

APPEALS & COMPLAINTS CASES FOR WEBSITE PUBLICATION

NO.1

Pyne & Associates - **Complainant**
Vs.
Department of Urban Roads, Kumasi - **Respondent**

Tender:

Roadline Marking & Installation of Signs – Tender No. DUR/KMA/2006/003 Lot 2 & Drainage Works at Tafo Hemang – Tender No. DUR/KMA/2006/002 Lot

Complaint:

- Discrimination in the award of contracts by Respondent, against Complainant.
- Whether contractor's past performance should be the basis for disqualification in other projects.

Applicable Provisions of Act 663:

- Section 19 (2) – Tender Evaluation Process
- Section 62 – Repeat Tender Qualifications.

Brief Facts:

Lot 2 was awarded to the Complainant. The work, for various reasons fell behind schedule. The Respondent subsequently adjudged the quality of work poor, adducing to other delays by the Complainant in previous projects at Cape Coast and New Juaben Municipal Roads Units.

Complainant denied these allegations, accusing Respondent of gender discrimination and malice calculated to discredit the company. Correspondence from the parties showed an underlying deterioration in working relationships between the Parties which could have been resolved through mutual co-operation.

Complainant subsequently tendered for Lot 3 but was disqualified by the Tender Evaluation Committee during post-qualification evaluation, based on poor work quality and unjustifiable delays on previous contracts awarded.

Complainant claimed an ensuing trend by which it was consistently ignored in several subsequent tenders for which it had submitted competitive bids.

Issue(s):

1. The contentious issue was whether Respondent, dissatisfied with Complainant's previous performance in a tender awarded, could use this as a basis for disqualification from another project.

Arguments:

1. Post qualification is defined in the applicable Standard Tender Document (STD) as an assessment by the Employer after tender evaluation and immediately prior to

contract award, to ensure that the lowest evaluated, responsive, eligible tenderer is qualified to perform the contract in accordance with previously specified qualification requirements.

2. Ordinarily, a contractor cannot be barred from a subsequent project based on previous performance as disqualification is specific to a project. If this were not the case, most contractors would be out of business.

Under the PPA Procurement Manual, a history of poor performance may be considered sufficient justification for failing post-qualification evaluation if the tenderer is unable to demonstrate that steps have been taken to resolve previous problems. Post-qualification evaluation was a published requirement in this tender process.

3. Post-qualification evaluation gives an entity the opportunity to assess a tenderer based on capacity for effective performance. The Respondent was therefore duty bound to assess previous projects undertaken by the Complainant.

Findings:

The Authority found as follows:-

1. That disqualification of Complainant had been duly decided based on published post-qualification evaluation criteria.
2. From documentary evidence submitted, the Authority was not able to establish any wrongdoing on the part of the Respondent.
3. The Authority was of the view that the Complainant could enhance its future chances of winning contracts by undertaking technical & procurement training.

Case decided against Complainant.

No.2

Franksoph & Sons Ltd. - **Complainant**
Vs.
Volta River Authority (VRA) - **Respondent**

Tender:

One Year Contract for the Supply of Vehicle Lubricants – MMD-B-0500084 and/or MMD-B-0500074

Complaint:

- Discrimination in contract award
- Wrongful cancellation of award
- Wrongful annulment of tender process

- Wrongful retention of tender security

Applicable Provisions of Act 663/ other procurement rules:

- Section 80 (1) (d) (Administrative Review)
- Section 65(2), (4) and (7) (Entry into force of procurement contract)
- UNCITRAL Procurement Guidelines
- World Bank Instruction to Tenderers (ITT) – rules on award notification
- VRA ITT Clause 33.1
- PPA Procurement Manual – section 4.18.4

Brief Facts:

The Respondent advertised the disputed tender in or about April 2006. Complainant submitted a bid and was shortlisted. Four (4) months later, Complainant was requested to extend its bid validity for two (2) months with consequent extension of validity of Tender Security, to allow for completion of the evaluation process. On expiry, Complainant was again requested to extend bid validity for an additional 2 months period with corresponding extension of validity of Tender Security, for the same reason aforementioned.

Complainant eventually emerged the lowest responsive evaluated bidder.

A negotiation/clarification meeting was subsequently held in January, 2007 on a number of issues including validity of quotation, price & price escalation. Respondent had sought to hold Complainant to prices indicated in its tender submitted 10 months previously. Per the tender documents, prices for subsequent deliveries after 6 months were subject to escalation based on exchange rate fluctuations. Complainant agreed to extend the expired price validity period but clearly indicated that considering the 10 months processing interval, it was impossible to maintain the oil lubricants prices even for the first Lot. The Parties finally agreed to a 4% increase in contract price.

Six (6) weeks after negotiation/clarification meeting, Respondent issued an Award Notification to Complainant in March 2007 (i.e. 12 months from tender opening).

Complainant duly responded, accepting the award but sought upward contract price revision in view of further oil price fluctuations which had occurred within the 6-week processing interval. Complainant communicated acceptance without signing the Acceptance Form. Meanwhile, delay in processing time had invariably affected desired delivery schedule

Respondent, arguing that Complainant's request effectively opened up negotiations for further price variations, refused Complainant's request and proceeded to withdraw the award.

Respondent also purported to annul the entire tender process relying on Clause 33.1 of the relevant Instructions to Tender (ITT), which stated:-

“The Purchaser reserves the right to accept or reject any tender and to annul the Tender process and reject all Tenders, at any time prior to award of contract, without thereby

incurring any liability to the affected Tenderer or Tenderers or any obligation to inform the affected Tenderer or Tenderers of the grounds for the Purchaser's action".

Respondent further claimed that Complainant's action called for forfeiture of its Tender Security which was however not exercised because Complainant's tender security had not been valid at the time of offer, having failed to renew it after expiry on 31 August, 2006.

The Complainant sought administrative review in accordance with the Public Procurement Act, 2003 (Act 663).

Documentary evidence submitted tracks the tender process over almost thirteen (13) months.

Issue(s):

1. Whether Complainant had been properly awarded the tender.
2. Whether or not a contract had been formed, considering Complainant's written acceptance without signing Acceptance Form.
3. Whether Respondent could withdraw its award based on Clause 33.1 of the relevant Instructions to Tenderers (ITT).
4. Validity of the Complainant's Tender Security at the time of offer.
5. Forfeiture of the Complainant's Tender Security.
6. Considering the trends established, whether VRA should not have considered the merits of the Supplier's second request for price variation.

Arguments:

1. Negotiation/Clarification Meetings as a rule must not occur after a tender process. In accordance with Section 51 of Act 663, clarification may occur prior to submission of tender documents, which information must be shared equally with all suppliers/contractors to facilitate tender preparation.
2. Whether non-signature of a Letter of Acceptance amounts to failure to contract is an issue governed by the provisions on award notification in the tender documents. Prima facie, notification of award constitutes formation of contract, broken only by winning bidder's failure to sign contract submitted by purchaser and post the required performance bond within provided time limits.

Complainant's failure to sign the acceptance form, in this instance could not call for forfeiture because the contract was formed at the issuance of Award Notification. Forfeiture may occur only upon the following:-

- failure to sign the governing contract; and
- failure to post performance bond within 28 days of award notification.

3. On the issue of withdrawal of award based on Clause 33.1 of ITT - Respondent could not annul the tender process by reliance on ITT Clause 33.1 because the right conferred thereof can only be exercised prior to contract award. From documentary evidence, Respondent had already awarded the contract three (3) months earlier and could not seek to annul after contract award.
4. On validity of Complainant's Tender Security – it was argued that though Complainant's bid security was purported to have expired, the fact that Respondent had nevertheless proceeded to make an award to Complainant almost 6 months after the supposed expiry, could not be reconciled.
5. In accordance with the relevant rules (including section 4.18.4 of the Manual to Act 663) tender security must be returned to all bidders **after contract award**. Having awarded the contract, Respondent should have returned Complainant's tender security for replacement by performance bond.
6. Respondent's withdrawal of award without due consideration to Complainant's request for further price adjustment was considered. There was ample industry information for Respondent to carry out a price due diligence to verify Complainant's claim of price & exchange rate escalations/fluctuation.

Findings:

1. Respondent should not have entered into price negotiations/clarification after submission of tenders, contrary to sections 51 and 64(1) of Act 663. Clarification should occur prior to tender submission.
2. Based on relevant sections of the UNCITRAL guidelines, the Public Procurement Act, 2003 (Act 663) and sample World Bank Instruction to Tenderers (ITT), the following position was established:-

*“Notification of award constitutes formation of contract. Signature of the acceptance form & provision of performance security is a next step in the process, preceding notification to unsuccessful bidders & discharge of bid security. Notification of Award should be accompanied by the draft Contract Agreement in the form provided under the bidding documents which incorporates **all** agreements between the parties. The successful bidder is then expected to sign and return the Contract Agreement & provide Performance Security within 28 days of receipt of award notification. Failure to sign the contract and provide performance security constitutes sufficient grounds for annulment of award and forfeiture of bid security”.*

In the applicable circumstances, failure to sign acceptance letter did not constitute absence of contract.

3. Forfeiture may occur subject to two composite conditions:
 - Failure to sign contract and post performance bond within 28 days of award notification.

4. Respondent was ordered to conclude the tender process with Complainant and reach agreement on the issue of price instead of starting the entire process afresh, because Respondent should have been mindful of price volatility of oil lubricants and accordingly minimized long delays in its procurement/evaluation process.
5. Respondent to return bid security and pay 100% compensation to Complainant for bank charges accrued in respect of the bid security for the period wrongfully retained.
6. Complainant to consequently sign applicable contract and post required performance bond.
7. Respondent cautioned to re-align its procurement practices and seek relevant training.

Case decided in favour of Complainant¹.

No.3

Ladi Derek Ventures - **Complainant**
Vs.
University of Ghana, College of Health Sciences, Korle Bu - **Respondent**

Tender:

Supply and Installation of Computers and Accessories–IFT CHS-UG/NCT/02/2005

Complaint:

- Unfair treatment in tender process
- Reliance on declaration at tender opening to Supplier’s financial detriment.
- Request for compensation for financial loss.

Applicable Provisions of Act 663:

- Section 56 – Opening of Tenders
- Section 65 (1) – Acceptance of Tenders

Brief facts:

The Complainant participated in the tender for supply of Computers and Accessories on 8th December, 2005. At tender opening a “loud declaration or announcement” allegedly adjudged the Complainant winner of the tender. Complainant claimed to be the only tenderer to have complied with a condition of the tender to quote for a training component and general maintenance.

¹ Findings being duly implemented by Complainant & Respondent.

Complainant did not receive notification of award after bid opening. Multiple demands on the Respondent failed to produce an award letter or evaluation report. Complainant threatened to sue.

Respondent subsequently challenged Complainant to provide evidence to prove that it won the tender. Complainant provided a self-sworn affidavit attesting that it had been declared the winner during Tender Opening.

Complainant was later informed of its unsuccessful bid by the Respondent, and its Tender Security accordingly returned.

Having exhausted the dispute settlement process at Entity Level, Complainant applied for Administrative Review at the Public Procurement Authority.

Issues:

1. Whether or not the alleged pronouncement at Tender Opening announcing Complainant as winner qualifies it as such.
2. What are the rules governing selection of winning tenderer?
3. Whether the Complainant is entitled to compensation

Arguments:

1. A winning tenderer is determined after evaluation and appropriate notification. A reckless pronouncement at bid opening announcing a winner does not therefore amount to a winning tender nor an awarded contract.
2. It was not prudent for Complainant to import products without having received a formal Notification of Award.

Findings:

1. Regardless of the possibility that a reckless pronouncement could have been made, it was not lawful for the Complainant to be declared a winner at tender opening. A declaration at tender opening does not amount to a contract properly awarded.
2. Complainant not entitled to compensation for financial loss since PPA cannot enforce an illegality. He should have had an award letter in hand before committing his suppliers.
3. Complainant is not entitled to any compensation for financial loss. An illegality cannot be enforced.

Case decided against Complainant.

No. 4

Cintalubern Enterprise - **Complainant**
Vs.
Ghana Cocoa Board - **Respondent**

Tender:

Supply of 1,000,000 Pieces of Long Lasting Insecticide Mosquito Bed Nets –
(GCB/LLIN/ICT/V.1/2007/3)

Complaint:

- Manipulation of technical specifications to favour a particular supplier.
- Petition for the right procedure to be followed.

Applicable Provisions of Act 663:

- Section 33-Description of goods, works or services

Brief facts:

The Complainant participated in the tender for the supply of 1,000,000 pieces of Long Lasting Insecticide Mosquito Bed Nets. After evaluation, Complainant was disqualified for offering a product which only had the World Health Organization's (WHO) provisional certification as opposed to the fully approved WHOPES certification stated in the tender specifications.

Complainant alleged that attempts had been made to award the contract to a favoured supplier through the manipulation of technical specifications, regardless of detrimental costs of preferred bidder's price, and engaged the Respondent in discussions to resolve the matter.

Complainant applied for Administrative Review after exhausting the dispute resolution process at the Entity Level (with Respondent).

Issues:

- Whether Respondent put out the proper specifications.
- Whether Complainant's product met Respondent's specification.
- Whether Respondent contravened Section 33 of Act 663.

Arguments:

1. In view of the mandatory two-step testing procedure applicable to all new long lasting insecticidal nets (LLINs), the Authority argued in line with supporting documentation from the WHO, that provisional certification of the product did not make it less effective than the fully approved. Relevant documentation clarified that provisional certification conferred safety, efficacy and wash resistance.

2. It was argued that Respondent's specifications unnecessarily played on the degree of "WHOPES approval" which had the end result of placing limitations on similar competing products. Though permethrin had completed the long testing process, for which reason it had received a fully approved WHOPES certification, the concerned insecticide (detamethrin), a newer derivative pyrethroid to permethrin, had also been recommended by the WHO for use in malaria prevention.

Findings:

1. Technical specifications initially written for 'fully approved WHOPES' pointed to one brand only, against technical rules of procurement in competitive bidding.
2. Other brands of insecticide containing newer derivative pyrethroids (since the first and only fully WHOPES certified permethrin) had subsequently been recommended by WHO for use in malaria prevention.
3. Though Respondent had amended the disputed tender by an Addendum published in the Daily Graphic, the said Addendum only served to mislead prospective tenderers into thinking they could compete fairly by opening up competition (in paragraphs 3 & 6) but still closing out competition by insisting on the only insecticide with a 'fully WHOPES approved' certification (in paragraph 10).
4. In writing specifications, all parts must harmonize.
5. Respondent, accordingly under section 80 (3) (a) of Act 663, declared culpable of manipulation of technical specifications to favour a preferred bidder/product contrary to Section 33 of the Public Procurement Act, 2003 (Act 663).
6. Respondent ordered, in accordance with Section 80 (3) (c) of Act 663, to cancel initial evaluation and re-evaluate based on clarified and unambiguous specifications.
7. Respondent advised to re-align its procurement practices, desist from manipulation of specifications and strengthen competence in drawing up technically compliant specifications, on the pain of appropriately prescribed penalties and/or sanctions by the Public Procurement Authority for future similar procurement lapses.

Case decided in favour of Complainant².

² Respondent protested findings & has since awarded the contract (in disregard of finding #6 above).