

No. 6

M. K. Awi Enterprise - Complainant
vs.
Kumasi Polytechnic - Respondent

Tender:

Tender for supply of Fashion Design Tools & Equipment (Contract No. AS/K-POLY/G/006/2009)

BACKGROUND

M.K. Awi Enterprise Ltd. (the “Complainant”) participated in the tender mentioned above, on 25th March 2009, by Kumasi Polytechnic (the “Respondent”). By letter dated 3rd August 2009, the Respondent notified the Complainant that it had been awarded a contract for the supply of certain equipment.

By letter dated 13th August 2009, the Complainant raised a number of reservations about the said award and sought clarifications from the Respondent prior to accepting the offer. The Complainant in the letter alleged the following:-

- that one Lot was shared between two or more tenderers (the Complainant inclusive) and that this is contrary to law.
- that it tendered for Lot 4, but in the offer letter items 3 and 4 of Lot 4 were excluded from the items in respect of which the award was made, contrary to procurement rules. The Complainant said that its interest in the tender proceedings was due to the quantity to be supplied in items 1 to 4 of Lot 4 without which it would not have participated in the proceedings.
- the delivery period of 30 days specified in the letter of award was less than the 60 days specified in the tender documents (Instruction to Tenderers (ITT)). He contended that 30 days was not sufficient considering the overall time required for the importation and shipment of the equipment.

The Complainant, dissatisfied with the above, requested the Ministry of Education to investigate the matter, by letter dated 28th December 2009. In that letter, the Complainant also alleged that its competitor did not have a valid tax clearance certificate yet had been awarded part of the contract.

Not having received any response from the Ministry of Education, the Complainant by letter dated 2nd February 2010 petitioned the Public Procurement Authority for administrative review of wrongful action by the Kumasi Polytechnic in respect of the contract mentioned above.

Though the Polytechnic admitted awarding the contract to the Complainant, and corroborated the Complainant’s assertions in respect of the issues aforementioned, the Polytechnic insisted that the Complainant had verbally indicated his acceptance of the decision to split the award with other tenderers in meetings with him. The Polytechnic indicated that its response was delayed for 5 (five) months because it was awaiting the Ministry of Education’s intervention in the matter, which did not materialize. They explained that to avoid further delay in procuring these items, the Polytechnic decided to re-advertise (*ref. letter no. 269 dated 26th July 2010*).

ISSUES

Issues arising for discussion were as follows:-

1. Whether or not Lots may be shared between or among tenderers
2. Whether or not the purchasing institution is entitled to exclude certain items from a Lot as advertised, in awarding a contract in respect of that Lot and allocate those items to another Tenderer.
3. Whether or not the delivery period stated in the award to the Complainant was the same as that advertised in the Tender Documents.

CASE DELIBERATION

a) Sharing of Lots among tenderers

There was no indication in the Tender Documents that the Lots would be split. Secondly, from the Evaluation Report submitted, the Polytechnic had no basis for splitting the Lots in the manner in which this was done. Higher priced items in the Complainant's quotation had been excluded from the award to him, though he had duly won the tender, which was not lawful. Splitting of Lots could only be justified where pre-disclosed in the tender documents (*ITT*).

b) Exclusion of items quoted by a winning tenderer from an Award

Similar to the findings in paragraph 1 above, the Authority found that the Polytechnic had acted outside accepted procurement principles in unilaterally excluding from the award made to him, items that the winning tenderer had quoted for and won.

c) Reduction or extension of Delivery periods

On the delivery period pre-disclosed to all tenderers in the solicitation documents, the Authority found that the Polytechnic's requirement that the Complainant deliver within thirty (30) days in the letter of award was contrary to the sixty (60) days delivery period stated in *Section IV. Technical Specification* of the Tender Document, for which the Complainant had submitted its quote.

It was further held that the Complainant had to be adequately compensated if the Polytechnic required a shorter delivery period, considering the higher costs that would accompany accelerated delivery. The Complainant's price was based on a 60 day delivery period, and 30 days subsequently required would come at a cost for expedited action.

DECISION

1. The Authority decided that the Complainant was entitled to the total award of the Contract, to be delivered within the delivery period stated in the Tender Document.
2. In case of expedited delivery, the Polytechnic should negotiate with the Complainant to compensate this requirement adequately.
3. The Polytechnic's requirement that the Complainant deliver within thirty (30) days in the letter of award was contrary to the sixty (60) days delivery period stated in *Section IV. Technical Specification* of the Tender Document
4. Excluding the higher priced items in the Complainant's quotation from the award to him, though he had duly won the tender, was not lawful. Splitting of Lots can only be justified where explained and pre-disclosed in the tender documents (*ITT*).

Editorial Note:

In Compliance with the PPA's decision on this case, the Respondent (Kumasi Polytechnic) has as of 22nd October,2010, awarded a contract for the supply of fashion design tools & equipment in the amount of GHC88,990.00 to the complainant in settlement of the matter.