



Independent Review Panel

Decision No. 08/18

In the matter of:

I. M. Bawamia Co. Ltd

(Applicant)

v/s

Office of the Commissioner of Police

(Respondent)

(Cause No. 07/18/IRP)

Decision

A. History of the case

The office of the Commissioner of Police issued tenders for the supply of heavy duty boat with OBM & Trailer. The invitation for bids was dated the 21 November 2017 using the open advertised bidding method pursuant to section 16 of the Public Procurement Act 2006. The applicant duly submitted its bid, which was successful. However, the respondent later informed the applicant's Director that he had not submitted the Tax Clearance Certificate within the prescribed delay of 7 days mentioned and that he was bound to do so.

It is undisputed that, on the 27 April 2018, the MRA requested the applicant to settle the balance for late submission for VAT return. The 28 and 29 April 2018 were non-working days, i.e. a Saturday and a Sunday. Tuesday 1st May 2018 was a public holiday.

It is only on Monday 7 May 2018 that the Tax Clearance Certificate was issued to the applicant.

On the 9 May 2018, the Public Body cancelled the bidding procedure and informed the applicant of its decision.

B. Applicant's and Respondent's cases

The applicant's case is that the cancellation of the tender procedure was injudicious as they, the public body, were indeed in possession of the requested Tax Clearance Certificate since the 7 May 2018. Thus, the applicant's bid could have been validated and a contract concluded between them.

The stand of the respondent was as expressed in its letter of the 18 May 2018: *"As per Directive 33 on the Public Procurement Act 2006, a Public Body shall prior to award, request the lowest substantially responsive bidder to submit a Tax Clearance certificate from the MRA within a period of one week in case the successful bidder does not submit the Tax Clearance Certificate, the Public Body may consider the next lowest responsive bidder. As you were the sole responsive bidder a request was made to you to submit the Tax Clearance Certificate on 23 April 2018 and you ought to have submitted same within one week. However, you submitted same after prescribed delay. The public body decided to cancel the tender."*

The applicant herewith appeals to the Independent Review Panel asking for the annulment of the Respondent's decision to cancel the bid. The issue is of one of jurisdiction. Can the Independent Review Panel review the procedure of cancellation of the bid?

C. Decision

Section 39(5) of the Public Procurement Act 2006 (the “Act”) stipulates that a public body may at any time prior to the acceptance of a bid, reject all bids or cancel the public procurement proceedings where all the bids are non-responsive, amongst other reasons.

In the present case, we also note that the applicant was the only responsive bidder. In the absence of a Tax Clearance Certificate being supplied within the prescribed delay, its bid was therefore rendered non-responsive. As such, the public body contends that there were no other bidders and it was entitled to act within the powers given to it by section 39(1)(a). We accordingly find that, in the present case, there was no responsive bid as that of the applicant was marred by a fault, that is, the failure to produce the TCC within the delay. Nobody else’s bid had been successful. Written notice of the cancellation was duly given.

On the issue of jurisdiction, section 39(5) spells out, in no uncertain terms, that when public procurement proceedings are cancelled by a public body under section 39, no challenge and no application for review shall be entertained in respect of the cancellation.

Counsel for the applicant has made a very ingenious submission to the effect that section 39(5) of the Act applies only to cases where the public body has cancelled the procurement proceedings according to section 39 itself and that, in the present matter, the cancellation was not done in accordance with this section. We do not subscribe to this view and we find it clear that since the applicant had failed to provide a requested clearance and since there were no other next successful bidder- whose bid the public body would have been legally bound to select pursuant to section 40(6) of the Act- it followed that no bids were responsive.

We are fully conscious that, prior to 2015, this Panel did have the jurisdiction to go into the merits and assess the propriety of cancellations of a procurement process; however, the legislator has since expressly removed this power from our jurisdiction and an applicant who now wishes to challenge such a cancellation can do so by applying for prerogative orders from the Supreme Court, and not by way of a challenge with the public body under section 43 or of an application for review before this Panel pursuant to section 45. The wording of section 39(5) is clear to that effect and deciding otherwise would be *ultra vires*.

We also find that section 39(5) is referred to in, and in our opinion, should be read together with sections 43(1) and 45(1), which form the very basis of any challenge and any eventual application for review; the latter sections are both made subject to section 39(5) and we wish to draw the attention of any

future applicant to ensure compliance with these operative sections of the Act.

We are comforted in our view by a read through of the first session of the Parliamentary Debates (HANSARD) 6th National Assembly – Wednesday 13 May 2015, No.26 of 2015. The Honourable Minister of Finance commented on section 39 in reply to some remarks by Honourable A. Gannoo thus: *“In fact the principle is that when a tender is cancelled there is no substance for which a challenge may be undertaken.”* This comment sheds greater light on the purport of Section 39(5) and on Parliament’s intention that no application for review is possible in such cases as the present one.

So, we find that the application of I.M. Bawamia Co. Ltd regarding the cancellation of the bidding exercise by the respondent cannot be entertained and, in these circumstances of this case, we deem it, accordingly, devoid of merit.

(Herve Lassemillante)
Chairperson

(Ajay M. Gathani)
Member

(A. Karrim Namdarkhan)
Member

Dated 11 September 2018

