

**No. 10**

Global Lighting Centre Ltd. - Complainant

Vs.

Energy Foundation - Respondent

Tender:

Energy Efficiency In Public And Industrial Facilities Project No.Gh-Ti-4092

Petition by Global Lighting Centre Limited (Complainant) dated 1<sup>st</sup> December, 2009 for administrative review of an alleged discriminatory decision against the company by the Energy Foundation (Respondent) in respect of a tender submitted for Project NO-GH-TI-4092

**Brief Facts:**

It was the Complainant's case that it participated in the tender mentioned above in October, 2009, and emerged the lowest priced tenderer at tender opening conducted in November 2009. The Complainant's tender was however found non-responsive at evaluation, on the grounds that a Manufacturer's Authorization it submitted, failed to indicate the products covered or accompanying guarantees and warranties, specifically requested in the Instruction to Tenderers (ITT). Moreover, samples submitted by the Complainant did not bear the indicated manufacturer's name or trademark making it difficult to determine whether these samples were properly covered by the Manufacturer's Authorization submitted.

By letter dated 24<sup>th</sup> November 2009, the Complainant explained that the samples submitted were different brands produced by its authorized manufacturer. He complained about the Respondent's acceptance of the late submission of the winning tenderer's company registration certificate, submitted at least two (2) working days after the deadline for submission of tenders. He also expressed reservations about the Respondent's delay in communicating contract award, contrary to Section 65(9) of the Public Procurement Act, 2003 (Act 663) which action seemed calculated to deny an award in its favour. The Complainant also raised the issue of the winning tenderer successively winning Energy Foundation tenders over the past five (5) years under different company names, to the detriment of other companies who were equally capable of performing those contracts. The Complainant claims to have been prejudiced and discriminated against by the conduct of the Energy Foundation (Respondent).

In response the Respondent rightly submitted that the lowest evaluated responsive tenderer was determined only after evaluation of technical and commercial responsiveness to tender specifications. Price was therefore not the only factor. They further contended that the late submission of company registration certificates was considered and treated as a minor deviation by the Respondent, as permitted under the relevant rules. On the allegation of

delayed communication of award, the Respondent maintained that it was operating within the sixty (60) days tender validity period.

Finally, the Respondent argued that each tender over the past 5 years was unique and specific, and had been subjected to competitive tender. Nothing prevented earlier successful Tenderers from participating in subsequent competitions.

The Complainant applied for administrative review of the matter.

**Issue(s):**

Issues considered by the Authority in its review were as follows:-

1. Whether or not a tenderer with a manufacturer's authorization may use samples other than those of that manufacturer.
2. Whether or not a tender may be rejected if one or more of the required certificates are not submitted prior to tender submission deadline – i.e. the treatment of non-conforming tenders.
3. Whether or not the Respondent delayed communication of award of the contract, contrary to Section 65(9) of Act 663.
4. The legality of successive awards to a single winning tenderer under competitive tender.

**Case Deliberation:**

Following detailed review of supporting documents received from both parties, the Authority observed as follows:

1. Regarding the discrepancy noted on the face of the Manufacturer's Authorization, the Authority noted that the Invitation for Tenders (IFT) and the Instructions to Tenderers (ITT) required more than identification of eligible source country for the products to be supplied. By Clause 13.3 of the ITT a tenderer offering to supply goods that it did not manufacture had to be duly authorized by the Manufacturer. Further, the format provided as part of the tender documents required manufacturers to extend full guarantee and warranty cover for the goods to be supplied. The applicable Evaluation Report showed (*pages 2 & 14*) that the Complainant's Manufacturer's Authorization did not list the product samples submitted by the Complainant making it difficult to determine that those samples would benefit from the manufacturer's full warranty. The Authority further noted the requirement to use the *World Bank Guidelines: Procurement under IBRD Loans and IDA Credits* under paragraph C, page 1 of the tender documents. These guidelines opened the tender process to all tenderers from "eligible source countries". The source country of the Complainant's multi-brand samples could not be clearly determined. The Complainant effectively failed to comply with essential qualification criteria.

2. In respect of non-submission of a required certificate at the tender submission deadline, the Authority noted that, in accordance with Section 58(2) of the Public Procurement Act, Act 663 the omission could be considered and treated as a minor deviation.
3. On the matter of a tenderer winning competitive tenders successively, the Authority noted the tender was conducted through National Competitive Tendering (NCT), which was an open process for competition. A previous successful tenderer is free to participate in subsequent tenders.
4. The claim of delayed award notification calculated to prevent the Complainant from winning was not sufficiently substantiated.

### **Decision**

- The Authority found that the tender was conducted competitively and open to all interested tenderers.
- There was no indication that the Energy Foundation had breached the Public Procurement Act, Act 663 or manipulated the procurement proceedings to favour a particular tenderer.
- The Complainant's tender was not responsive, having failed to comply with an essential qualification criteria – the submission of Manufacturer's Authorization in the manner prescribed under the ITT.
- The Energy Foundation may proceed with the procurement process.