

Marubeni Corporation - **Complainant**

Vs.

Volta River Authority (VRA) - **Respondent**

Tender:

Procurement of Contractor For T4 Thermal Power Plant Project

Petition by Complainant – Marubeni Corporation through their Solicitors, dated 20th November, 2014 for administrative review of the unfair treatment of Complainant in the tender process by the Volta River Authority (VRA) for the procurement of a contractor for the Combined Cycle Power Plant EPC Package for Takoradi 4 Thermal Power Project (T4 Project).

BACKGROUND

The Complainant (Marubeni Corporation) responded to a Request for Proposal invitation by the Volta River Authority (the "Respondent") for the Takoradi 4 (T4) Thermal Power Plant Project. Complainant submitted a response to the tender in August 2014 prior to which, an earlier process had been commenced and cancelled in May 2014, for specified reasons.

As part of that earlier process, the Respondent had asked Complainant to clarify some issues involving the investigation of Marubeni by the Department of Justice (DoJ) in the United States of America, in respect of an alleged breach of the Foreign Corrupt Practices Act of the USA (FCPA) in Indonesia, by agents representing a consortium of which the Complainant was a member in 1990. Marubeni decided to enter a Plea Agreement in order to resolve the criminal charges, agreeing to pay a fine. The Plea agreement was accepted by the District Court of Connecticut. The funders of the Indonesian Tarahan project, the Japan International Cooperation Agency (JICA) decided to suspend Marubeni for nine (9) months effective 26th March 2014 to 25th December 2014) from participating in projects it funded within this period. The consortium's bid was successful. An EPC contract was signed in July 2004 and the Tarahan Project was completed about 7 years ago, in December 2007.

The Complainant indicated that since this incident, Marubeni has implemented strict new compliance programmes, specifically designed to prevent conduct that violates the US FCPA or any other global anti-corruption laws. It further assured Respondent (in its letter of 6th June, 2014, that the conduct which was the focus of the DoJ's investigations occurred many years ago and pre-dated many improvements made by Complainant company to its anti-bribery compliance program. Also that JICA had since resumed financing projects handled by Marubeni. Complainant submitted a copy of the Marubeni Group Global anti-Corruption Policy to the Respondent for its consideration.

The Complainant was subsequently permitted to participate in the Respondent's new call for tenders for the T4 project, it successfully qualified through both the preliminary examination and evaluation of technical/non-technical stages of the tender process.

It is the Complainant's case that the subject matter of the US DoJ's investigation, raised again by the Respondent, in a subsequent request for clarifications on the technical and commercial proposals at the evaluation stage of the current tender, clearly raised red flags of the Respondent's intention to disqualify it, using clause 35 of the ITB, on Fraud and Corruption, which states:-

“Employer will sanction a firm or individual declaring them ineligible, either indefinitely or for a stated period of time, to be awarded a contract by the Employer if it at any time determines that they have, directly or through an agent, engaged in corrupt, fraudulent, collusive or coercive practice in competing for, or in executing a contract”

Complainant’s suspicion was based on the approach adopted by the Respondent in the tender process and contended that it could not be disqualified based on a generic clause without any specific definition of the specific act and time frame being considered. In October 2014, Complainant sought the PPA’s explanation (as sector regulator) on the exclusion or disqualification of a tenderer from tender proceedings by reason of fraud and corruption. In a legal opinion dated 28th October, 2014, the PPA clarified the rules applicable to such matter. That section 22(1)(e)(i) of the Public Procurement Act, 2003 (Act 663) required the disqualification of a tenderer that had directors or officers who had been *convicted* of any criminal offence relating to professional conduct or misrepresentations on professional qualifications within 10 years prior to the tender. The opinion also clarified that disqualification on such grounds was not mandatory and had to be done through a due assessment process. In view of the serious economic and financial implications for both a procurement entity and tenderer, the said opinion further admonished against reckless disqualification on such grounds. It advised that the disqualification of tenderers on grounds of criminal professional conduct or administratively determined misconduct should be carefully premised on the procurement entity’s existing, detailed policy guidelines.

The Complainant, convinced of the direction in which Respondent’s enquiry was leading, lodged a formal complaint with Respondent dated 20th November, 2014. The Respondent failed to respond, following which Complainant petitioned the PPA for administrative review via letter dated 19th December, 2014, requesting the Public Procurement Authority (PPA) to

- a) Prevent the unfair treatment of Marubeni in the procurement process;
- b) Prevent the use of the DoJ’s investigation to unfairly disqualify Marubeni; and
- c) Make such order to ensure a fair, transparent and competitive procurement process under the Act is followed by the VRA

Via letter dated 29th December, 2014, the Respondent was requested to respond to the Complainant’s petition and also, to submit the relevant tender documents required for timely determination of the matter. After a reminder dated 26th January, 2015 when a response was not forthcoming, the procurement process was suspended via letter dated 17th February, 2015, for a period of 30 days or until the VRA had submitted the documents requested, whichever occurred earlier. By a letter dated 17th February, 2015, Respondent forwarded copies of the Tender Documents and Evaluation Report earlier requested.

ISSUE(S)

- Whether the Complainant could be disqualified on the basis of Clause 35 of the ITB
- Whether the Respondent unfairly disqualified Complainant from the tender process

CASE DELIBERATION

1. The Panel noted that the disqualification of a tenderer on grounds of corruption was governed by Section 22(1)(e) of Act 663 and the procedure specified in the ensuing sections 22(2) to (4). A combined reading of these sections requires that any criteria established, pursuant to this section must be stated in the tender documents and qualifications of candidates evaluated in accordance with criteria and procedures stated in the tender documents. Consequently, Respondent should have handled the

matter of disqualification on grounds of corruption at the *preliminary examination* stage of the tender process, similar to how it would treat any issue on legal capacity, solvency or the fulfilment of tax and social security obligations.

In this instance, Respondent's attempt to disqualify the Complainant on grounds of corruption occurred at a much later stage, the detailed technical/non-technical evaluation stage, by which stage Complainant had committed substantial effort and resources to the bidding process. The Panel noted for a fact from the evaluation report that Complainant's combined evaluated bid was best overall, having won on both the technical and non-technical evaluation criteria.

2. Respondent based its disqualification on Clause 35 – "Fraud and Corruption" of its instructions to bidders (ITB), which reads:-

"Employer will sanction a firm or individual declaring them ineligible, either indefinitely or for a stated period of time, to be awarded a contract by the Employer if it at any time determines that they have, directly or through an agent, engaged in corrupt, fraudulent, collusive or coercive practice in competing for, or in executing a contract"

3. The Panel considered Respondent's letter dated 30th March, 2015, challenging the PPA's jurisdiction to administratively review this petition. On the issue of advice given by the PPA pursuant to section 22 of Act 663, it was the Panel's view that this was an opinion written outside the administrative review forum, ahead of the application for administrative review, and did not amount to a determination of the matter before the Respondent could be heard. The Panel consequently held that the PPA had jurisdiction, and advised that a separate response be issued to the Respondent on the aspects of jurisdiction, the legal opinion and to provide clarification on other misunderstood provisions of the procurement Act noted in the said letter.
4. It was the Panel's view that the petition was duly assessed and found not to be frivolous prior to invoking administrative review and further investigation.
5. Complainant did not deny the allegation of corruption and indicated that the matter had been dealt with. Complainant's concern was the future adverse use of this matter against it. Rightly so, because as was noted, disqualification from a tender on grounds of corruption (under section 22(1)(e)) effectively stops the affected party from doing business in Ghana for ten (10) years. This clearly requires suitable policy guidance, since it holds serious economic and financial consequences not only for the disqualified, but also for the procurement entity and ultimately for the economy as a whole. Especially so in specialized sectors, like the energy sector which could easily experience a shortage of qualified expert operators in that field.

For national interest considerations and the critical energy situation in the country, the Panel was not able to recommend cancellation of the award to the tenderer that placed second in the Evaluation Report. It however advised that the attention of the Respondent be drawn to the fact that they had not done the proper thing, having neglected the proper procedure and impressed upon to correct such action in future tenders.

6. There are preliminary disqualification criteria in Section 22 which allow an entity to disqualify a tenderer who falls within any of the stated provisions. Respondent should

therefore have disqualified the Complainant from the outset instead of allowing the process to go on until the final stages to do so.

DECISION

1. Respondent's disqualification of Complainant for corruption should have been done at a much earlier stage in the process and duly assessed at the preliminary stages of tender examination (while deciding to select participating tenderers) and not at the final stages of evaluation (while deciding to award the contract).
2. The Complainant was aware of clause 35 of the ITB and is deemed to know the Act. The Respondent should amend clause 35 in its standard tender documents to conform to the provisions of section 22 of Act 663, to avoid repeating such mistake in the future. Sample Standard Tender Documents must be adapted to conform to the country's laws, rules and regulations.
3. The PPA has jurisdiction to conduct administrative review on the petition and is duly advised to respond separately to the Respondent's letter challenging its authority as well as the legal opinion issued. The PPA as sector Regulator (on public procurement) was mandated to issue advisory opinions to advise, regulate, guide and to nip early detected regulatory problems in the bud to avert future escalation.
4. From the foregoing deliberations, Respondent was faulted in the flawed handling of this type of disqualification.
5. Complainant was also faulted, in that clearly falling under the ambit of the disqualification provisions of section 22(1)(e) it should have conducted legal due diligence on the laws applicable to such matters and exhaustively clarified the issue prior to submitting its bid.