

AWARD OF THE BID PROTEST COMMITTEE
IN THE BID PROTEST OF BID
“SUPPLY AND DELIVERY OF BOXED JUICE-NATIONAL DISTRIBUTION”
(FS: NPTAB: 1229/2016/40)
BY
TROPICAL ORCHARD PRODUCTS COMPANY LIMITED
AGAINST
THE MINISTRY OF EDUCATION
(The Procuring Entity)

Reasons for Review

On the 23rd September, 2016 the Complainant- Tropical Orchard Products Company Limited (TOPCO) requested a review of the award of the contract for the Supply and Delivery of Boxed Juice-National Distribution. The Complainant’s reasons for review are-

1. The Procuring Entity failed, refused and/or neglected to consider only such evaluation criteria as set forth in the solicitation and tender documents contrary to sections 5 (3), 39 (2) and 39 (4) (c) of the Procurement Act, Cap 73:05.
2. The non-disclosure of past performance as an evaluation criterion in the solicitation documents prevents and precludes the Procuring Entity from belatedly relying on such criterion in the evaluation and determination of the bid.

Summary of Facts

This claim concerns the Ministry of Education project-Supply and Delivery of Boxed Juice National Distribution Programme. The Ministry of Education procured boxed juice for national distribution to children in nursery and primary schools (grades 1 and 2). The invitation for bids for the procurement of boxed juice was done using the restricted tendering method with the bidding documents prepared by the Ministry of Education given to six bidders. The six bidders were (1) Caribbean International Distribution Inc, (2) Guyana Beverage Inc., (3) Banks D.I.H. Holdings, (4) Tropical Orchard Products Company Ltd (TOPCO), (5) Ansa McAl Trading Ltd and (6) Continental Foods Inc.

Four bids were received from (1) TOPCO (G\$506,688,000), (2) Ansa McAl (G\$628,992, 000), (3) Guyana Beverages Inc. (G\$542,360,000) and (4) Caribbean International Distributors Inc. (G\$545,272,000). These bids were evaluated against administrative criteria by an Evaluation Committee comprising Ms. Delma Nedd - Permanent Secretary, Ministry of Education, Mr. Roland Barclay - Chief Electrical Inspector, Ministry of Public Infrastructure and Mrs. Jolene Brown-Griffith - Assistant Secretary General, Ministry of Public Telecommunications.

All bidders satisfied the administrative criteria, however, the Complainant was deemed non-responsive because the Procuring Entity had experienced numerous problems with the Complainant, namely, expiration dates and spoilages. As a result of being considered non-responsive the Complainant's bid was not further evaluated.

By letter dated 7th September, 2016 the Complainant was informed by the Procuring Entity that it was unsuccessful in its bid. On the 16th September, 2016, Mr. Komal Samaroo, Chairman of TOPCO wrote to the Procuring Entity seeking a review of the decision to render its bid unsuccessful and requested that its bid be evaluated or re-evaluated in accordance with the criteria set out in the Bid Documents. The Procuring Entity failed to respond and the Complainant lodged a protest with the Bid Protest Committee (the Committee) on the 23rd September, 2016. By letter, the Procuring Entity responded to the Complainant's reasons for review, stating that the law makes provision for them to evaluate the Complainant on the criterion of past performance. The Procuring Entity also stated that despite knowing of the 'past performance' of the Complainant, because the method of procurement was restricted tendering, it felt compelled to invite the Complainant to bid.

On the 29th November, 2016, the Committee held a hearing into the matter. At the hearing the Complainant represented by Ms. Allison Thorne, Company Secretary, maintained its reasons for review relying on sections 5 (3), 39 (2) and 39 (4) (c) of the Procurement Act, Cap 73:05 and the principles expounded in Canadian cases of **Elan Construction v South Fish Creek Recreational Association [2015] ABQB 330** and **Lion Apparel System Ltd v Firebuy Ltd [2007] EWHC 2179 (Ch)**. The Complainant has asked for the following remedies-

- (a) annul the award decision to render TOPCO's bid unsuccessful;
- (b) order the Procuring Entity to evaluate or re-evaluate, TOPCO's bid based only on such criteria specified in the tender documents; and
- (c) full refund of its registration fee lodged relative to TOPCO's protest.

The Procuring Entity, represented by Ms. Delma Nedd, Permanent Secretary, at the hearing advanced the argument that it rightly used past performance as a criterion relying upon section 5 (1) of the Procurement Act. The Procuring Entity

further argued that although past performance was not listed as a criterion it was implied and the Complainant's bid was not substantially responsive as it did not pass the criterion of past performance.

3. Decision

The Committee has decided that the Procuring Entity was obligated by law to disclose in the tender documents the criteria that would be used to evaluate bidders. Additionally, the Evaluation Committee acted unlawfully when it went outside the scope of its remit by evaluating the Complainant on the criterion of past performance. Therefore, the Committee has decided to grant the following remedies to the Complainant-

1. pursuant to regulation 13 (7)(d), annul part of the procurement process namely the evaluation of tenders as the Evaluation Committee used an unlawful procedure to assess the bid of the Complainant; and
2. pursuant to section 53 (5) of the Procurement Act, the Procuring Entity is ordered to compensate the Complainant for the cost of the preparation of its bid.

The Committee's reasoning is below.

1. Disclosure of Evaluation Criteria

Section 5 of the Procurement Act, Cap. 73:05 deals with the qualifications of suppliers and contractors. Section 5 (1) which sets out the various evaluation criteria that a procuring entity can use to evaluate tenderers states that -

“Every supplier or contractor wanting to participate in procurement proceedings must qualify by meeting such of the following criteria as the procuring entity considers appropriate.”

An extensive list is set out in section 5(1) (i) to (vi). Paragraph (vi) which the Procuring Entity relied upon specifically states **“that it's past performance substantiated by documentary evidence would commend it for serious consideration for the award of the contract.”**

However, subsection (1) should not be read in isolation. Section 5 (3) states-

“Any requirement mentioned in this section **shall be set forth in the prequalification documents, if any, or in the solicitation documents and shall apply equally to all suppliers or contractors.** A procuring entity shall impose no criterion, requirement or procedure with respect to the qualifications of suppliers or contractors **other than those set forth in this section or the regulations.**”

Subsection (3) places two burdens on the Procuring Entity. The first duty is that while the Procuring Entity can choose any criterion to evaluate bidders, whatever criterion is chosen it must be set out in the documents that are given to bidders and must apply equally to all bidders. The second duty is that the Procuring Entity must not include any criterion, requirement or procedure that is not provided for under section 5 or the regulations. This means that while the Procuring Entity is given discretion to choose any criterion to assess bidders, the criterion must be disclosed in the tender documents. It must be a criterion that is provided for in section 5 of the Procurement Act and the Regulations made under the Act and the criterion must apply equally to ALL bidders.

The law goes further by giving the Procuring Entity the power to modify the bidding documents. Section 33 (2) states-

“At any time prior to the deadline for submission of tenders, the procuring entity may, for any reason, whether on its own initiative or as a result of a request for clarification by a supplier or contractor, modify the tender documents.”

However, while modification can take place it must be done before tenders are submitted. The section above also gives no scope for an implied criterion. Full disclosure is provided for under the law because bidders must not be ambushed, they must know exactly what is required of them. This is to ensure that the evaluation process is transparent and objective. Therefore, the Procuring Entity cannot introduce a new criterion following submission of tenders. To do so would be to go against the intent of the legislation and offends against the principles of transparency and fairness which is fundamental to the integrity of the procurement process.

Apart from the legislation, the Canadian cases relied upon by the Complainant supports the argument that the evaluation criteria must be disclosed.

In **Elan Construction Limited v South Fish Creek Recreational Association [2015] ABQB 330**, Elan Construction Ltd. was not awarded the construction contract and stated that the bids were not evaluated in accordance with the disclosed evaluation criteria, but on the basis of undisclosed criteria. The court agreed finding that the evaluation was conducted in an arbitrary manner on the basis of undisclosed criteria and that this constituted a breach of the duty of good faith. Similarly, in **Lion Apparel Systems Limited v Firebuy Limited [2007] EWHC 279** it was held at paras 29-30 that-

“The criteria used by the Authority must be transparent, objective and related to the proposed contract. When the Authority publishes its criteria, which conform to the above requirements, it must then apply those criteria.”

In addition to the Canadian cases, the European Courts have also held that the relevant authority must disclose the criteria used to access bidders in the tender documents. In European Dynamics v OHMI (2015) (Case T-299/11), the Court stressed that a contracting authority cannot apply a criterion or sub-criterion which was not previously brought to the attention of tenderers. The court further made it clear at para 44 that contracting authorities must-

“ensure at each stage of the tendering procedure, that equal treatment is observed and, in consequence, that all tenderers enjoy equal opportunities. Similarly, the principle of equal treatment means that tenderers must be on equal footing both when they prepare their tenders and when those tenders are evaluated by the contracting authority. This means more specifically that the award criteria must be formulated, in the tender specifications or the contract notice, in such a way as to allow all reasonably well-informed tenderers of normal diligence to interpret them in the same way and that, when the tenders are being evaluated, those criteria are to be applied in an objective and uniform manner to all tenders....In addition, the principle of transparency, which is essentially intended to preclude any risk of favouritism or arbitrariness on the part of the contracting authority, implies that all conditions and detailed rules of the award procedure must be drawn up in a clear, precise and unequivocal manner in the contract notice or tender specifications in order, first to enable all reasonably well-informed and normally diligent tenderers to understand their precise scope and to interpret them in the same manner and, second, to enable the contracting authority actually to verify whether the tenderers’ bids meet the criteria of the contract in question...”

The issue of transparency with respect to evaluation criteria was also discussed in EMM G Lianakis AE and Others v Municipality of Alexandroupolis³ [2008] All ER (D) 172. This case concerned Article 36 (2) of Council Directive (EEC) 92/50 which provides that:

“Where the contract is to be awarded to the economically most advantageous tender, the contracting authority shall state in the contract documents or in the tender notice the award criteria which it intends to apply, where possible in descending order of importance.”

In the above case, the Court noted that the purpose of the directive is to ensure that there is no discrimination between bidders and that the necessity for the award criteria as well as any sub-criteria to be stated up front is because all tenderers must know the existence, scope and relative importance of “all the elements” that the relevant evaluation committee will take into account when awarding the

contract. Further, tenderers must be placed on an equal-footing throughout the procurement process and this requires that the criteria must be publicised.

Apart from the above, the learned authors, The Hon. Sir Vivian Ramsey and Stephen Furst, QC of **Keating on Construction Contracts (Sweet & Maxwell 2015)**, at para-15-028 state that-

“The principle of equal treatment of tenderers, non-discrimination and transparency are of central importance in determining whether a contracting authority has breached its obligations under the Regulations. In relation to matters of judgment or assessment (including choice of criteria and evaluation of tenders), a contracting authority has a wide discretion and a ‘margin of appreciation’. A court will not interfere with an authority’s exercise of its discretion unless it has committed a manifest error, although a case of manifest error is simply a case where an error has clearly been made. Obvious breaches of the principles of equal treatment and transparency may include failure to advertise the contract; **failure to identify the relevant criteria for contract award**; allowing changes to a bid or submission of alternative bids by only one tenderer; or providing additional information to only one tenderer.”

In applying the facts to the applicable sections of the Procurement Act, the decided cases and the learnings of the above authors, the Committee disagrees with the argument put forth by the Procuring Entity that section 5 (1) allowed them to choose past performance as a criterion without it being expressly stated in the tender documents or solicitation documents. The Procuring Entity had a duty to disclose how all bidders would be assessed in the tender documents so as to ensure that all bidders could be evaluated in a transparent and objective manner.

Additionally, the Procuring Entity’s representative’s testimony at the hearing further underscores the arbitrary nature of assessing bidders against an undisclosed criterion. As admitted by the Procuring Entity, only the Complainant’s past performance was considered by the Evaluation Committee. The Procuring Entity’s representative further stated that the reason past performance was not applied to the other tenderers was because they had no previous business relationship with the Procuring Entity. This argument is unacceptable because not only must the criterion be disclosed but it must be applied equally to all bidders; if it cannot be applied equally then it should not be used.

Also, the Procuring Entity argued that past performance was implied in criterion 12 which states, **“Bidders must state if any contract (s) awarded within the last two years were left incomplete/terminated. Bidders who have never had any suspension/termination of project must also state so.”** (It must be noted that the Complainant passed this criterion.) The Procuring Entity also presented to the

Committee 38 pages of documentary evidence which in their opinion did not support consideration for the award of the contract to the Complainant. Their representative also admitted that it was the Procuring Entity that brought this evidence to the Evaluation Committee, where Ms. Delma Nedd was a member of that Committee. The Committee questioned the Procuring Entity why this relationship was not terminated if they were dissatisfied with the Complainant's performance. In response, the Procuring Entity stated that their hands were tied as they could not terminate the contract and that from the beginning of the national distribution programme the Procuring Entity was in a single source arrangement with the Complainant and felt compelled to maintain the status quo. The Complainant's counter argument was that the contracts with the Procuring Entity have at all times contained a termination clause and if they were under-performing the Procuring Entity had the option of terminating the contracts.

The Committee finds that the Procuring Entity was not bound to remain in a contractual relationship with the Complainant. The contract between the parties dated 28th December 2012, contained clauses related to settlement of disputes as well as a termination clause. Additionally, if past performance was as important as the Procuring Entity asserted then it should have been listed in the bid documents as a criterion among the **fourteen** that were listed. Moreover, if weight is to be given to the argument of the Procuring Entity that past performance was implied in criterion 12, then the Complainant should have gotten a 'NO' instead of a favourable 'YES'. However, what is implied is the obligation on the Procuring Entity to treat bidders in a fair manner. As the Supreme Court of Canada stated in **Martel Building Limited v Canada, [2000] 2 SCR 860** at para 88-

“Implying an obligation to treat all bidders fairly and equally is consistent with the goal of protecting and promoting the integrity of the bidding process, and benefits all participants involved. Without this implied term, tenderers, whose fate could be predetermined by some undisclosed standards, would either incur significant expenses in preparing futile bids or ultimately avoid participating in the tender process.”

Further, the Procuring Entity in a correspondence dated 5th December, 2016 to the Committee, advanced the argument that “the matters raised by TOPCO are merely auxiliary to the crux of the matter of this case which undoubtedly is: PRESERVATION OF THE WELL BEING AND BEST INTEREST OF THE CHILD.” The Ministry then went on to cite the Convention on the Rights of the Child and further stated that “The well being of every child is therefore always uppermost etched in the Ministry's mind and this priority outweighs any other bidding requirement that TOPCO is seeking to rely on.” The Committee accepts

that the well being of children is always paramount but finds it difficult to reconcile that this was “always etched in the Ministry’s mind”. There were complaints from several schools including complaints-

- (a) dated 24th October, 2012 which complained of expired juice discovered after a child drank the juice and recognising that the taste was different asked her teacher to drink it;
- (b) dated 5th September, 2013 which complained of juice shortages and unpleasant taste in the juice;
- (c) dated January 10th, 2014 about cartoons of juices that were rat bitten and roach infested;
- (d) dated 24th June, 2014 which detailed that cartoons of juices were swollen and smelly and worms were seen in the cartoons.

A Ministry that had the welfare of children in their contemplation should have at minimum ensured that the criteria for the assessment of bidders were tailored in such a manner so as to ensure that there was not a repeat of the experience complained of. Past performance would have been the ideal criterion to assess all tenderers in this project that had children as the main focus.

2. Evaluation of Tenders by the Evaluation Committee

Section 39 of the Act deals with examination of tenders and outlines the procedure to be followed by the Evaluation Committee. Subsection (2) states as follows-

“The Evaluation Committee shall, **using only the evaluation criteria outlined in the tender documents, evaluate all tenders, determine which tenderer has submitted the lowest evaluated tender, and convey its recommendation to the procuring entity** within a reasonable period of time, but not longer than fourteen days.”

Additionally, section 39 (6) (a) states that, “All evaluation criteria for the procurement of goods, works and services in addition to price, will be qualified in monetary terms and the tender will be awarded to **the lowest evaluated.**”

Apart from section 39, section 42 (1) states that, “the tender that has been identified as the **lowest evaluated tender shall be accepted.**”

Based on the sections above it is clear that the Evaluation Committee has a specific remit from which it should not deviate. Firstly, it must only use the evaluation criteria that are in the tender documents to evaluate the bidders. Secondly, using these criteria it determines the lowest evaluated tender. Thirdly, it conveys its

recommendation to the Procuring Entity in a timely manner. No scope is given to the Evaluation Committee to use any criteria other than what is set out in the tender documents.

This recommendation that the Evaluation Committee gives to the Procuring Entity is the bidder who is responsive to the requirements in the tender documents as dictated in section 39 (4) (c) which states-

“Subject to paragraph (b), the Evaluation Committee may regard a tender as responsive **only if it conforms to the requirements set forth in the tender documents;**”

Additionally, the tender document prepared by the Procuring Entity further explains how the contract will be awarded by the Procuring Entity. Clause 14.2 of the Instructions to Bidders (ITB) states that-

“The Procuring Entity shall determine **the responsiveness of each bidder to requirements of the bidding documents.** For the purposes of this Clause a **substantially responsive bid is one which satisfies all the indicated provisions without a material deviation or reservation.**”

Further, Clause 14.5 states that “The Procuring Entity shall evaluate and compare **only the bids that are determined to be responsive to the bidding documents.**” Further, clause 16.1 as amended states that “The Procuring Entity will award the Contract to the Bidder whose **bid is determined to be substantially responsive to the requirements of the bidding documents, and who offered the Lowest Evaluation Bid per item (s).**” A substantially responsive bid is one that positively responds to the requirements in bid documents notwithstanding any technical deficiencies that do not significantly deviate from the requirements in bid documents.

Also the notes on page 34 of the bidding documents that follows the criteria further instructs the bidder that the award will go to the bid that is responsive to the criteria in the tender documents. Paras (b) and (c) reads-

(b) Any bidder who **receives a NO in any criteria (1-14)** stated above shall be non-responsive.

(c) The contract would be awarded to the bidder whose bid is determined to be **substantially responsive to the bid document** and who has offered **the lowest evaluated bid price per item (s).**

Based on the above, the very instructions to the bidders by the Procuring Entity confirms that the procedure for assessment would be-

1. That the Procuring Entity would only use the criteria stated in the tender documents to evaluate and compare the bids;

2. Using the criteria they will determine two things (1) the bid (s) that is responsive to the tender documents and (2) the bid that is both responsive and the lowest; and
3. Having determined the bid that is both responsive and lowest, they will award the contract to this bidder.

In the case before us, the Complainant's bid, according to the evaluation report, received a 'YES' for all fourteen criteria, signalling that it had complied with all that was required. Additionally, the Complainant's bid was the lowest. Therefore, the Complainant was the tenderer with the lowest evaluated bid that was responsive to the bid documents.

However, the Evaluation Committee not only took into consideration the clearly outlined extensive criteria but sought in their determination to consider what was revealed to them by the Procuring Entity. In essence they embarked on an unlawful procedure taking into consideration numerous problems that the Procuring Entity stated that they had encountered since 2012 with the Complainant. This resulted in the Complainant being adjudged non-responsive despite responding positively to the bid documents and being the lowest bidder.

It should be noted that the Procuring Entity is not compelled to accept the recommendation of the Evaluation Committee. Section 39 (3) states-

“The procuring entity shall, if it agrees with the Report of the Evaluation Committee, publicly disclose the name of the tenderer identified by the Evaluation Committee as the lowest evaluated tenderer. If the procuring entity does not agree with the Evaluation Committee's determination, the procuring entity shall issue an advisory recommendation to the Evaluation Committee regarding which bidder should be the lowest evaluated bidder, which recommendation the Evaluation Committee shall observe.”

Therefore, if the Evaluation Committee had followed the correct procedure and recommended the Complainant, the law gives the Procuring Entity the flexibility to reject that decision. The Procuring Entity having rejected their evaluation can then advise the Evaluation Committee which bidder should be the lowest evaluated bidder. Apart from the above provision, the ITB contains the following privilege clause at clause 18.1-

“The Procuring Entity reserves the right to accept or reject any bid or all bids, and to cancel the bidding process at any time prior to award of contract, without thereby incurring any liability to Bidders and without being required to inform the Bidder or Bidders of reasons of such actions.”

Like section 39 (3) by virtue of the above clause the Procuring Entity is under no contractual obligation to award the contract to any tenderer, even one who is the

lowest. However, as noted in Ed Brunet & Associates Inc. and Westeinde Construction v 154469 Ontario Inc. (2002) 28959 (ON SC), the privilege clause does not remove the obligation to treat all bidders fairly and equally and to disclose all criteria by which the bids will be evaluated. Further, Justice Cummingham noted at para 22 that “An owner is not entitled to rely upon the Privilege Clause to introduce new or undisclosed evaluation criteria after the close of bids in order to make a determination as to whom to award the contract.”

An example of not accepting the lowest bid can be found in the case Sound Contracting Ltd. V City of Nanaimo, 2000 BCCA 312. In this case Sound was the lowest bidder but was not awarded the contract because of past dealings with Nanaimo. The court at para 17 held that—

“The privilege clauses in the request for tenders released the City from the obligation to award the contract to the lowest bidder if there were valid, objective reasons for concluding that better value might be contained by accepting a higher bid. It was not shown that the City acted unfairly or other than in good faith in determining which tender provided the greatest value based on quality, service and price....”

Additionally, the court while acknowledging that privilege clause creates an opportunity for arbitrariness in the operation of the bidding system noted the following at para 19-

“In this case the previous dealings between these parties provided the basis for the additional criteria addressed by Nanaimo. It is not for us to substitute our own analysis for that of the owner in whom the discretion to award the contract ultimately resides and whose staff, in my view, have not been shown to have acted unfairly or together than in good faith in determining which tender provided the “greatest value based on quality, service and price” to the City. Nor can it be said in my view, that the consideration of past dealings between these parties constituted an undisclosed criterion. In fact past dealings are probably the best indicator of how a proposed relationship will come to work out in practice. I would caution, however, that this discretion must not be exercised in such a way as to punish or to get even for past differences.”

Therefore, had the Evaluation Committee not erred in their assessment the Procuring Entity probably would have had a plausible case for rejecting the Complainant even though they were the lowest evaluated bid. However, while there is scope to reject the lowest evaluated bid the procedure laid out in statute is clear and this procedure must be followed when evaluating bidders. In Guyana, the Evaluation Committee does not have the same power as the Evaluators in Sound. The power to reject the lowest bid or any bid resides only in the Procuring Entity.

However, because of the error in assessment the Procuring Entity was never given the option to use the privilege clause.

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Ms. Joann Bond
Chairperson

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Archibald Clifton
Member

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Ewart Adams
Member

12th December, 2016