

In the matter of an application by BK International Inc. No: 75-CM /2013

[1] In June 2013, the Guyana Geology and Mines Commission (G.G.M.C), by way of public advertisement, invited bids for the rehabilitation of the Aremu Road, Phase 1, Region 7, Guyana.

The Invitation for Bids (IFB) stated that bidding was open to selective bidders. The invited bidders were:

1. CB & R Mining;
2. MMC Inc;
3. BK International; and
4. R&A Construction.

[2] The bids were opened in the office of the Commissioner on June 11, 2013, and a representative of BK International Inc. was present. Three (3) bidders responded to the advertisement. These were:

CB and R Mining	-	\$385,562,188
MMC Inc	-	\$525,413,240
BK International Inc	-	\$379,707,900

Upon the opening of the bids it was revealed that CB and R Mining Company did not submit its NIS and GRA Compliance Certificates and also did not submit any information required by the Procurement Act in relation to general experience, specific experience, personnel capabilities, equipment capabilities, evidence of cash in hand, lines of credit, legal status, etc. The applicant BK International Inc. claimed that they submitted all the relevant documents including their income tax compliance certificate and three (3) separate bid security documents.

[3] BK International stated that having not received any notice by July 22, 2013, and having learnt that CB and R Mining was awarded the contract, they expressed their dissatisfaction with the bidding procedure to the Minister of Natural Resources and Environment. The Minister's response was to appoint Caribbean Engineering and Management Consultants to conduct an investigation into the applicant's complaint. Caribbean Engineering and Management Consultants Inc. conducted its investigations into the awarding of the contract for the Aremu Road Rehabilitation and made material findings adverse to CB and R Mining. Despite the adverse findings GGMC failed to take action to correct its decision. Consequently, CB and R Mining remained the awardee of the contract to rehabilitate the Aremu Road.

[4] BK International Inc., claimed that "GGMC is a department or agency of the Ministry of Natural Resources and the Environment i.e. the Government of Guyana and pointed out that **Section 2(1) of the Procurement Act** stated that "a procurement entity "means" the procurement entity of any ministry, department, agency or unit of the Government and asserted the GGMC was clearly an agency or unit of the Government".

[5] GGMC claimed that it was a statutory body established by the Geology and Mines Commission Act and was not under an obligation to comply with the provisions of the Procurement Act since the Procurement Act applied to "procurement entities" within which statutory definition GGMC did not fall. GGMC further claimed that even if the findings of the Caribbean Engineering and Management Consultants Inc. were as alleged by the applicant, GGMC was not obliged to accept them.

[6] The Court had directed that CB and R Mining be served with a copy of the proceedings. Chunilall Baboolall in response on behalf of CB and R Mining and on his own personal behalf deposed that the Procurement Act does not at all empower GGMC and therefore GGMC is not amenable to proceedings for breach of any provisions of the Procurement Act.

[7] Hon. Chief Justice (ag) Mr. Ian Chang, in his decision stated that Parliament created GGMC a body corporate and conferred upon it the governmental functions specified in section 4 of the Guyana Geology and Mines Commission Act. Hon Justice Chang also stated that GGMC, as a statutory corporate body on whom Parliament has conferred specific governmental functions, is an agency of the executive government, more particularly the Ministry of Natural Resources and Environment and is therefore a “procuring entity” for the purposes of the Procurement Act. As such, the provisions of the Procurement Act had application when GGMC sought to procure the services of a contractor to rehabilitate the Aremu Road in Region 7.

[8] With reference to page 2 of the Invitation for Bids (IFB) which stated that:

“The Guyana Geology and Mines Commission reserves the right to accept or reject any or all bids without giving reasons.”

The Court emphasized that

- (a) The exercise of any right to accept or reject any or all bids on the part of GGMC as a procuring entity had to be in compliance with the Procurement Act since a right could not be exercised in contravention of the provisions of the Act; and
- (b) GGMC was obliged to give reasons for acceptance or rejection of a bid to the Court or even the subject Minister.

[9] Section 6(3)(c) of the Procurement Act requires that the prequalification documents provided by the GGMC or the procuring entity shall include the following information:

“any documentary evidence or other information that must be submitted by suppliers or contractors to demonstrate their qualifications”.

The Court held that since GGMC is a procuring entity its prequalification procurement process had to comply with the Procurement Act.

[10] The Court found:

- (a) Prequalification was adjudged on the criteria of financial and technical capability in as much as the Invitation for Bid (IFB) omitted to state the criteria on which bidders would be prequalified.
- (b) GGMC did not provide to the Court any evidence of any documentary evidence or other form of information provided to it by CB and R Mining as required under Section 6(3)(c) of the Act to support its bid to be selected as a prequalified bidder.

(c) CB&R Mining did not apprise the Court of what documentary evidence or other form of information he submitted to the GGMC to prequalify.

[11] The Court concluded that either no prequalification proceedings were conducted or, if such proceedings were conducted, the process was ultra vires the provisions of the Procurement Act.

[12] The Court held that CB and R Mining should be paid for the rehabilitative work it had done on the road on a quantum meruit basis ("As much as he deserved" in this instance to pay CB and R Mining as much as is reasonably deserved), and annulled GGMC's decision to award the contract to CB and R Mining".

[13] GGMC has appealed this decision to the Court of Appeal.