

IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY
AT DAR ES SALAAM

APPEAL CASE NO 04 OF 2016-17
BETWEEN

M/S CADASP (T) LIMITED AND GROUP SIX
INTERNATIONAL LIMITED JVAPPELLANT

AND

THE BOARD OF TRUSTEES OF THE NATIONAL
SOCIAL SECURITY FUNDRESPONDENT

DECISION

CORAM

- | | | |
|-------------------------------------|---|-----------|
| 1. Hon. Vincent K.D Lyimo, J. (rtd) | - | Chairman |
| 2. Mrs. Rosemary A. Lulabuka | - | Member |
| 3. Ms. Monica P. Otaru | - | Member |
| 4. Mr. Ole-Mbille Kissioki | - | Secretary |

SECRETARIAT

- | | | |
|---------------------------|---|----------------------|
| 1. Ms. Florida Mapunda | - | Senior Legal Officer |
| 2. Mr. Hamisi O. Tika | - | Legal Officer |
| 3. Ms. Violet S. Limilabo | - | Legal Officer |

FOR THE APPELLANT

1. Mr. Zhida Yu - Chief Executive Officer – CADASP (T) Ltd
2. Mr. Fang Xiao Kai - Deputy General Manager – Group Six International Ltd

FOR THE RESPONDENT

1. Mr. Randolph Shimbo - Legal Officer
2. Mr. Ally Mkewa - Procurement Officer
3. Mr. Halfan H. Sanga - Procurement Officer

This decision was set for delivery today 17th October 2016, and we proceed to deliver it.

The Appeal was lodged by the Joint Venture (JV) between M/S Cadasp (T) Ltd. and Group Six International Ltd. (hereinafter referred to as “the Appellant”) against the Board of Trustees of the National Social Security Fund, commonly known by its acronym NSSF (hereinafter referred to as “the Respondent”).

The Respondent floated Tender No. PA/004/2015-2016/HQ/W/19, which had four Lots. This Appeal is in respect to Lot Nos. 1 and 3 for the Sub-contract for Curtain Walling, ACP Cladding and Louvers, Skylight, Glass Shop Front and Frameless Doors Works, and Lot No. 4 for the Sub-

contract for Aluminum Doors and Windows, Glass Partitions and Balustrades Works at the Proposed Construction of Mzizima Commercial Tower on Plot No. 2163/2 junction of Maktaba and India Street, Ilala Municipality, Dar es salaam (herein after referred to as "the Tender").

After going through the record of Tender proceedings and the oral submissions by the respective parties and the documents submitted to the Public Procurement Appeals Authority (hereinafter referred to as the "Appeals Authority"), the facts of the Appeal may be summarized as follows:

The Respondent invited tenderers to participate in the above Tender through an advertisement in the Daily News newspaper dated 11th July 2016. The deadline for submission of the tenders was on 2nd August 2016 whereby four tenders were submitted for Lot No. 1, four for Lot No.3 and five for Lot No. 4.

The tenders were subjected for evaluation which was conducted in three stages namely; Preliminary Evaluation, Detailed Evaluation and Post Qualification. After completion of the evaluation process, the Evaluation Committee recommended the award of contract for Lot Nos. 1, 3 and 4 to the Appellant.

The Tender Board at its meeting held on 25th August 2016 approved the award of tender to the Appellant at corrected bid price of TZS 7,949,140,604.77 for Lot No 1, TZS 26,393,333,663.00 for Lot No. 3 and TZS 573,176,707.85 for Lot No. 4. Thereafter, the Respondent on 29th

August 2016 notified all tenderers of its intention to award the tender for Lot Nos. 1, 3 and 4 to the Appellant. By the same letter, each of the unsuccessful bidders was notified of the reasons for being unsuccessful.

Dissatisfied, two tenderers, namely M/s Dar es salaam Glass Works Limited and M/s Tropical Aluminum and Glass Industries Ltd through separate letters received by the Respondent on 05th September 2016 applied for administrative review challenging; amongst others, the intention to award the tender to the Appellant. Both tenderers asserted that the award is been made to a tenderer who has conflict of interest.

Having received the said complaints, the Respondent vide letter with reference No. NSSF/HQ/N.12/144/VOL.XV/19 dated 7th September 2016 informed the Appellant and suspended the tender process pending determination of the same.

On 14th September 2016, the Respondent by his letter Ref. No. NSSF/HQ/P.14/421/VOL.II/25 informed the Appellant that the applications for administrative review were upheld and their tender had been disqualified after it was established that the award was unfairly made to them.

Aggrieved by the Respondent's decision, the Appellant vide a letter Ref. No. CADASP JV GSI/2016/9/19/01 dated 19th September, 2016 applied for Administrative Review to the Respondent challenging its disqualification from the tender process. On that same date, the Respondent, rejected the Appellant's application for administrative

review by relying on the findings issued by the independent review team which was pursuant to the Public Procurement Act No. 7 of 2011 as amended (hereinafter referred to as "the Act") read together with Public Procurement Regulations, GN No. 446 of 2013 (hereinafter referred to as "GN 446 of 2013"). The Respondent's letter Ref. No. NSSF/HQ/P.14/421/VOL.II/30 is relevant.

Aggrieved, on 23rd September 2016 the Appellant lodged his Appeal to the Appeals Authority.

SUBMISSIONS BY THE APPELLANT

The Appellant listed three main grounds of Appeal which could be summarized as follows-

- a) The Respondent erred in law for entertaining complaints that were lodged out of time.
- b) Conflict of interest between the Respondent and one partner in the Appellant's (JV)
- c) Non-registration of the JV agreement

In support of the first ground, the Appellant submitted that, the Respondent erred in fact and law for entertaining complaints from other tenderers as they were lodged out of the prescribed time provided under Section 96(4) of the Act. The Appellant submitted further that, the two tenderers became aware of the existence of the Appellant's JV from the date of the tender opening; hence they ought to have filed their

complaints within seven working days from that date. The two tenderers lodged their complaints to the Respondent on 5th September 2016, while the same ought to have been lodged within seven working days from 2nd August 2016 (tender opening ceremony). Thus, the Respondent erred in law for entertaining the complaints that were lodged out of time.

Regarding the second ground, the Appellant stated that, the Respondent erred in law by stating that, M/s Group Six International Limited being the main contractor for the project is considered to have access to information regarding the tendering process contrary to Clause 3.6(e) of the Instruction to Tenderers (hereinafter referred to as "ITT").

The Appellant averred further that; the Respondent's administrative review team erred in fact and law by concluding that M/s Group Six International Limited being the main contractor have more knowledge of the environment of the envisaged works and puts them in more advantageous position compared to others - presence of conflict of interest.

Furthermore, the Respondent's administrative review team erred in law and fact by concluding that the execution of the sub contract agreement with the Main Contractor will create challenges for the client to enforce their legal rights against the main contractor and sub contractor particularly the quality of works and materials to be used because the two entities and their respective projects were completely different. Thus, their disqualification based on Regulation 6(3)(b) of GN 446 of 2013 was not proper.

Addressing issues in ground three, the Appellant submitted that, the Respondent's administrative review team erred in law and fact by concluding that the JV between M/s Cadasp Tanzania Ltd and Group Six International Ltd was supposed to have applied for registration at the Contractors Registration Board prior to the submission of the Tender Document.

Finally, the Appellant prayed for the following;

- Declaration that the decision of the administrative review team was a nullity for being a decision considered out of the prescribed time pursuant to Section 96(4) of the Act.
- The Respondent be ordered to award the tender to the Appellant.
- A declaration that M/s Group Six International Limited being the main Contractor does not have any access to information regarding the tendering process.
- A declaration that M/s Group Six International Limited being the main contractor for the project is not prohibited or disqualified from providing sub contracts works for the tender.
- A declaration that the execution of sub contract agreement between the main Contractor and M/s Cadasp Tanzania Ltd and Group Six International Ltd, JV shall not create conflict of interest nor create challenges for the Respondent to

enforce their legal rights against the main contractor and sub contractor with respect to quality of works and materials to be used.

- A declaration that M/s Cadasp Tanzania Ltd and Group Six International Ltd JV was not supposed to apply for registration at the Contractors Registration Board prior to the submission of their bid.

REPLIES BY THE RESPONDENT

In reply to the Appellant's grounds of Appeal, the Respondent submitted that, his decision to disqualify the Appellant's tender resulted from the findings made by an independent review team as per the requirement of the law. The Respondent stated further that, they did not entertain any complaint; they just communicated the findings made by the administrative review team which was an independent team from the Accounting Officer.

Therefore, the Respondent prayed for the following orders:

- Declaration that the Respondent acted within the law in awarding the tender to the Appellant.
- Any other relief the Appeals Authority shall deem fit and equitable to grant.

ANALYSIS BY THE APPEALS AUTHORITY

Before embarking on the analysis of the case, the Appeals Authority wishes to point out that, the Respondent did not fare well in this Appeal. On one hand, the Respondent in his statement of reply stated that the tender process was conducted in accordance with the law and therefore the Appellant deserved to be awarded the tender. Specifically, the Respondent prayed that, the Appellant's JV be declared the successful tenderer. On the other hand, the Respondent submitted that the decision that was communicated to the Appellant by its letter dated 14th September 2016 Ref. No. NSSF/HQ/P.14/421/VOL.II/25 was after the scrutiny by an independent team. The Appeals Authority does not share the views of the Respondent who under the circumstances has distanced himself from the findings of his own technical team. That said, the Appeals Authority proceeds to determine the issues herein as follows:

In this Appeal there were three triable issues namely-

- Whether the Application for administrative review to the Respondent's Accounting Officer was out of time;
- Whether the Appellant's disqualification was proper at law
- To What reliefs, if any, are the parties entitled.

Having identified the issues, the Appeals Authority proceeded to determine them as hereunder-

1.0 Whether the Application for administrative review to the Respondent's Accounting Officer was out of time

In determining this issue, the Appeals Authority revisited the documents submitted before it and observed that, the applications for administrative review was lodged to the Respondent by two tenderers, namely; M/s Dar es salaam Glass Works Limited and M/s Tropical Aluminum and Glass Industries Ltd on 5th September 2016 after being dissatisfied with the Notice of Intention to Award that was issued by the Respondent on 29th August 2016. According to Section 60(3) of the Act any tenderer who is dissatisfied with the Notice of Intention to Award is allowed to lodge his application for administrative review to the Accounting Officer within seven working days. Counting from 29th August 2016 when the Notice of Intention to award was issued, the seven days ended on 7th September, 2016. Since the application for administrative review was lodged on 5th September 2016, the Appeals Authority is of the settled view that, the application for administrative review was lodged within time.

Furthermore, the Appeals Authority considered the arguments by the Appellant that the two complainants above ought to have raised their complaints within seven working days from the date of tender opening and not after the issue of the notice of intention to award. Their arguments being that the parties to the tender knew each other and as such the complainants should be taken to have condoned the process. The Appeals Authority considered the Appellant's arguments in the light of the provisions of Regulation 199(3) of GN. No. 446 of 2013 which

guides on what has to be done after opening of the tenders. The said Regulation reads as follows;

“All tenders that are accepted and opened shall be passed promptly, with a copy of records of tenders received and those persons attending the meeting to the respective evaluation committee for evaluation” (emphasis added).

From the above extract, it is clear that after the tender opening, all received and opened tenders are to be submitted to the evaluation committee so as they can be checked and assessed for compliance with the requirements of the Tender Document. No other activity has been mandated apart from submitting the tender documents to the appropriate evaluation committee. It is the evaluation committee working with the respective tender boards that have been mandated to affirm or disqualify bidders after the due process of procurement has been fully observed. During the tender opening ceremony, respective bidders can observe and note anomalies in respect to tenders that have been submitted and opened. They can only challenge the validity of any tender after they have been notified of the result of the evaluation. The Appeals Authority rejects the Appellant's argument that the circumstances giving rise to a complaint arose on the date of tender opening ceremony. The two tenderers could have not raised the issue of conflict of interest on the date of tender opening since they could not know if the same would not be noted by the Evaluation Committee. Therefore, the two tenderers could not have raised the issue of

Appellant's conflict of interest much earlier than after the Notice of Intention to Award was issued.

The conclusion of the Appeals Authority with regard to the first issue is that, the Application for Administrative Review was lodged within time as required by law.

2.0 Whether the Appellant's disqualification was proper at law

In resolving this issue, the Appeals Authority considered the arguments raised by the Appellant with regard to the issues of conflict of interest and non-registration of the JV and decided to frame the following sub issues;

a) Whether the Appellant's JV had a conflict of interest

b) Whether the Appellant's tender complied with JV registration requirement

Having identified the sub-issues, the Appeals Authority proceeded to resolve them as hereunder;

a) Whether the Appellant's JV had a conflict of interest

In order to determine this sub issue, the Appeals Authority reviewed the documents submitted before it and observed that, the Appellant's tender clearly shows that they had tendered as a JV of two companies namely; M/S Cadasp (T) Ltd. and Group Six International Ltd. The Appeals Authority observed further that, M/s Group Six International Ltd. is the Main Contractor for the whole project. Having so noted, the Appeals

Authority is of the firm view that, in terms of Regulation 6(3)(b) of GN No. 446 of 2013 it was not proper for the Appellant to participate in sub contract works for the same project. For purposes of clarity the said Regulation 6(3)(b) is reproduced herein below:-

“a tenderer who is engaged by a procuring entity for provision of goods, works or services and any of its affiliates, shall be disqualified from subsequently providing goods, works or services (other than continuation of earlier contract) or acquiring assets from the same project”
(Emphasis added).

Furthermore, the Appeals Authority revisited Clause 3.6 (e) of the ITT which provides as follows;

3.6. “A tenderer shall not have a conflict of interest. All tenderers found to have a conflict of interest shall be disqualified. A tenderer may be considered to have a conflict of interest with one or more parties in this tendering process, if they:

e) “have a relationship with each other, directly or through common third parties, that puts them in a position to have access to information about or influence on the tender of another tenderer, or influence the decision of the procuring entity regarding this tendering process” (Emphasis supplied).

Relating the above quoted provisions to the facts of the this Appeal, it is crystal clear that M/s Group Six International Ltd. are the Main Contractor for the project and are directly engaged with the Procuring Entity (Respondent). When asked by the Members of the Appeals Authority, the Appellant admitted that M/s Group Six International Ltd. as the partner in the JV with M/s CADASP (T) Ltd. is the same as the main contractor. As such, there is no doubt that M/s Group Six International Limited is in advantageous position of having access to information which were relevant for preparations of the disputed tender since the firm works on the same project.

Additionally, the Appeals Authority revisited the Agreement and Schedule of Conditions of Building Sub-Contract issued by the National Construction Council (NCC) that was made part of the Tender Document and observed that, it contains some of provisions which clearly require the Main Contractor to be a different firm from Sub-Contractors. For purposes of clarity the Appeals Authority considers some of the said provisions herein below:-

(a) Clause 1.1 mandates the Main Contractor to supervise all the works that are required to be executed by the Sub-Contractors. The Clause states as follows;

1.1" The Sub-Contractor shall execute and complete the sub contract works subject to and in accordance with this Sub-Contract in all respects to the reasonable satisfaction of the Main Contractor and Architect for the time being under the Main Contract and in conformity with all

reasonable directions, rules and the requirement of the Main Contractor..."(Emphasis supplied).

- (b) Clause 2.1 pre supposes that the Sub-Contractor understands all the terms and conditions of the main contract except the detailed prices included in the Schedules of Rates and Bills of Quantities. The said provision states as follows;

"the Sub-Contractor shall be deemed to have a clear understanding of all the provisions of the Main Contract except the detailed prices of the main contractor included in Schedule of Rates and Bills of Quantities"
(Emphasis added).

The Clauses quoted above clearly shows that the Main Contractor and Sub Contractors are to be separate entities. M/s Group Six International Ltd. being the Main Contractor is conversant with the detailed prices in Schedule of Rates and Bills of Quantities for the whole project; since it belongs to them. Automatically, that gave them unfair advantages over other Sub-Contractors.

- (c) Clauses 6.1 and 7.2 require the Main Contractor to approve the work schedule and commencement of the Sub-Contract work as well as to supervise the quality of the work by ensuring that materials used are in accordance with Sub-Contract Agreement. From the wording of the two provisions, it is clear that the Main Contractor and Sub-Contractor cannot be one and the same firm.

(d) Clauses 19 and 20 require the Main Contractor to prepare the payment certificate which will fairly represent the total value of the sub-contract work done and submit it to the Architect for payment. If the Main-Contractor and Sub- Contractor is one and the same, it is not possible for the former to assess its own sub-contract work and issue a certificate which will fairly reflect the actual work done.

From the findings made herein above, the Appeals Authority is of the firm view that, that the Appellant's tender ought to have been disqualified during evaluation process pursuant to Regulation 9(10)(b) of GN. No 446 of 2013 which provides as follows;

"A party to a joint venture, consortium or association shall be eligible to participate in the procurement or disposal by tender and where one party is deemed to be ineligible, the whole joint venture, consortium or association shall be declared ineligible". (Emphasis added)

The Appeals Authority is of the settled view that, the Appellant's JV has a conflict of interest and therefore, his disqualification is proper in law.

b) Whether the Appellant's tender complied with JV registration requirement

In resolving this sub issue the Appeals Authority considered the Appellant's argument that the Respondent's independent review team had unfairly disqualified their tender based the non-registration of the JV

agreement. In order to substantiate the validity of the Appellant's claim, the Appeals Authority revisited Regulation 9(10)(c) of GN No 446 of 2013 which provides as follows;

9(10) "where a solicitation document allows a tenderer to submit a tender as a part of the joint venture, consortium or association, the solicitation document shall require where appropriate, that;-

c) A copy of the joint venture, consortium or association agreement or the proposed agreement shall be required to be submitted as part of the tender..." (emphasis supplied)

Furthermore, the Appeals Authority revisited Clause 3.1 of the ITT and noted that it requires tenderers to submit as a basis of existence of a joint venture, a formal intent or a copy of the existing JV agreement.

From the documents submitted, it is clear that the Appellant's bid was attached with a copy of JV agreement entered between M/S Cadasp (T) Ltd. and Group Six International Ltd. dated 15th July 2016. Thus, the Appeals Authority observed that the Appellant complied with the requirement of the Tender Document since he was required to submit either intent to enter into a JV agreement or a JV agreement itself.

Furthermore, according to Clause 11 of the ITT read together with Clause 8 of the Bid Data Sheet, it is not necessary to have a certificate of registration from CRB prior to submission of tenders. Thus, it was not proper to disqualify the Appellant for failure to submit a JV agreement

that is registered by CRB. It should be noted that, once the conflict of interest is established as done above, it is irrelevant whether the JV is registered or not.

Accordingly, it is the settled view of the Appeals Authority that, the Appellant was properly disqualified.

3.0 To What reliefs, if any, are the parties entitled.

In considering prayers by the parties, the Appeals Authority took cognizance of the findings made on the second issue that award made to the Appellant was not proper in law. The Appellant ought to have been disqualified during evaluation process. Consequently the Appeals Authority upholds the findings made by the Respondent's independent review team save for the issue of JV registration and states that the award proposed to the Appellant is bad in law.

The record shows that there were thirteen bidders altogether. Twelve of them were disqualified during various stages of evaluation save for disqualification of the Appellant as indicated herein above. Since all bidders have been disqualified the Respondent has no option other than to re-tender. It is so ordered. The Appeal is hereby dismissed.

Each party to bear its own costs.

The Right of Judicial Review as per Section 101 of the Act was explained to the parties.

This Decision is delivered in the presence of all parties this 17th October 2016.

A handwritten signature in black ink, appearing to read 'Vincent K.D. Lyimo', written over a horizontal dotted line.

VINCENT K.D. LYIMO, J. (RTD)
CHAIRMAN

MEMBERS:

1. MRS. ROSEMARY A. LULABUKA.....

2. MS. MONICA P. OTARU