

REPUBLIC OF LIBERIA
COMPLAINTS, APPEALS & REVIEW PANEL (CARP)
Public Procurement & Concessions Commission
Executive Mansion Grounds
Capitol Hill, Monrovia, Liberia

RULING

IN RE:

WAYMARK IFNROTECH/MWETANA
JOINT VENTURE by and through its Bidder
Authorized Representative, Mr. Lebogang
M. Matjila **APPELLANT**

VERSUS

NATIONAL ELECTIONS COMMISSION by
And thru its Chairperson, Hon. Davidetta
Browne-Lansanah, of 9th Street, Sinkor,
Monrovia, Liberia **1ST APPELLEE**

AND

LAXTON GROUP LIMITED by and thru
Its Authorized Representative of the City of
Monrovia, Liberia..... **2nd APPELLEE**

APPEAL

GROWING OUT OF THE CASE:

**BID CHALLENGE SUBMITTED BY THE WAYMARK INFOTECH/MWETANA
JOINT VENTURE TO THE NATIONAL ELECTIONS COMMISSION (NEC)**

1.0 FACTUAL SUMMARY

The appeal before this panel grows out of a Bid Challenge Notification-Selection of Laxton Group. The Bid Challenge Notification alleges the following:

1. That Waymark Infotech/Mwetana Joint Venture (Appellant) submitted a bid response for the ICB No: NEC/VRPLE/ICB/001/2022 issued by the National Election Commission (NEC) on July 29, 2022, and subsequently presented its offer and demonstrated twice to the NEC on August 9, 2022 and October 7, 2022 respectively.
2. That Appellant challenged NEC's selection of Laxton Group Limited (Laxton Group) as the most responsive bidder; and
3. The Appellant prayed NEC to reconstitute a Bid Evaluation Panel.

1. That NEC's press statement, as cited by the Appellant in its December 1, 2022 communication, gave a summary of the Bid Evaluation Panel's reports and provided that the remaining four bidders, including the Appellant, had defects;
2. The PPCC October 21, 2022 letter to the Commission recommended that the Commission select a company from the remaining four bidders (PSI/HID, Waymark/Mwetana, ESI or Laxton Group) that would be most suitable for the supply of biometric equipment and services;
3. That NEC observed that the delivery proposals submitted by the remaining four bidders, including the Appellant, were in response to the NEC's delivery day of October 9-16, 2022, as anticipated in the standard bidding documents which also anticipated that the voter registration exercise would have commenced on December 15, 2022. However, a review of the delivery proposal shows that neither of the remaining four bidders, including the Appellant, were responsive to the October 2022 delivery date in that they all submitted delivery that were outside of the date(s) stipulated in the standard bidding documents. Furthermore, when the Bid Evaluation Panel reconvened on November 15, 2022 to select from the remaining four bidders, the stipulated October 2022 delivery date had elapsed;
4. A bidder's capacity to pre-finance is a pre-qualifying requirement. The Bid Evaluation Panel's August 26, 2022 Report shows that the Appellant did not meet the pre-finance requirement and that the Bid Evaluation Panel also utilized the standard provided in the PPCC's September 27, 2022 letter to the EC for determining a bidder's capacity to pre-finance and concluded that the Appellant did not meet the pre-financing requirement.
5. As to the issue of price NEC's understanding of the "value for money" term is not that the contract be awarded to the bidder that submits the lowest price but that a bidder must be responsive to the entire stipulated requirements which includes compliance to the technical specifications, conformity of the goods, quality of the equipment, experience in implementation of project(s) of similar nature and other indicated requirements.

On December 20, 2022, having received NEC's decision, the Appellant filed a 22 count appeal to the PPCC with attention to this Panel and averred essentially the following:

1. That Appellant submitted a bid in response to ICB No: NEC/VRPLE/ICB/001/2022 issued by the NEC of on July 29, 2022 and subsequently presented its offer and demonstrated twice to the NEC on August 9, 2022 and October 7, 2022 respectively;

3. That on December 16, 2022, the Appellant received NEC's response to the Bid challenge in which NEC decided to reject the challenge;
4. That Section 62.4 of the PPCA required NEC to evaluate the bids in accordance with the criteria and methodology stated in the bidding documents and that Section 65.1 of the PPCA demands NEC to award the contract to the bidder that is qualified and submitted the lowest responsive bid. NEC failed to comply with the stated statutory requirements when it refused to determine and award the contract to the Appellant;
5. That based on the PPCC's November 22, 2022 response to NEC's request for PPCC to approved the awarding of the Contract to Laxton Group, the NEC Re-Evaluation report stated that the Appellant was one of the three companies who NEC deemed responsive following the October 7, 2022 re-demonstration;
6. That NEC's Re-Evaluation report listed several reasons why NEC considered the Laxton Group to be the most responsive, which included responsiveness to the demonstration, capacity to pre-finance, accessibility of supplier and responsiveness to other indicated requirements in the bid, etc.;
7. That NEC conspicuously left out the bid price criteria from the award report which is puzzling as NEC was required to evaluate the bids it received in accordance with Section III of the bid document. Section II requires for NEC to evaluate the bidders and determine whether the bidders have the required qualifications and the first evaluation criteria mentioned in the Evaluation Criteria segment is the bid price;
8. At the bid opening, the Appellant's bid, which was US\$11,256,929.25 was the lowest of all the bidders and approximately lower by S\$700,000.00 than the other two bidders NEC deemed to be responsive after the re-demonstration;
9. That NEC was required to make a written record of what transpired at the bid opening and share such record with all of the bidders in accordance with Section 61(2) of the PPCA but NEC violated the provision by not sharing the record even after the Appellant requested NEC to provide the written record.
10. That the Appellants' bid documents and the video evidence of the re-demonstration proved that the Appellant satisfied the evaluation and qualification criteria contained in Section III of the bidding documents and that the Appellant's assertion was re-enforced by NEC's Re-Evaluation Report that named the Appellant as one of the three responsive bidders;
11. That considering NEC rightly deemed the Appellant's bid to be responsive in its Re-Evaluation Report with the bid price roughly US\$700,000.00 lower than the other two bidders, NEC had the statutory obligation to award the contract to Appellant.

13. That where NEC legitimately scored Laxton Group as the lowest responsive bidder after carrying out its post-qualification assessment of Laxton Group, NEC should have no longer considered Laxton's Group bid as Section 62(9) of the PPCA provides that "if a bid contains material deviations from or reservations to the terms, conditions and specifications in the bidding documents, [the bid] shall not be considered further. Appellant averred that in light of Laxton's Group apparent material breach of the bidding requirements, NEC violated the PPCA by not only continuing to consider Laxton Group but to also award Laxton Group as the most responsive bidder.
14. That NEC, in its bid rejection letter, did not address any of the points raised in Appellant's bid challenge that Laxton Group should not have been considered any further once NEC recognized that Laxton Group did not provide the required audited financial statements. Appellant says that the reason for NEC not addressing the issues raised is because NEC cannot reconcile their decision in light of the requirements contained in the bidding documents;
15. That notwithstanding Section III, Part 4 unambiguously declaring the ability to pre-finance as a post-qualification requirement, NEC, in its rejection letter stated that "a bidder's capacity to pre-finance is a pre-qualifying requirement", which is an unequivocal deviation from the bidding document;
16. A technical requirement in the bidding document was the use of tablets and that the Appellant used a gold standard tablets to meet the requirement with its power-point presentation detailing the specifications of the rugged Microsoft surface tablet that would be used during the implementation of the project. But that Laxton Group used a laptop instead of a tablet;
17. That although Appellant's delivery schedule only spanned 50 days, the Chairperson of NEC mentioned in her press conference that Laxton Group had the longest delivery period of 147 days from the signing of the contract, for which NEC permitted Laxton Group to revise the length of the delivery period; and
18. That if NEC had the authority to permit Laxton Group to change its delivery schedule, in the spirit of Section 33(2) of the PPCA, such request to modify should have been communicated to all bidders participating in the procurement proceedings without delay. However, NEC only communicated to the Laxton Group about modifying the delivery schedule which was obviously intended to solely benefit Laxton Group at the expense of the other bidders.

Following receipt of the Appellant's Appeal, a notice of Assignment for the hearing of the appeal was issued on January 4, 2023 for hearing on Friday, January 13, 2023 at 10:00am at the PPCC Conference Room.

Appellant's Argument

The Appellant cited the following legal citations and presented his side of the case which principally rested on the following:

1. That Laxton Group did not provide an audited Financial statement in accordance with Section II of the bidding document and, therefore, should not have even been qualified as one of the final four responsive bidders. The Appellant requested the panel to instruct NEC to reconstitute a Bid Evaluation Panel to access the bids of the remaining responsive bidders which should exclude Laxton Group;
2. That Laxton Group, during its re-demonstration, used a laptop when it was required for to use a tablet;
3. That Laxton Group had the longest delivery schedule which spanned over a period of 147 days, yet NEC overlooked the Appellant's delivery schedule of 50 days to award the contract to Laxton Group;
4. That the Appellant had the lowest bid price of all the bidders with a range of about US\$700,000.00 as the difference in price, yet the NEC declared Laxton Group as the most responsive bidders; and
5. That the NEC allowed Laxton Group to amend its bid document in regards to the delivery date without informing the other bidders or allowing the other bidders to amend their delivery date.

Appellee's Argument

The Appellee cited the following legal citations and presented its side of the case which principally rested on the following:

1. That all four bidders (PSI/HID, Waymark/Mwetana, ESI or Laxton Group) had defects and as such, there was no bidder which successfully met up with all the bids document requirement;
2. Contrary to the Appellant's assertion, the Appellant did not qualify and was never named as of the three most responsive bidders;
3. That during the re-demonstration, the Appellant did not use the specified tablet (rugged Microsoft surface tablet) as required in the bidding documents but had its presentation of a portrait of its tablets;
4. The Appellant did not meet the Pre-financing qualification as was stated in the NEC's August 26 and November 15, 2023 reports;

6. NEC did not allow Laxton Group to amend its delivery date as the delivery date is as per the signing of the contract and not to the October 9-16, 2022 requirement. and
7. Laxton Group did provide its audited Financial Statement.

2.0 ISSUES

Having listened to the argument put forth by the parties and their response to the questions asked by this panel, there are two questions that are dispositive of this case.

Issue #1: Whether or not Appellant show that it had met all the requirements of the bid document for which it should have or could have been awarded the NEC Contract?

Issue #2: Whether or not the Appellant claim/assertion is sufficient to warrant a reconstitution of the Bid Evaluation Panel?

3.0 DISCUSSION

As to the first issue, this panel answers in the negative.

The standard set in the bidding document as a requirement for being a responsive bidder includes but are not limited to the following:

- a. Ability to deliver the required goods fully and completely in the time indicated;
- b. Submission of biometric voter registration services several times during the past six years with at least one Elections Management Body;
- c. Capacity to Pre-Finance;
- d. Provision of audited financial reports of the bidder for the past two years;
- e. Experience of the bidder;
- f. Conformance to the Technical Specifications; etc.

Waymark/Mwetana Financial statement, as shown in the NEC's November 15, 2022 Bid Evaluation Panel Report stated that the Appellant had a Revenue of US\$2,080,111.81 and a cost of sale of US\$1,234,707.41 for the year 2021 and a Revenue of US\$1,895,698.49 and a cost of sale of US\$1,699,256.69 for the year 2020. The Appellant's audited financial statement shows that the Appellant had a Revenue of 36,961,367 Rand (US\$2,145,178.82) and cost of Sale of 21,939,433 Rand (US\$1,274,997.92) for the year 2021 with a Revenue of 33,684,539 Rand (US\$1,957,558.12) and cost of sale of 30,193,978 Rand (US\$1,754,706.12) for the year 2020. Even though the Appellant presented its audited financial statement covering the past two years (2020 and 2021), the Appellant's audited financial statement fell short of the estimated value of the Project. The audited financial

Furthermore, the Appellant's (Waymark Infotech/Mwetana) audited financial statements show that the project it has completed over the two fiscal years (2020 and 2021) is US\$4,210,003.25 (Four Million Two Hundred Ten Thousand Three United States Dollars) for 2021 and US\$2,352,663.49 (Two Million Three Hundred Fifty-Two Thousand Six Hundred Sixty-Three United States Dollars Forty-Nine Cents) for 2020. The Appellant fell short in terms of the implementation of the NEC Biometric project as reflected in their revenue position, and as such, the Appellant lacks the performance capacity as per the audited financial statement.

The Appellant, with the financial worth as stated above, also fell short of the Pre-financing requirement as provided in the NEC's Bid document. The Appellant, having failed to meet up with these requirements as set forth by the NEC, is a strong showing that the Appellant was not qualified to have been a winner of the bid evaluation process as conducted by the Bid Evaluation Panel of the NEC and was not prejudiced by the decisions of NEC.

While the Appellant was listed as one of the four responsive bidders, NEC stated in the December 15, 2022 response to the Appellant's Bid Challenge Document that neither of the four bidders met the required standard of the bid documents as all the four shortlisted bidders had defects. NEC also raised this issue before the panel during argument and the Appellant neither contented nor rebutted this assertion, thus acknowledging the assertion of NEC.

The Supreme Court of Liberia opined in the case *Liberia Material Ltd. V. His Honor Gbeneweleh et al*; LRSC 12 (2015) that "*when an allegation is made by a party which requires rebuttal, the failure to rebut will be deemed as an admission of the allegation*". [Inter-Con Security v. Miah and Yarkpawolo, [1998] LRSC 12; 38 LLR 633 (1998); Ministry of Lands, Mines and Energy v. Liberty Gold and Diamond Company et al, decided on January 10, 2014.]

The Appellant case, as shown before this panel, was in such that the Appellant focus its case on Laxton Group having defects and not the strength of the Appellant's case, which is a contradiction to the principle of law in this jurisdiction that requires a party coming to court to come on the strength of its own case and not the weakness of the adversary.

During argument, this panel asked the Appellant about its strength/case and what it had done or bided for which it believed it should have been awarded the contract. The Appellant said that the issue of what it had in its bidding document was secondary. What was primary for the Appellant was that Laxton Group should not and ought to not have been selected as one of the responsive bidders due to Laxton's Group failure to have provided the required audited financial statement. This panel says that as the four named responsive bidders had defects, the Appellant is without any equitable ground to raise an issue on the defects of another bidder when it is and was also selected with defects.

the bidder's Pre-Financing qualification, Technical specification, physical demonstration, quality of equipment and experience in implementation of project(s) of similar nature.

Further, NEC also argued that the bidders were required to use the rugged Microsoft surface tablet but the Appellant did its re-demonstration using the gold standard tablets instead of the specified rugged Microsoft surface tablet. On the issue of the Appellant using the gold standard tablet instead of the rugged Microsoft surface tablet, the Appellant argued that the NEC did not provide any mandatory use of the rugged Microsoft surface tablet during the re-demonstration. This argument of the Appellant on NEC not providing a mandatory use of the rugged Microsoft Surface Tablet would provide two conclusions to this panel which are:

- i. Assuming without admitting that NEC did not make it a mandatory requirement for the bidders to use the Rugged Microsoft Surface Tablet during the re-demonstration, the bidders, including the Appellant and Laxton Group, might not have necessarily needed to use the Rugged Microsoft Surface Tablet during the re-demonstration and therefore need not be blamed or sanctioned; and
- ii. Assuming without admitting that NEC made it a mandatory requirement for the bidders to use the Rugged Microsoft Surface Tablet during the re-demonstration, having not used the Rugged Microsoft Surface Tablet, the Appellant has no standing to point out Laxton Group not using the Rugged Microsoft Surface Tablet.

With all of these before this panel, we are of the opinion that the Appellant, having had defects in its bid document and not being able to pre-finance the contract, has not shown to this panel that it would have and should have been awarded the contract if the NEC had not selected Laxton Group, neither has the Appellant shown that it suffered irreparable loss. This panel believe that the prayer of the Appellant to have this panel instruct NEC to reconstitute a Bid Evaluation Panel to access the bids of the remaining responsive bidders which should exclude Laxton Group is without merit.

As to the Second issue, this panel answers in the negative.

Chapter 25, Section 25.5(1) of the Civil Procedure Law provides that "*The burden of proof rests on the party who alleges a fact except that when the subject matter of a negative averment lies peculiarly within the knowledge of the other party, the averment is taken as true unless disproved by that party.*"

Chapter 25, Section 25.5(2) of the Civil Procedure Law also provides that "*It is sufficient if the party who has the burden of proof establishes his allegations by a preponderance of the evidence*"

fell short of the estimated value of the Project (about 12 million United States Dollars), the terms of the implementation of the NEC Biometric project in regards to the projects implemented by the Appellant over the last two years and the financial worth of the Appellant also fell short of the Pre-financing requirement as provided in the NEC's Bid document.

This Panel says that both the Appellant and Laxton Group did not use the Rugged Microsoft Surface tablet during the re-demonstration as required by NEC as the Appellant used a gold standard tablet and Laxton Group used a laptop.

This Panel says that while the Appellant tendered the lowest bid price, this Panel acknowledges the fact that bid evaluation takes into consideration the entire bid documents and not necessarily the lowest tendered price. A core purpose for procurement practices is to ensure value for money in accordance with section 24.1(b) of the PPCA. However, this should not be construed as selection of the lowest price in total disregard of other requirements as contained in the bid documents.

Furthered, the Appellant's assertion that NEC allowed Laxton Group to amend its delivery date to the detriment of the other bidders was refuted by NEC. The Appellant also made no effort to show proof of this assertion and having alleged an issue without providing the proof of such allegation, this Panel cannot sustain the allegation of the Appellant. This Panel says that the law in this jurisdiction is that "*In civil cases, proof is established by a preponderance of evidence, which is the perfection of evidence*". (Dopoe v. City Supermarket, 34LLR 343, Syl. 11, text at page 352). The Appellant, having alleged that NEC allowed Laxton Group to amend its delivery date and did not make any effort to prove such allegation, particularly in the face of NEC rebutting such allegation, cannot be said to have established its case by the preponderance of evidence.

WHEREFORE AND IN VIEW OF THE FOREGOING FACTS AND CIRCUMSTANCES, this Panel says that the Appellant, failed to show and prove its allegations levied against the National Elections Commission (NEC), this Panel holds that the appeal as filed by WAYMARK INFOTECH/MWETANA Joint Venture is hereby and shall be denied and dismissed.

It is hereby so ordered!

GIVEN UNDER OUR HANDS AND SIGNATURES
THIS 30th DAY OF JANUARY, A. D. 2023

Signed by:



Clerk Knote Knadeh Gizzie



Atty. Rowan C. Mulbah