to the Respondent to evaluate the appellant's bid alongside that of Lawassa Enterprises. However in view of the massive differences in the bid price of the two bidders, and bearing in mind the further delay that will occur should we choose that course of action, we are of the view that it would be inappropriate to do so. Had the respondent not imposed an additional evaluation criteria on the procurement process not previously disclosed in the bidding documents, we are of the view that the

contract would have been awarded to the appellant. In those circumstances, we make the following orders:

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 that not only have there been delays in this procurement process to date, such delays have been excessive and unjustified.
2. The decision by the Procurement Committee to select Lawassa Enterprises for award of the contract as stated in Ex F is annulled.
3. The decision to exclude the appellant from further evaluation of his bid on account of the alleged technical non-compliance of the bid in conformity with the evaluation criteria is annulled.
4. Zenith Enterprises be substituted for Lawassa Enterprises as the bidder having submitted the lowest evaluated and substantially responsive bid.
5. The contract be awarded to Zenith Enterprises within (fourteen) **14** days of the date of this decision as the bidder having submitted the lowest responsive bid.
6. Costs of Two Million Leones {2,000,000.00} 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 22 March 2010