



SUMMARY OF FINDINGS

TENDER NO. 66/2023/02

DECEMBER 29, 2023

SUMMARY OF FINDINGS

File No.	017 2023 INN
Complainant	Akamai Inc.
Tender Reference No.	66/2023/02
Procuring Entity	Hinterland Electrification Co. Inc. - Office of the Prime Minister
Evaluation Board	National Procurement & Tender Administration Board ('NPTAB')

Background

[1] On July 17, 2023, Akamai Inc. wrote to the Hinterland Electrification Co. Inc. objecting to the award of the above subject Tender to Tels Engineering Service. Akamai Inc. further requested the reasons why their tender was not successful. They contended that-

- their bid price was substantially better than Tels Engineering, and
- their technical specification met GPL standards being above the requirements set out in the bid document.

[2] The said letter, which was copied to the Public Procurement Commission ('PPC') ('the commission') referred to a letter to NPTAB dated June 1, 2023, to which they stated they did not receive a response.

[3] On August 16, 2023, Akamai Inc. wrote to the PPC *"to register a complaint about [their] attempts to obtain from the procuring entity (Hinterland Electrification Co. Inc.) the reasons [they were] not awarded the [subject] contract."*

[4] On September 6, 2023, the commission responded in writing informing that strictly, there is no express provision within the governing Procurement Act, Cap. 73:05 which compels a procuring entity to provide reasons for the rejection of a bid. The tenderer company was further advised as to the processes available if they are dissatisfied with the rejection of their bid on good grounds, to wit, applying for an Administrative Review or requesting an investigation.

[5] Subsequently on the said September 6, the commission received an application for an Administrative Review. The breach alleged was that of S. 10 of the Procurement Act, Cap. 73:05.

[6] On the following day, September 7, the commission informed NPTAB of the complaint received and, pursuant to Article 212DD of the constitution of the Co-operative Republic of Guyana, requested that they submit to the commission within three (3) days of the date thereof –

- i. a copy of the Record of the procurement (tender) proceedings including the Evaluation Report and all other such relevant documents, and
- ii. the date of publication of the tender award.

[7] The procuring entity was similarly on the said day also informed of the complaint and similarly requested to submit within five (5) days of the date thereof-

- i. a copy of the Record of the tender proceedings (tender) proceedings including the Evaluation Report and all other such relevant documents,
- ii. whether the contract therefor has been entered into, and if so, a copy thereof, and
- iii. whether the procuring entity complied with S. 39(3) of the Procurement Act, Cap. 73:05 by considering that the Evaluation Report for the subject tender and thereby indicated their agreement or disagreement therewith, prior to the contract award.

[8] On November 1, 2023, almost one month later, NPTAB responded to the request facilitating a copy of Evaluation Report and other documents relating to the tender proceedings.

[9] There was no response to the request for the date of publication of the contract award.

[10] There was also no response from the procuring entity within the time delimited and or at all.

Analysis

a. Procedure

[11] The complainant, Akamai Inc., sought to move the commission by way of the Administrative Review process.

[12] The said statutory process, requires as a precondition, that a written protest (known as a ‘Bid Protest’) is submitted to the subject procuring entity “*within five (5) business days following publication of the contract award decision.*”¹ The provision is strict.

[13] The record before the commission reflects that the contract award was made on July 6, 2023. Assuming that the letter from the complainant to the procuring entity satisfied a “protest” contemplated within the provisions of the Procurement Act, Cap. 73:05, it is dated July 17, 2023. More than the required five (5) days after the contract award if it is to be taken that the contract award was published on the said day. However, there is nothing before the commission (at no fault of the complainant) as what is in fact “*the date of publication*” thereof. The website of NPTAB reflects the date of the contract award, but not the date of publication of that contract award. The latter being the date from which time runs for the lodging of a protest by a tenderer.

[14] Notwithstanding and in order to bring relief to the complainant, the commission, in the exercise of its wide constitutional mandate² and investigative functions³, reviewed the tender proceedings to determine whether there were any irregularities in the rejection of the bid of the complainant on the grounds alleged or otherwise.

¹ Section 52, Procurement Act, Cap. 73:05

² Article 212W

³ Article 212AA

b. Methodology

[15] There are no Regulations or other legislative direction on the procedure to be followed by the commission in the exercise of its investigative functions other than that by way of Administrative Review.

[16] In the absence thereof, the commission adopted the methodology of first determining on the request for an investigation, whether *prima facie* grounds are raised. On being satisfied thereof, the commission requests and reviews the subject tender proceedings to determine whether any irregularities as alleged or otherwise appear thereon. If so, it is brought to the attention of the procuring entity and subject tender board for an explanation together with a request (if applicable) for remedial action within a certain time frame. The complainant is informed accordingly thereafter.

[17] The timeframe for the completion of the aforesaid varies depending on the steps to be taken within the aforesaid framework and timely responses by the procuring entity and or tender board.

c. Evaluation of Bids

[18] The Office of the Prime Minister issued an Invitation to Bid in March 2023 through an open tendering process with an opening date of April 13, 2023, at 9am.

[19] There were five (5) bidders of which only one (1) was deemed non-responsive, to wit, the complainant, Akamai Inc.

[20] The award was made to Tels Engineering Service who submitted the second lowest bid at \$124,768,000.00 (one hundred and twenty-four million, seven hundred and sixty-eight thousand dollars) but was deemed the lowest evaluated bidder having satisfied all of the evaluation criteria.

[21] Akamai Inc. although they submitted the lowest bid at \$120,842,296.00 (one hundred and twenty million, eight hundred and forty-two thousand, two hundred and ninety-six dollars) was deemed non-responsive by the Evaluation Committee for failing to satisfy two (2) of the seventeen (17) of the evaluation criteria, to wit –

- Criteria #10 – “*Demonstrate experience by providing **documentary evidence** that shows: similar goods were provided in a (sic) least one (1) contract in the last two (2) years to a minimum value of (GYD\$5,000,000).*”

The Record reflects that under this heading, the complainant submitted a ‘spreadsheet’ listing certain ‘projects.’ The Evaluation Committee found that this did not satisfy the criteria for “**documentary evidence**”; copies of contract(s) ought to have been provided. The commission notes that the term “documentary evidence” is not defined in the governing Procurement Act, Cap. 73:05 nor in the bidding documents. It is therefore a matter of interpretation.

- Criteria #17 – “Bidder must provide a letter stating any or no terminated (sic) of projects. The letter must be dated within one month of the bid opening date. If there were no terminations, a statement must also be given indicating such.”

The record of the procurement proceedings does not reflect that this document was submitted.

[22] In accordance with the Procurement Act, Cap. 73:05, in order to be deemed responsive and considered for a contract award, the bidder must satisfy **all** of the evaluation criteria. The failure to satisfy any one of the evaluation criteria would result in the bidder being non-responsive and thereby not considered for the award. Therefore, even if, arguably, in the absence of a definition, the Evaluation Committee ought to have accepted the ‘spreadsheet’ as documentary evidence, the tender nevertheless fails on the non-satisfaction of criteria #17.

[23] Section 10(1) of the Procurement Act, Cap. 73:05 expressly vests the procuring entity with the responsibility of maintaining a record of the tender proceedings. Parties are thereby bound.

[24] As noted by this commission before⁴, a procuring entity is by such statutory responsibility expected to maintain systems of the highest integrity in ensuring an accurate record of the tender proceedings, including documents submitted by bidders. This is imperative since there is no mechanism within the current tender procedure of independently verifying documents submitted to, and or received by, the procuring entity. A Bid is submitted in a sealed envelope and only the administrative requirements are read and recorded at the opening. The tenderer is not given a receipt of what is in fact received by the procuring entity.

[25] The commission is cognizant that a record may not be accurate for a number of reasons, such as but not limited to, negligence on the part of the tenderer and or procuring entity, innocent but mistaken belief of submission and the misplacement of documents (intentional or unintentional). The forum for settlement of such conflicts, should they arise, would be the court. Unlike other enquiry bodies, the PPC is not vested at this time with the requisite enabling legislative framework to *subpoena* witnesses, administer oaths and or examine witnesses⁵ so as to arrive at a determination as a fact as to an act or omission relating to the record and where such responsibility lies.

d. Ground(s) of Complaint – Is a bidder entitled to the reasons for the rejection of his/her bid?

[26] The aforementioned correspondence of the complainant tends to suggest that the frustration lay in not being informed of the reason(s) for the rejection of their bid.

[27] As the complainant was informed by way of the aforesaid correspondence from the commission dated September 6, 2023, there is strictly no provision within the governing

⁴ Summary of Findings – Motiram Construction

⁵ e.g. Public Utilities Commission Act, Cap. 57:01; Commission of Inquiry Act, Cap. 19:03

Procurement Act, Cap. 73:05 which expressly mandates a procuring entity to provide the reasons for the rejection of a bid.

[28] The complainant, in their application for an Administrative Review, alleged a breach of Section 10 of the Procurement Act, Cap. 73:05.

[29] While Section 10(2) & (3) of the Procurement Act, Cap. 73:05 makes provision for certain aspects of the record of the procurement proceedings to be made available, it expressly limits which aspects can be so made available to who and when and more importantly to the issue herein, does not expressly include the Evaluation Report, which would detail the reasons for the rejection of a bid. To the contrary of the complainant's contention, Section 10(3)(b) expressly prohibits a procuring entity from disclosing "*information relating to the examination or evaluation of tender proposals...*" save and except by Order of the Court.

[30] Further, Section 43 of the said Act only provides that the bidders be informed of the entry into contract with the winning bidder, that bidder's name, address and the contract amount.

[31] Notwithstanding, it is the view of this commission that it is good administrative practice to disclose the reason(s) for the rejection of a bid, on request. It also lends to transparency of the system.

[32] This entire exercise could have been avoided if the procuring entity had responded to query of the complainant.

Findings & Recommendations

- I. On the record, the complainant, Akamai Inc. did not satisfy all of the evaluation criteria and was thus deemed non-responsive. Accordingly, they were not found by the Evaluation Committee to be the lowest evaluated tenderer in accordance with Section 39 of the Procurement Act, Cap. 73:05.
- II. The commission recommends and urges procuring entities to exercise care in the drafting of evaluation criteria to avoid to use of subjective terms. For instance, as the issue herein relates, if it is intended that contracts be provided as 'documentary evidence', then that should be expressly stated.
- III. There is no express requirement by the governing Procurement Act, Cap. 73:05 for a tenderer to be informed of the reasons for the rejection of his bid. However, it is good administrative practice to so do. It lends to transparency and can avoid unnecessary use of resources in the defence of Court or other proceedings. The commission therefore encourages procuring entities to be responsive to such queries by tenderers.

- IV. The commission is once again⁶ compelled to express its disappointment and concern at the non-response by the procuring entity and sloth of response by NPTAB to the request for information by the commission. In addition to adversely affecting the work and efficiency of the commission, it also unnecessarily undermines transparency. The commission urges procuring entities and NPTAB to be better responsive.
- V. The commission notes that in the absence of response (as those matters are only within the purview of the procuring entity and or NPTAB and not the complainant) there is nothing before it to show:
- i. that S. 39(3) of the Procurement Act, Cap. 73:05 was complied with;
 - ii. when the contract award was published, particularly, whether prior to the entry into force of the contract so as to give bidders the statutorily provided five (5) days for a Bid Protest.

While the aforesaid does not necessarily affect the contract award in this particular matter, the lack of compliance could adversely affect the right of a bidder to lodge a Bid Protest and benefiting from the remedies thereunder which are wider than that on an investigation of the commission which has no binding authority. Pursuant to Section 53 of the Procurement Act, Cap. 73:05 the timely lodging of a Bid Protest suspends the final contract award and decisions made thereunder are binding on the procuring entity.

The commission therefore encourages procuring entities and NPTAB to ensure strict compliance with the aforesaid statutory requirements so as to not undermine transparency and confidence in the system which are imperative for its good functioning.

The commission also recommends that NPTAB forthwith act on its request made in May 2023 to amend its website to include in the table of the publication of contract award decisions, ***the date of publication of the contract award.***

Disposal

[33] The complainant, procuring entity and tender board are to be made aware of the findings herein.

Adopted at a Meeting of the Commission on the 29th day of December, 2023.

⁶ Summary of Findings – Motiram Construction