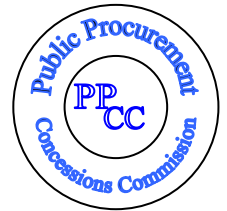


Republic of Liberia
Complaints, Appeals & Review Panel (CARP)
Public Procurement & Concessions Commission
Executive Mansion Grounds
Capitol Hill, Monrovia, Liberia



March 12, 2010

**OPINION IN THE CASE IDENTICARD SYSTEM, EQUIPMENT AND ACCESSORIES
INT'L MUSIC, INC. VS. LIBERIA WATER AND SEWER CORP. (LWSC)**

Background

The Public Procurement and Concession Act which dictated the establishment of the Public Procurement and Concession Commission also mandated the creation of the Complaints, Appeals and Review Panel within the Commission, with the sole purpose or responsibility to investigate complaints by bidders emanating from procurement /concession processes against Procuring /Concession Entities. Consistent with the above, Identocard System, Equipment and Accessories International Music, Inc. a Liberian Company filed this complaint with the Commission against the Liberia Water and Sewer Corporation (LWSC) for investigation.

Methodology

At its meeting held in the conference room of the Commission the panel having first cleared the issue of the time lines, agreed to proceed with investigation of the complainant against the LWSC by Identocard System, Equipment and Accessories International Music, Inc. The investigation took the form of reviewing the records submitted to the Panel by the complainant. The records reviewed are: The Complainant's complaint to the procuring entity, complainant's complaint to the Commission, the communication under the signature of Chairman of the Board of Directors of LWSC to the Managing Director, Complainant's letter of October 12, 2009 to the Managing Director of LWSC, the response of LWSC to complainant's, LWSC's letter to complainant which forwarded the bid evaluation report, the evaluation report in the proceedings, the documents entitled "requirement for bid participation", known as the advertisement which contained instructions to bidders or qualification requirements, and the letter of acknowledgement of complainant's complaint by LWSC.

FACTS

In a bid to acquire Aluminum Sulphate and Phenol Red Tablets to treat the drinking water that is being supplied to LWSC consumers, the entity conducted a tendering process for the supply of said tablets. Only two bidders including the complainant responded and participated. The bid documents among other requirements stipulated: (1) Business

Registration, (2) Tax Clearance, and (3) Names, telephone numbers, and the E-mail address (es) of these entities that each of the bidders supplied with such chemicals for the past three (3) years or so. Both bidders submitted their bids that were evaluated and a winner from the process selected. The complainant not being satisfied complained to the procuring entity from which response or decision complainant appealed to the commission for review of the bid proceedings.

Issues raised in the complainant's complainant area:

That their rival, Capricorn who won the bid was supplied the list of requirements and specification, two (2) weeks prior to advertisement of the bid;

That the advertisement in the papers lasted only two (2) weeks instead of one (1) month as required by law;

That the procuring entity failed to indicate the closing and opening dates of the bids;

That the bid opening time was extended by one hour or so and that is a violation of the law;

That the entity requested for one representative each from the bidders to witness the bid opening and that is a violation;

That prior to the opening of the bid and in the presence of other bidders representatives, the Deputy Managing Director for Administration (DMDA) made a statement that "low price is not a guarantee to winning the bid";

That the bid evaluation committee and some competing bidders' representatives at the opening of the bid openly commented and challenged their (complainant) references of entities supplied in the past, claiming that the references are foreign.

Discussion of the issues raised by complainant

As to the supply of list of requirements and specification to Capricorn, rival bidder, two weeks prior to advertising the bid, the procurement law and practices are clear. All the bidders in the bid proceedings are to be treated equally and fairly. Hence, the supply of information to one party before the advertisement of the bid is wrong and a violation of the law. Also, this kind of practices in procurement is tantamount to giving undue advantage to one bidder over the other. In the competitive process, the procuring entity violates the PPC Act when it supplies information to a bidder or bidders to the exclusion of the other (s). It also amount to perpetration of fraud or collusion in the competitive process which undermines transparency and completion.

As to the issue of advertisement in the paper lasted two weeks only, the procuring entity is in violation of the law and procurement practices. Under the PPC Act and Accepted

International Best Practices, four weeks are required when National Competitive Bidding (NCB) method of procurement is adopted as in the case at bar. Hence, the entity breached the law when it published the advertisement for two weeks only.

As to the entity's failure to indicate the closing and opening dates of the bid, it is the breach of the procurement law, as it is a requirement that the advertisement and bid documents carry both the closing and opening dates. However, this defect or mistake in this case was corrected when the entity subsequently communicated the information to the bidders, though postponement upon postponement to open the bids was made by the entity. In other words, postponement of bid opening in itself is not a violation if the bidders are communicated to on time. We observed in this case that the information about postponement of the bid opening was communicated to all the bidders every time there was a need to postpone. In such a case, we see no violation of the law or any wrong prejudicial to the bidder's interest.

As to the entity's request for one representative of the bidder to be present at the bid opening, we see no violation in as much that information was communicated or contained in the bid documents to all bidders prior to the date of bid opening.

As to the statement made by the Deputy Managing Director that price is not the determining factor to winning the bid at the bid opening ceremony, we note that the Director erred to make such a haste statement prior to the opening of the bid. The statement had the potential to influence the bid evaluation panel. In fact, it pre-supposes that he got some information on the bids prior to their opening. That which he said was purely within the realm of the bid evaluation panel who takes other things in to consideration.

As to the challenge by the evaluation panel of complainant's references of suppliers during bid opening and in the presence of other bidders, the panel says that such behavior was wrong and constitutes a violation of the law. Under the law and procurement practices, the evaluation panel, on the day of bid opening, is required to take note in writing the specifics of bidders' bids. The minutes and the bids are sent to the bid evaluation committee for evaluation. The references of suppliers or past performance (s) are checked or verified by the entity as a way of exercising due diligence.

Issue in the case

The main issue in the case at bar is whether or not bidder who fails to give sufficient information of its past performance record, including references that are requested for in the Advertisement, Instructions to bidders and the Bid documents is qualified to be selected as winner over those bidders who met the requirements?

The answer to this question is no. The meeting of the requirements in the bid documents or instructions to bidders is the pre-qualifying factor or in the event that pre-qualification exercise was not done, then post-qualification proceedings shall solve the problem. Under section 32(8) of the PPC Act, it is stated that "where pre-qualification proceedings are not conducted, post-qualification, in which the procuring entity verifies the qualification of the bidder against the criteria stated in the bid documents, shall be used". The Act further

stipulated in section 32 (1)c that in order to participate in procurement proceedings, a bidder must qualify by meeting the criteria set by the procuring entity, which may include: professional and technical qualifications, past performance among others. At section 32(4), a procuring entity shall disqualify a bidder if it finds at any time that the information Submitted concerning the qualifications of the bidder was materially inaccurate or materially incomplete.

In the case at bar, complainant submitted as reference names and addresses of persons or entities that were challenged or proved to be incorrect. Instead of providing the addresses and telephone numbers of their references, they elected to complain against evaluation committee making open remark at bid opening only.

Rulings

In view of the above facts, law and circumstances, the panel is of the opinion that the procuring entity, Liberia Water and Sewer Corporation (LWSC) acted rightly when it dropped complainant from the bidding process for failure to provide sufficient information, such as the addresses and telephone numbers of entities or individuals supplied in the past. Failure to facilitate access to one's previous suppliers to demonstrate past performance is tantamount to inability to perform if the contract were to be awarded that bidder or procurement of the contract by way of false information or materially incorrect information .

In view of the foregoing, Panel rules that the Complaint of the complainant is adjudged to be without merit, hence same is hereby dismissed. And it is so ordered.

IN WITNESS WHEREOF, WE , MEMBERS OF THE PANEL HAVE HEREUNTO SET OUR HANDS AND AFFIXED OUR SIGNATURES TO THIS RULING, THIS 24TH DAY OF MARCH, A.D. 2010.

SIGNED:

Cllr. Beyan D. Howard, Chairman _____

*Mr. Massaquoi Morlu Kamara, Co-Chairman _____

Atty. Eric B. Morlu, Secretary _____

Mr. David M. Jallah, Member _____

Mrs. Esther Paegar, Member _____

Mr. Martin Kollie, Member _____

*Note: Mr. Massaquoi Morlu Kamara did not sign this opinion because he did not participate in the investigation due to his absence from the Country.