

Republic of Liberia
Complaints, Appeals & Review Panel (CARP)
Public Procurement & Concessions Commission
Executive Mansion Grounds
Capitol Hill, Monrovia, Liberia

OPINION

Damen Shipyards Gorinchem, by & thru Mr. Dereck Oerlemans, Regional Director for Africa.....**COMPLAINANT**
Versus

National Port Authority, (NPA) by & thru its Managing Director, Matilda W. Parker.....**DEFENDANT**

**Illegal Cancellation
Of Bid**

BACKGROUND:

The Public Procurement and Concessions Commission Act (PPCA) which established the Public Procurement and Concessions Commission (PPCC) also created within the Commission, the Complaints, Appeals and Review Panel (CARP). The Panel is to review/investigate complaints or appeals filed by aggrieved party or parties.

Against this backdrop and in keeping with the applicable law, Damen Shipyards, through its Regional Director for Africa filed a complaint to the offices of the Executive Director of the PPCC against the management of the National Port Authority (NPA) for the NPA alleged illegal cancellation of the advertised invitation to tender for the acquisition of two used tugs-Bid Ref. ICB No.NPA/ICB/002/2012. The Executive Director then forwarded the complaint to the CARP for investigation in keeping with the PPC Act. Damen Shipyards participated in the advertised bid and received a letter from the NPA dated May 1, 2013, notifying Damen of the intent to award the contract to Damen. As a result of the May 1, 2013 letter, several negotiation meetings were held between the parties and a number of communications were also exchanged essentially expressing commitments to each other. Irrespective of these mutual exchanges by the parties, the NPA wrote a letter to Damen Shipyards dated January 13, 2014, informing Damen Shipyards of the cancellation of the bid due to what the NPA termed as financial constraints. It is this decision that Damen Shipyards has challenged, terming it a violation of the PPC Act.

METHODOLOGY:

Upon careful review of the Complaint and the supporting documents thereto attached, the Panel officially wrote two separate letters to the management of the National Port Authority (NPA) requesting her to provide official comment and/or present any and all documents in the possession of Management that would assist the investigation. Management responded with two communications indicating reasons that led to the cancellation of the bid proceeding.

Based on the Complaint and the attached documents as well as the official responses from the Defendant Management, the Panel proceeded to deliberate. The Panel had two sessions of deliberations and was guided by the Amended and Restated PPC Act of 2010.

FACTS

In July 2012, the National Port Authority (NPA) advertised an International Competitive Bid (ICB) for the supply of two second hand tugs. Six Companies participated in the process including Damen Shipyards. Damen Shipyards a Dutch Company, purchased the bid documents and subsequently submitted a sealed bid for second hand tug boats in response to the specifications of the NPA on July 31, 2012.



On May 1st 2013, the National Port Authority wrote a letter to Damen Shipyard, notifying the latter of the NPA's intend to award a contract consistent with ICB#NPA/ICB/002/2012 tug boat acquisition. On the strength of that communication, site visits were made, negotiations were held between the NPA and Damen. After these certifying visits and negotiations, the NPA again wrote a letter over the signature of its managing director, Madam Matilda W. Parker, dated July 25, 2013, primarily inviting Damen to begin contract negotiation for the purchase of two tug boats as in keeping with the specifications of the advertised bid. The facts reveal that several other meetings were held thereafter. After those meetings, Damen says she heard nothing from the NPA towards the conclusion of the contract, therefore on August 23, 2013, Damen wrote a letter requesting an audience with the NPA management, particularly the Managing Director. The Managing Director of NPA responded to that communication, informing Damen that the NPA had forwarded the bid documents to the PPCC for the purchase of the tug boats as in keeping with law. Damen says she waited for response but got none from the NPA; as such she sent a letter dated October 23, 2013 seeking clarification. NPA responded to that letter on October 29, 2013 by informing Damen 'You will be contacted by our Legal Department to continue negotiations.'

The facts of this case conclude that irrespective of the communications and negotiations mentioned above, the NPA on 13th January, 2014 wrote a letter referenced DMD-LRG1/001/14 aborting the negotiations and stating further that all negotiations for the purchase of the tug boats are cancelled for now and the immediate future due to financial constraints. As a result of this letter, Damen responded to NPA on January 20, 2014 asking for reconsideration. However on January 28, 2014, NPA again wrote confirming the cancellation of the entire proceeding.

Consistent with Section 125 (2) Part VIII of the PPC 2010, titled Complaint and Review Process, Damen filed a formal complaint with the procuring entity; in this case the NPA on February 12, 2014 which complaint was duly received by the NPA. According to Damen, the NPA took no action before or after the fifteen (15) days as required by PCCA 2010.

Against this background, Damen shipyard filed a formal complaint to the Public Procurement and Concessions Commission (PPCC), the entity established by law to investigate all procurement and procurement related matters. The complaint was forwarded by the Executive of the PPCC to the Complaints, Appeals and Review Panel of the said institution for investigation.

ISSUE:

From the facts of this case, the Panel says there is one issue that is determinative of this case. And that issue is:

1. Whether or not the cancellation of the bid proceedings by the National Port Authority (NPA) due to financial constraints after the issuance of the 'Notice of intent to award' and the letter of invitation to begin contract negotiations was consistent with the PPC Act of 2010?

The answer is no.

DISCUSSION OF THE ISSUE:

From the facts of this case, it is established that there was a meeting of the minds of the parties, that is, the NPA and Damen Shipyard. That meeting of the mind, in essence translates into a constructive contract.

By the presentation of Damen's sealed bid in response to NPA's advertisement an offer was made. NPA's letter of the Intent to Award and the letter inviting Damen to begin contract negotiations, constitute an acceptance within the meaning of contract law, since in fact, the consideration quoted in the bid document had been accepted by Damen which was actually the basis for Damen's participation in the entire proceeding.

According to Part IV, Section 40 (1) of the PCCA 2010, all procuring entities shall undertake procurement planning with the view of achieving maximum value for public expenditure and the other objects of this act. The act also places the responsibility on procuring entities to prepare



annual procurement plans for goods, works, and services in the procuring entities budgeting process. Upon budget approval, the entity through its procurement unit shall prepare annual procurement plan for goods, works and services. The NPA being one of such procuring entity, is obligated by law to comply to this provision. The panel has every reason to believe that the NPA, did in fact comply with this provision of the law as evidenced by their approved procurement plan. It is therefore within the context of this approved procurement plan that the NPA acted when she advertised the bid in the first place. It is also within this context that the NPA informed Damen that the bid documents were in process at the PPCC.

During investigations, the NPA provided reasons for the cancellation of the bid in two separate letters dated March 31, 2014, and April 15, 2014. In the March 31, 2014 letter, the NPA informed the Panel that the NPA had the right to cancel or reject all bid documents thereby incurring any liability to bidders. In reliance thereto, the NPA cited section 1 (39.1) of its bid document. In its second letter of April 15, 2014, the NPA said that she cancelled the bid because, it was in the process of rectifying a loan with the Kuwaiti fund for the purchase of tug boats among other things that must be bid for following specific rules that had to be preapproved by the fund. The later suggest that the Kuwaiti fund was in fact the pre-condition for advertising the bid. If this is the case, the panel thinks, that such preconditions should have been mentioned in the NPA's advertisement. To have failed to mention it in the bid document and/ or notice of intent to award and the letter authorizing the contract negotiations, as well as the series of negotiations itself constitutes a waiver and a bar to exercise the right to cancel the bid proceeding as in this instance case.

The NPA's reliance on its letter of March 31, 2014 conflicts with the PPCC Act of 2010. As such, the Act prevails over the bid provided by the NPA. The essence of the establishment of the PPCC is to ensure that all procurement proceedings are compliant with the PPCC Act of 2010.

Assuming without admitting that the Kuwaiti fund could be used as a precondition for the awarding of the contract subject of dispute, the PPCC Act is clear and unambiguous. According to Part IV, section 36 (2b), "a procurement proceeding may be cancelled for insufficient funding at any time **Prior** to the acceptance of a bid where continuing with the procurement in its present form or a substantially similar form is not appropriate".

In this case, the exchange of the sealed bid by Damen, and the acceptance thereto, that is to say the letters of award and contract negotiations from the NPA to Damen essentially met the meeting of the minds of the parties thereby binding them. Either party could not have cancelled the contract without the knowledge and consent of the other or without due process of the laws. For either party to have done so, in the mind of the Panel, is arbitrary and a violation of the PPCC Act. The authority to cancel a contract is vested within the Judiciary Branch of government. As such, any party exercising that authority without due process, is void ab initio.

OPINION/FINDINGS:

Wherefore and in view of the foregoing facts and laws, it is the opinion of the independent Complaints, Appeals and Review Panel of the Public Procurement and Concessions Commission of the Republic of Liberia that the National Port Authority was in violation of the PPC Act 2010, when she cancelled the bid proceedings after the issuance of a letter of intent to award contract and another letter authorizing Damen to begin contract negotiations with the NPA.



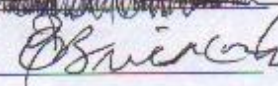
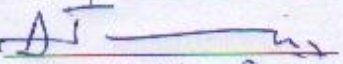
RULING:

Accordingly, the Complaints, Appeals and Review Panel (CARP) invalidates and reverses the decision of the National Port Authority to abort all negotiations and cancel the procurement process relative to the purchase of tugs, and that to ensure compliance with the PPC Act, the National Port Authority is hereby ordered to formalize the contract for the acquisition of tugboats with Damen Shipyards Gorinchem in keeping with prior negotiations. **AND IT IS HEREBY SO ORDERED.**



IN WITNESS WHEREOF, WE (MEMBERS OF THE PANEL) HAVE HERE ONTO
SET OUR HANDS AND AFFIXED OUR SIGNATURES TO THIS DOCUMENT
THIS 25TH DAY OF APRIL, A.D. 2014.

Signed:

1. Cllr. Beyan D. Howard.....Chairman 
2. Mr. Massaquoi Morlu Kamara.....Co-Chairman 
3. Cllr. Eric B. Morlu.....Secretary 
4. Mr. David M. Jallah.....Member 
5. Mr. Martin S. Kollie.....Member 