

IN THE INDEPENDENT PROCUREMENT REVIEW PANEL

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

BETWEEN

DOOR TO DOOR ENTERPRISES

Appellant

~and~

SIERRA LEONE POLICE

Respondent

RULING

INTRODUCTION

1. The appellant appeals against the decision of the head of a procuring entity not to award a contract for the supply of police uniforms and accoutrements for the respondent force, to his firm. Being dissatisfied with the decision of the Inspector General of Police, hereinafter referred to as the head of entity, the CEO of the appellant firm, one Mr A T Bundu, wrote a letter of “protest” 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 Sierra Leone Police with uniforms and accoutrements, along with nine other firms. As part of the bidding process, a bid document was obtained by the appellant firm from the Sierra Leone Police. The appellant firm further submitted its bid document along with the other bidders. The appellant firm attended the bid opening ceremony, at which three of the ten firms which had previously bought bid documents were absent, and subsequent to that bid opening ceremony the evaluation committee carried out an evaluation exercise into the bids submitted and recommended that the contract be awarded to Universal Trading and Supplies for the sum of Nine Billion, Two Hundred and Sixty – Five Million and Forty Thousand, Thirty – Seven Leones (Le9,265,040, 037).

3. However the Procurement Committee, did not approve the recommendation of the award on the basis that the firm's bid price tripled the budgeted price of Three Billion, Five Hundred Million Leones (Le3,500,000,000) in the procurement plan. The Committee then agreed to award the contract to Sierra Leone Guoiji Investment and Development Company, for the contract price of Three Billion, Three Hundred and Thirty- One Million, Eight Hundred and Eighty – Seven Thousand, Three Hundred and Five Leones (Le3, 331, 887,305).
4. That decision was communicated to the appellant firm whose CEO proceeded to write to the head of entity, complaining about the decision not to award the contract to his firm, in a letter dated 7th April 2009. The Head of Entity (Inspector General of Police) then responded to the letter of “protest” in a letter dated 8th April 2009. It is that decision as contained in that letter that is now the subject of this appeal for review.

THE LAW

5. 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 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.

THE ISSUES

6. The issues for determination in this appeal are two fold.
 - i. Whether the Head of the procuring entity was correct in disqualifying the appellant from further taking part in the bidding process on account of alleged fraud.
 - ii. Whether the Procurement Committee were correct in law, to make the award of the contract to Sierra Leone Guoiji Investment and Development Company.

DELIBERATIONS

7. At the start of the process, it was established that there were no preliminary reasons as to why the review had to be suspended. 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. During the review process, the panel had an opportunity of perusing a number of documents. These are listed for expediency sake.

- Letter of protest to the IPRP dated 21st April 2008, which is marked as Ex A.
- Letter of protest to the Inspector General of police, dated 7th April 2009, which is marked as Ex B
- Preliminary examination and assessment of qualifications document, undated, which is marked as Ex C.
- Response letter from the Inspector General of Police, dated 8th April 2009, and which is marked as Ex D.
- List of documents received from the National Public Procurement Authority, (NPPA), which is marked as Ex E 1-8
- Letter from the CEO, NPPA to the Accountant General, dated 17th April 2009 and marked as Ex F
- Letter from the Accountant General to the CEO, NPPA, dated 21st April 2009, and marked as Ex G.

8. The appellant's primary complaint as can be gleaned from Ex A is the fact that he was dissatisfied with fact that he had not been awarded the contract. In the letter he had this to say: *"I wish to forward herewith a letter of protest that we were not able to meet all the evaluation requirements and hence the contract could not be awarded to our firm. We are not satisfy by the IG neglect principles and procedure"*. He goes on further to say that they were dissatisfied for the following reasons:

- Neglect or ignore the principles and procedure set aside in governing in the tender document.
- The samples submitted by the awarded contractor or company any are Chinese products scanty substandard products, although they are cheap as the IG is claiming, but this is mere waste of economic resources because of the goods will not last the police.
- That the awarded contractor or company failed to provide vendor code at the time of bid opening.
- That the awarded contractor cannot provide manufacturer Authorisation Certificate and therefore is not responsive to be evaluated in the first place according to tender document.

- That Door-to-Door is an Indigenous Enterprise, that fulfil the criteria to be awarded the contract although the IG is claiming that the price differences because of Government financial constraints but it is the right price for UK products also considering the prices of other bidders which their product prices are higher than us. Because of these reasons, we appealing to the IPRP to review the matter.

Consideration must now be given to each of these grounds in turn.

9. It is imperative also that consideration is given to Ex B. In that document the appellant continually makes reference to his organization being the only indigenous business in Sierra Leone who complied with all the commercial requirements and claimed the samples submitted were of good quality. The fact that his business is an indigenous business is irrelevant for these purposes. He further claims the price was reasonable for the quality of materials planned to be supplied because they are UK products. That the company awarded the contract did not meet these criteria.

- Vendor Code
- Manufacturer's Authorisation Certificate
- Samples submitted were sub standard.

10. Having analysed the major issues, it is expedient for us to consider the first issue in this appeal as set out in para 6(1) above. Full consideration must therefore be given to Ex D which sets out in some detail, the reasons for not awarding the contract to the appellant and thereby disqualifying him in the process. In Ex D, the Inspector General refers to ITB Clause 36 of the bidding document described as fraud and corruption, which entitled the government to disqualify a bidder where there is evidence of fraud or corruption in the bidding process. He goes on further to claim that the bidding document requested for a vendor code assigned by the Ministry of Finance and the appellant submitted a code **468/2008**, which could not be traced from the data of codified vendors. He claimed such a practice was fraudulent which in turn led to the appellant being rejected for the award and at the same time, "indefinitely declaring your firm as ineligible to be awarded a Government financed contract". We shall now deal with the allegations of fraud.

11. In Ex A at page 2 para {b}, the appellant claims he has not acted fraudulently. He had this to say: " *as far as I know and my memories could serve me, any registered business man or woman has a vendor code. Vendor means business registration No is 468/2008. Entering the vendor code in to the integrated financial Management System*

(IFMIS) is just a matter of transparent payment style". We find as a matter of fact that the explanation given by the appellant is indeed a plausible one. There is no evidence of fraud before the panel. It is clear from the above that the appellant was unaware of what a vendor code is and wrongly assumed that the vendor code was referring to his business registration certificate, which is not the case.

12. The Inspector General of police equally went further to declare the appellant as an ineligible bidder for government financed contracts indefinitely, on account of the alleged fraud. We have considered whether the Inspector General was correct in issuing such a declaration and whether he had the power in law to do so. The relevant legal provision is that contained in s34 of the Public Procurement Act 2004. s34(2) provides that *a bidder shall not engage in or abet corrupt or fraudulent practices including The misrepresentation of facts in order to influence a procurement process.....* If there was evidence that the appellant had knowingly acted fraudulently, he would undoubtedly have contravened s34 of the Act. The powers of the Inspector General as head of this procuring entity, is to report the bidder concerned to the NPPA and other relevant law enforcement authorities like the Anti Corruption Commission as provided for in s34(4).
13. The power to debar a bidder is exclusively vested in the NPPA by virtue of the provisions of s35(1) of the Act which provides: *The Authority may exclude a bidder or a supplier from participation in the public procurement process for a minimum period of one year and a maximum period of six years after compliance with the procedures laid down in s35(1)a-c. s35(2) further sets out the grounds upon which a bidder may be debarred and s35(2)(a) makes provision for debarment where false information is supplied in the process of submitting a bid.* However the point being made is that only the NPPA has the power to debar a bidder and the Inspector General of Police as head of the procuring entity concerned has no power in law to debar the appellant from future bidding for Government Contracts, indefinitely. On the basis of the above, we conclude that there is no evidence to conclude that the appellant knowingly acted fraudulently but the evidence rather reveals that he acted under a misapprehension of relevant facts that the business registration number is the same as the vendor code. In the circumstance, We would uphold the appeal on that ground.
14. In relation to the second ground that the contract ought not to have been awarded to another bidder but to the appellant, we firstly consider the legal provisions surrounding award of contracts. These are set out at s56 of the Act. For ease of reference they are reproduced verbatim. s56 (1) provides: "*The contract shall be*

awarded to the bidder having submitted the lowest evaluated and substantially responsive bid, which meets only those evaluation criteria specified in the bidding documents". We are satisfied that this provision requires interpretation as to its true meaning. In that regard, we have had regard to MAXWELL ON THE INTERPRETATION OF STATUTES, 7th Edition 1929. The use of the word **shall** implies the provision is mandatory and the contract **must** be awarded to a bidder (who has not been or ought not to have been disqualified) who has submitted the **lowest evaluated and substantially responsive bid** which meets only those evaluation criteria as specified in the bidding document. The obvious question to ask is what meaning is to be attributed to the words **lowest evaluated and substantially responsive?**

15. There is no meaning inserted in the Act for the words **substantially responsive**. Where there is no such meaning inserted in the Act to give the meaning to certain words, the ordinary meaning of the word must be considered. In the Concise Oxford Dictionary, the word **substantially** means inter alia **"to a great or significant extent; for the most part: essentially**. Upon its true meaning, the provision mandates two criteria must be satisfied before the award of a contract and where these two criteria are satisfied, the bidder who satisfies both criteria must be awarded the contract. What then are these criteria?
 - i. The bidder who submits the lowest evaluated bid in terms of the costs.
AND;
 - ii. The bidder who submits a bid which is the lowest in terms of costs and also to a large or significant extent or for the most part, has complied significantly in terms of meeting the evaluation criteria as specified in the bidding document.
16. It must be recognized that the provision do not require a bidder to have complied strictly or in totality with the evaluation criteria. What is required is compliance, which significantly or for the most part satisfies the evaluation criteria. The obvious question to ask is did the appellant fulfil the requirements of s56(1)? Regard must therefore be had to Ex C and Ex E6 , which are the documents that record the status of responses at the bid opening ceremony. For ease of reference we shall restrict our considerations to only the appellant's scores, that of Universal Trading Supplies who were initially recommended for the award and Sierra Leone Guoji who were eventually recommended for the award of the contract.

17. In evaluating the lowest responsive bid criteria, it can be observed that the appellant submitted a bid price of Le4,981,439,500, whilst Universal Trading Supplies submitted a bid of Le9,265,040,037 and Sierra Leone Guoji submitted a bid price of Le 3, 331, 887, 305.07. Clearly, the bid submitted by Universal Trading Supplies far exceeded the prices submitted by the appellant and Sierra Leone Guoji, despite its bid fully meeting the evaluating criteria otherwise. Consideration must then be given to the prices of the appellant and Sierra Leone Guoji. Clearly, the price quoted by the appellant exceeds the price quoted by Sierra Leone Guoji by the whopping sum of Le 1,649,552,194.93. It is therefore unarguable to suggest that the appellant satisfied the lowest bid price criteria.

18. We would now consider whether the appellant has substantially complied with the evaluation criteria. We conclude by studying Ex C and E6 that there was full compliance by both the appellant and Sierra Leone Guoji, with respect to the most critical and most important evaluating criteria, leaving aside Universal Trading who had demonstrated full compliance. These include business licenses, tax clearance and others. With respect to the submission of samples, both bidders did not submit a complete set of samples. However there is nothing in the bidding document that require a particular type of sample, failure of which to provide, ought to nullify the entire process or disqualify a bidder. The requirement to produce samples we conclude, was simply for the evaluation process. With respect to the Manufacturer's authorization certificate the appellant complied whilst Sierra Leon Guoji did not comply with that requirement. With respect to the IFMIS vendor code, the appellant claimed to have complied with that requirement but in reality and upon the available evidence he has failed to do so. Sierra Leone Guoji on the other hand did not comply with this requirement at bid opening but on a closer examination of Ex G they do have a valid vendor code. On this evidence it cannot be said that neither of the two bidders have achieved a greater degree of compliance with the evaluation requirements much more than the other side. Thus we conclude their level of compliance for these purposes is exactly the same.

19. However s56 does not limit itself to consideration of the evaluation criteria alone. Compliance must be reached by submission of the lowest evaluated bid in terms of price **AND** substantially responsive bid. In view of the fact that both bidders have not fully complied with the evaluation requirements, it must be considered as to whether both bids are substantially responsive. In view of the fact that both have achieved similar levels of substantial responsiveness in terms of degree, we are prepared to hold that both bids have substantially complied with the evaluation criteria as set out in the bidding documents.

20. However s56 requires satisfaction of both limbs and upon the available evidence, it is clear that the bid from Sierra Leone Guoji is the lowest evaluated bid in terms of the price and having achieved a similar degree of compliance with the evaluation criteria in the bidding document, it is difficult to conclude that the appellant ought to have been recommended for the award of the contract as opposed to the Sierra Leone Guoji bid.

21. It behoves us to deal with one important issue raised by the appellant in his complaint to the IPRP. He has criticised the decision of the Inspector General of Police to concentrate on the issue of costs alone whilst ignoring all the evaluating criteria. Clearly Ex E2 shows that the Inspector General considered the report of the evaluation committee and having paid due regard to the current financial situation, concluded it would be inconsiderate and in our view reckless to approve the recommendation of the evaluation committee which price is too high and practically impossible to afford, even when payment is spread over a period of two financial years. The current financial situation is of serious concern even to countries with prosperous economies. Sierra Leone is significantly donor supported and any procurement that seeks to go beyond the planned and budgeted price would need to be seriously justified. The IPRP holds the view that the current law as it stands precludes such an arrangement and no justification however strong would allow such a procurement to be effected within the meaning of the law. The actions of the Inspector General of Police were entirely in accordance with the letter, spirit and intent of the law, and in that regard the complaint is rejected on this ground.

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

1. The Complaint is **upheld** with regard to the first ground of complaint, there being no evidence of fraud or corrupt practices on the part of the appellant.
2. The complaint is **rejected** with regard to the second ground of the complaint.
3. There be a declaration that the decision to debar the appellant's firm indefinitely, from all future procurement bidding is null and void and the decision of the Inspector General of Police in that regard is reversed.

4. That the decision of the procurement Committee to award the contract to Sierra Leone Guoji Investment and Development Company is **upheld**, subject to the following conditions:

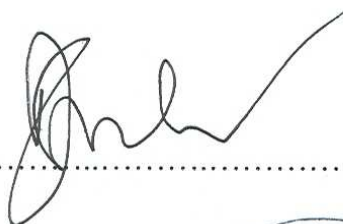
- That Sierra Leone Guoji Investment and Development Company, provides a complete and acceptable set of samples to the Procuring Entity (Sierra Leone Police) which shall be verified by the NPPA, **prior** to any contract being signed.
- That Sierra Leone Guoji Investment and Development Company provides a Manufacturer's certificate to the Procuring Entity (Sierra Leone Police) which shall be verified by the NPPA, **prior** to any contract being signed.

- That the above conditions must be fulfilled by Sierra Leone Guoji Investment and Development Company no later than the close of business on FRIDAY 29th MAY 2009, failing which the decision of the Sierra Leone Police dated 27th March 2009 to award the contract to Sierra Leone Guoji Investment and Development Company is annulled.
5. That the certificate of suspension pursuant to s65(6) of the Public Procurement Act 2004 against the Sierra Leone Police is lifted.
 6. There be no order as to costs.
 7. This decision to be served on all interested parties and made public, forthwith.

Peter Kamaray
Chairman



Umaru Barrie.....
Member



Adrian Fisher.....
Member

Dated 22nd April 2009

