

Berock Ventures Ltd. - **Complainant**

Vs.

University of Ghana, Legon - **Respondent**

Tender:

Construction and Completion of the Proposed Institute of Environment & Sanitation Studies

Petition by Complainant – Berock Ventures Ltd. dated 8th November, 2011 for administrative review against the University of Ghana regarding a tender for the procurement of Construction and Completion of the Proposed Institute of Environment and Sanitation Studies for the University of Ghana, Legon.

BRIEF FACTS

It is the case of the Complainant (Messrs. Berock Ventures Ltd.) that it submitted a bid in respect of the above mentioned project dated 14th April, 2011 undertaken by the University of Ghana (the "Respondent") for the procurement of Construction and Completion of the Proposed Institute of Environment and Sanitation Studies.

The complaint centered on the late submission of a tender security which, though recorded at tender opening, subsequently formed the basis of disqualification of the Complainant's tender at evaluation. Following a request on the status of its bid submitted for the above stated project, Complainant was informed that its bid was unresponsive due to late submission of the required tender security. It was later confirmed that a winning tenderer had been approved by the Central Tender Review Board.

The Complainant argued that there was no clause in the bid document indicating that a tender security not submitted with a bidder's tender could not be submitted in the course of the bidding process. That the Respondent had, in its opinion, acted *ultra vires*, and requesting the Public Procurement Authority (PPA) to help clarify the matter.

The PPA noted that the tender invitation documents had requested that the tender be submitted together with a tender security, which the Complainant omitted to do. The Complainant indicated that it took steps in the course of the tender opening to submit the tender security; which was accepted by the Procurement Entity and opened in the presence of other competitors (no objection was raised regarding the late submission neither by the procurement entity nor other tenderers present). Complainant contended that the Respondent could not declare a tender non responsive on grounds of late submission of tender security, especially when there had been no objection by the procurement entity or other tenderers during tender opening.

The Complainant therefore sought the following reliefs: -

- The true interpretation of the law; and
- Publication of the decision to educate the public and public procurement practitioners.

On its part, Respondent indicated that indeed the Complainant submitted a late Tender Security. That it was after all tenders had been opened, that a representative of the Complainant drew the tender opening team's attention to a separate envelope containing the complainant Company's tender security and sought to submit same. That in accordance

with tender opening procedures, the said tender security was subsequently opened and its contents including late submission, duly noted.

Consequently, the Respondent's Evaluation Panel in its deliberations found that the Complainant had submitted an incomplete tender, which it sought to rectify by submitting after the deadline for tender submission and after tender opening. Furthermore, by ITT Clause 26.3, the Complainant was not entitled to make responsive, the unresponsiveness of its original tender.

ISSUES

- Whether the Respondent could declare the tender unresponsive by reason of the late submission of tender security.
- Whether the Respondent could declare the tender unresponsive when no objection was raised to the late submission of tender security at tender opening.

CASE DELIBERATION/FINDINGS

In ascertaining the allegations made by the Complainant, the Authority considered copies of the Evaluation Report, Minutes of the Tender Opening and Tender Documents and found;

- (1) That from Minutes of the Tender opening specifically, Section 18 (1) of the Instructions to Tenderers (ITT) it was imperative for tenderers to submit all documents including the tender security, bound together; Section 12 of the ITT listed the documents to be bound (namely, (a) the tender;(b) the tender security;(c) priced Bill of Quantities;(d) Qualification Information Form Documents and (e) alternative offers where invited.
- (2) That the tender security was not found in the documents originally submitted by the Complainant and therefore not bound as required. The question therefore was whether or not the Respondent was right in opening the tender security when the said document had not been submitted together with the Complainant's tender as required under Section 12 of the ITT.
- (3) That the Complainant itself had indicated in its petition, that it had inadvertently omitted to attach the tender security. On this basis, the Complainant was found to have failed on its part to follow instructions as contained in the ITT and should have been disqualified automatically.
- (4) The Respondent should have recorded the absence of tender security at the tender opening and should not have recorded it upon late submission. The tender package should have included all requested documents.
- (5) The Complainant had, in its petition, contended that opening the late submitted tender security and recording the contents thereof signified acceptance therefore, the Respondent was *estopped* from using the late submission against him at evaluation. The Authority found this argument completely flawed and held that

estoppel did not arise in that situation because the bid opening stage was only a stage for recording submissions in the process and no rights accrued at that stage.

- (6) With reference to Section 56 (1) (b) of the Public Procurement Act 2003 (Act 663) which states that "tenders shall be opened at a place and in accordance with the procedures specified in the tender documents", the Authority further found, by reference to Section 59 (1) of Act 663 that following the criteria set out in the invitation documents, the tender security was missing and though the Respondent erred in opening it when it subsequently became available at the opening of tenders, the Complainant's disqualification at evaluation on the basis of late submission of tender security was in order. The Authority noted that Complainant's tender security was clearly included at an advanced stage of the tender opening process.

DECISION

- 1) The Authority found in favour of the Respondent.
- 2) The Authority noted that officials of the Respondent who conducted the bid opening should have followed instructions laid down in the ITT regarding the completeness of tenders to be submitted, and should not have accepted late submission of the tender security.
- 3) On the reliefs sought, it was noted that the Complainant sought to prevent the Respondent from declaring its bid unresponsive. The Authority however found that Complainant's tender was duly adjudged unresponsive for late submission of Tender Security. Tenderers should be advised to pay due attention to and comply with requirements of Invitations to Tender (ITT).