



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



November 20, 2008

Opinion in the case Delta Mining Consolidated (DMC) vs. Ministry of Lands, Mines and Energy

Background

The Public Procurement and Concessions Act (PPC Act) which established the Public Procurement and Concessions Commission (PPCC) also created within the Commission the Independent Complaints, Appeals and Review Panel (ICARP) to review/investigate Complaints or Appeals from bidders to the Commission against procuring entities emanating from procurement proceedings. In keeping with the law, the Commission received a complaint from Delta Mining Consolidated (DMC) against the Ministry of Lands, Mines and Energy (GOL) concerning a bid for the development of the Western Cluster Iron Ore deposits that said Ministry had conducted. Said Complaint, the Commission passed on to the Panel for investigation.

Methodology

The Panel, at its meeting on November 10, 2008 agreed to proceed with the investigation of the complaint. The panel reviewed all relevant documents and communications on the Western Cluster Iron Ore Deposits Bid Proceedings. These included the bid documents, the invitation to bid for a Mining concession for the Development of the Western Cluster, the Bids Evaluation Report, the Due Diligence Report by Deloitte and Touche, the February 6, 2008 letter of Lands, Mines and Energy to Delta, the September 22, 2008 letter by Webber Wentzel to Minister Shannon requesting the Ministry to provide official confirmation that DMC has not been awarded the concession, the response to this communication dated October 2, 2008 confirming that DMC would not be awarded the Concession, the complaint from DMC under the signature of Cllr. Theophilus C. Gould and others.

Facts

In May 2007, the Ministry of Lands, Mines and Energy via International Competitive Bidding, published an invitation to bid for Mining Concession for the Development of the Western Cluster Iron Ore Deposits. Seven (7) Pre-qualified companies including DMC short-listed, were invited to participate in the bidding process. In response to the RFP, six entities including Delta submitted proposals for the development of the Western Cluster Iron Ore Deposits Western Liberia.

Following the submission of proposals, the Bids were subjected to detailed evaluation by the Concession Evaluation Panel which resulted in ranking of the bidders with Delta being ranked #1 pending due diligence report on first three ranked companies.

The process then moved to the due diligence stage, which exercise was conducted by an Independent Consultants, Deloitte and Touche. On July 29, 2008 Deloitte and Touche

submitted its final report to the Ministry. In August, the Ministry prepared an internal review document that did not change the ranking of the bidders.

Complainant alleged that while looking forward to be invited for negotiation, it read from print and electronic media on Monday September 15, 2008 that the Government had taken a decision to re-launch the bidding process for the Western Cluster Iron Ore Deposits “based on report that the first bidding process could have been compromised by external influence or impropriety,” and disqualified DMC and another company from rebidding.

On September 22, 2008, Webber Wentzel, South African Counsel to Delta, addressed a letter to Minister Eugene Shannon of LM&E in which they gave Delta’s understanding of the chronology of events in the bidding proceedings. Delta requested confirmation of DMC’s status in relation to the tender, and if the media reports were correct, and to give reason (s) for re-launching the bidding process to the exclusion of DMC from the process.

Careful examination of the records, particularly ITB Clause #6 of the Invitation to Bid for the Mining Concession for the Development of the Western Cluster Iron Ore Deposits found on page 1 of 10 page document revealed that “The Government of the Republic of Liberia reserves the right to declare the bidding process void or otherwise without effect for any reason or no reason or to re-open the bidding process or to accept or reject any Bid (s) at any time and that such action will entitle any bidder to any claim whatsoever against the Government, the Ministry of Lands, Mines and Energy, the Inter-Ministerial Technical Committee or any of their respective agents, representatives, advisers or consultants, provided that such decision by the Government shall be made prior to the execution of formal contract.”

It is clear from the above quoted Clause #6 that the Government of Liberia or the Ministry of Lands, Mines and Energy acting on behalf of the Government has the legal authority to cancel the bidding process at any stage of the bid proceedings consisting with the Invitation To Bid for this Western Cluster Iron Ore Deposits. Furthermore, Section 36, subsection 3, 4, and 5 provide grounds on which Bidding proceedings could be cancelled.

As to the cancellation, the Government had the right to cancel the Western Cluster Bid Proceedings under the provision of the Invitation to Bid herein mentioned supra, which document was circulated and received by all bidders, including DMC. We also have been shown no evidence that the report of the Concession Evaluation Panel was approved by the Inter-Ministerial Concessions Committee, which is necessary under the PPC Act before negotiations on a Concessions contract can commence.

When the Cabinet announced the cancellation of the Bid proceedings, it also announced the re-bidding in the print and electronic media to the exclusion of DMC and one other Company.

As to the debarment of DMC, the Panel is of the opinion that such position was not carried out in accordance with the provisions of the Act, and therefore cannot be upheld under the Act.

Ruling

WHEREOF AND IN View of the foregoing, the Panel has resolved that the procedure used in cancelling the Bid proceedings was not correct because notice of cancellation should have

been given by the Entity under the PPC Act. However, under ITB Clause #6 of the Bid Documents the right to cancel the bidding process is clear and un-debatable.

Accordingly the Panel resolves as follows:

1. That all Companies that had earlier participated in the previous bid, including DMC, should be allowed to participate in the re-bidding process in the event there is a need for re-bid;
2. That if the need for re-bid arises, all previous participants including DMC should be given the bidding documents free of charge or at no extra cost;
3. That in keeping with the Invitation to Bid and Section 36(5), which states that the “Procuring Entity shall not be liable to a bidder by reason only of rejection of all bids or cancellation of procurement proceedings under subsection 2”, the Panel further rules that the Concession Entity is absolved of any liability with respect to the cancellation of the bid proceedings.

IN WITNESS WHEREOF, WE (MEMBERS OF THE PANEL) HAVE HEREUNTO SET OUR HANDS AND AFFIXED OUR SIGNATURES TO THIS DOCUMENT THIS 20TH DAY OF NOVEMBER A. D. 2008.

Signed:

Cllr. Beyan D. Howard, Chairman _____

Mr. Massaquoi M. Kamara, Sr., Co-Chairman _____

Atty. Eric B. Morlu, Secretary _____

Mr. David M. Jallah, Member _____

Cmmr. (Mrs.) Esther Paegar, Member _____

Mr. Martin Kollie, Member _____