

IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY
AT DAR ES SALAAM
APPEAL NO. 05 OF 2017-18

BETWEEN

M/S MF ELECTRICAL ENGINEERING LTD AND GESAP
ENGINEERING.....APPELLANT

AND

RURAL ENERGY AGENCY.....RESPONDENT

DECISION

CORAM

- | | | | |
|----|---------------------------------|---|-----------|
| 1. | Hon. Vincent K.D Lymo, J. (rtd) | - | Chairman |
| 2. | Mrs. Rosemary Lulabuka | - | Member |
| 3. | Eng. Francis T. Marmo | - | Member |
| 4. | Mr. Ole-Mbille Kissioki | - | Secretary |

SECRETARIAT

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

FOR THE APPELLANT

- | | | | |
|----|--------------------------|---|----------------------------------|
| 1. | Mr. Martin Rwehumbiza | - | Advocate, MNL Law Chambers |
| 2. | Mr. Wilbroad G. Mutabuzi | - | Managing Director, GESAP |
| 3. | Mr. Andrew Mwaipaja | - | Managing Director, MF Electrical |
| 4. | Mr. Said Mrisho | - | Procurement Contract Specialist |
| 5. | Mr. Hussein R. Mapugilo | - | Projects Coordinator |

FOR THE RESPONDENT

1. Mr. George M.J Nchwali - Director of Finance and Administration
2. Ms. Willa Haonga - Legal Affairs Officer
3. Eng. Jones Olotu - Ag. Project Planning and Research Manager
4. Mrs. Theresia N. Nsanzugwako - Head of Procurement
Management Unit
5. Mr. Elineema Mkumbo - Ag. Director Marketing Development &
Technologies

This Decision was set for delivery today, 31st July 2017 and we proceed to deliver it.

The Appeal was lodged by MF Electrical Engineering Ltd and GESAP Engineering Group Ltd JV (hereinafter referred to as "the Appellant") against the Rural Energy Agency (hereinafter referred to as "the Respondent"). The Appeal is in respect of Tender No. AE/008/2016-17/HQ/G/9 Lot 3 and 7 for Supply and Installation of Medium and Low Voltage Lines, Distribution of Transformers and Connection of Customers in Un-electrified Rural Area of Mainland Tanzania on Turnkey Basis (hereinafter referred to as "the Tender").

After going through the records submitted by the parties to the Public Procurement Appeals Authority (hereinafter referred to as "the Appeals Authority"), the facts of the Appeal can be summarized as follows:-

The Respondent by his letter dated 17th January 2017 invited sixty seven (67) pre-qualified tenderers to participate in the above named Tender. The

deadline for submission of bids was 22nd February 2017 whereby forty three (43) firms, the Appellant inclusive submitted their bids.

Tenders were subjected to evaluation and thereafter the Appellant was recommended for award of contract for Tender No. 9 Lot 3 and 7. After approval of the award recommendation by the Tender Board, the Respondent issued the Notice of Intention to Award the Tender to all bidders who participated in the Tender.

One of the participating tenderers M/s Future Century Ltd being dissatisfied by the Respondent's Intention to award the Tender filed Appeal Cases No. 30, 31, and 32 of 2016/17 respectively. He was unsuccessful in all the said Appeals. One amongst the Appellant's grounds in the quoted Appeals was that, the Respondent intended to Award Tenders to unqualified tenderers contrary to the requirement of the Contractors Registration Board (CRB). Further, that some of the tenderers have been registered with lower class and thus are prevented from awards of contracts with values above TZS two billion. That ground of appeal was rejected by the Appeals Authority on the reason that it was a new ground raised at an appellate level without being subjected to administrative review. The Appeals Authority issued its Decision in respect of the said Appeals on 12th May 2017.

On 15th May 2017, the Respondent issued the acceptance letter to the Appellant. The records indicate further that on 18th May 2017, the Respondent conducted due diligence to all bidders in order to verify their compliance with eligibility requirements. Amongst items that were verified

is CRB registration status whereby having formally inquired about the same from CRB, the Respondent was informed amongst others that Class one Certificate with Registration No. E1/16/06/2015 attached to the Appellant's tender was not issued by CRB. Having received such information, the Respondent vide his letter dated 13th June 2017 rejected/revoked the award of the Tender made to the Appellant.

Dissatisfied by the rejection of their award, on 19th June 2017, the Appellant applied for administrative review to the Respondent, challenging the reason given for rejection of their award. The Respondent, however, did not respond to the Appellant's complaint. Consequently, the Appellant on 10th July 2017 lodged this Appeal.

SUBMISSIONS BY THE APPELLANT

The Appellant's grounds of Appeal may be summarized as follows:-

- i. That, he disputes the Respondent's act of revoking the award on the ground that they had submitted a forged Class one CRB Certificate. In expounding on this point, he submitted that they participated in this Tender in a JV of two firms namely; M/s MF Electrical Engineering Ltd registered as Class one and M/s GESAP Engineering Group Ltd registered as class two. According to Clause 3 of the Bid Data Sheet (BDS) and Regulation 43(2) of GN No. 446 of 2013, JV's were allowed for purposes of enhancing the capacity of individual firms; thus the Appellant JV was formed. Having formed the said JV

the Appellant qualified for the award of the contract as the leading partner M/s MF Electrical Engineering Ltd is a class one contractor, thus complying with the requirement of the Tender Document. Based on that fact, the Appellant argued that, they had no reason whatsoever of presenting a forged class one certificate as it does not add any advantage on the formed JV. Therefore, the Appellant challenges the Respondent's decision of revoking the award made to them based on the allegation that they had attached to their bid a forged Class one Certificate as Specialist Electrical in Electric Power lines & Systems.

- ii. That, he disputes the Respondent's accusation that they had been engaged in fraudulent practices in order to influence the procurement process. He argued that, the Pre-qualification document submitted to the Respondent contained Class three Certificate attached with a letter indicating that they had already been upgraded to Class two though the Certificate was yet to be issued. They strongly disowned a Class one Certificate attached to their pre-qualification document by stating that the same might have been inserted when the documents were in the Respondent's custody. They suspected that their Pre-qualification document might have been tempered with when the documents were in the hands of the Respondent. According to them they had no reason of submitting a forged certificate while they qualify for the award of contract.

- iii. That, the Respondent's letter for nullification of award was misleading and contradictory. According to Section 3 of the Act the word fraudulent practice has been defined to mean misrepresentation of facts in order to influence the procurement process. The Respondent had used the word fraudulent practice inline with his allegation of forged Class one certificate. From the definition Section the Respondent's allegations of forgery do not fall under the meaning of fraudulent practice. The Appellant disputes to have been engaged in neither corrupt practice nor fraudulent practice as alleged by the Respondent so as to influence the procurement process. They further contended that one of the JV partners qualified for the award of the Tender for being Class one contractor, thus there was no need for M/s GESAP Engineering Group Limited to involve itself into fraudulent practices as alleged.

- iv. That, the Respondent's act of nullifying the award made to them contravened Section 53 of the Act which requires due diligence (Post-Qualification) to be conducted before an award is issued. They further contended that Section 3 of the Act defines Post-qualification to mean due dilligence which had to be conducted prior to the award of the contract. According to them they were checked for compliance with eligibility requirements during pre-qualification process and were found to be responsive; thus were invited for tendering. They further contended that, if the Respondent found it necessary to verify the information provided during Pre-qualification process, they ought to

have done so during Post-qualification process which was supposed to be conducted prior to communication of the award decision. Therefore, the Respondent's act of nulifying the award after the same has been communicated to the Appellant on the ground of due diligence contravened the law; thus the said act is null and Void.

They submitted further that Section 53(4) of the Act requires bidders during Post-qualification to demonstrate again their qualification before award is confirmed; however, the Appellant was not accorded an opportunity of demonstrating again their qualification. They further argued that even after the issue of forged certificate arose, the Appellant was not accorded a right to be heard before concluding that the certificate was forged by the Appellant. Thus, it is the Appellant's contention that the Respondent had conducted the Post-qualification process without complying with the laid down procedures.

Furthermore, they asserted that, the purported due diligence process had been used as an excuse to validate the Respondent's unlawful act of rejecting the Appellant's award.

- v. In substantiating further the procedural irregularity, the Appellant submitted that there were no separation of functions between Accounting Officer, Evaluation Committee and Tender Board as per Section 41 of the Act. Due diligence as a part of the evaluation

process was to be conducted by the Evaluation Team and the report be submitted to the Procurement Management Unit before the same is submitted to the Tender Board for approval. There was no proof that procedures were complied with taking cognizance of the fact that by the time due diligence was conducted award had already been communicated to the Appellant. The Respondent's conduct of issuing an award letter and thereafter conducting due diligence which resulted to nullification of award proves that the whole process was marred by irregularities.

Finally the Appellant prayed for the following:

- a) The Respondent be ordered to halt and discontinue the whole process relating to Tender No.9 Lots 3 and 7 until the matter is resolved and the verdict is given;
- b) The Respondent be ordered to act and proceed in a lawful manner by re-instating the awarded Lots to the Appellant;
- c) Cancellation of award rejection and maintenance of the status quo as per Section 97(5)(d) of the Act; and
- d) Proceed with the signing of contract as awarded by the Respondent's Tender Board and other contractual procedures.

REPLIES BY THE RESPONDENT

The Respondent's replies on the grounds of appeal may be summarized as follows;

That, Clause 3.3 of the Instruction to Bidders (ITB) required tenderers participating in the Tender to satisfy all relevant licensing and/or registration requirements. The Appellant failed to comply with such requirements as they had submitted the Certificate with Registration No. E1/16/06/2015 purported to be issued by CRB indicating that M/s GESAP Engineering Group Ltd one of the partners in the Appellant's JV is registered as class one contractor while they are registered as class two contractors. During Post-qualification the Respondent contacted CRB for confirmation of the registration status of the tenderers who participated in the Tender and it was realized that, M/s GESAP Engineering Group Ltd is registered as Electrical Contractor class two with Registration No. E2/19/08/2016. It was further noted that, the Registration Certificate attached to the Appellant's pre-qualification document indicating that M/s GESAP Engineering Group Ltd is a class one contractor had not been issued by CRB. Having realized that the Appellant had provided false information regarding registration status, the Respondent nullified the award made to them pursuant to Section 83(2) of the Act which allows rejection of an award if proved that the proposed firm had engaged in fraudulent, collusive, coercive or obstructive practices when competing for a contract in question.

That, the Appellant's act of presenting false information indicates that, they had willfully intended to mislead the Respondent and obtain unfair treatment over tenderers who had participated in the Tender while knowing that they do not deserve the same.

That, according to Section 60(11) of the Act, the procurement process enters into force when a formal contract is signed by the parties to the contract. The contracts for the Tender under Appeal were yet to be signed and pursuant to Section 83(2) of the Act the Respondent is allowed to conduct due diligence in order to determine authenticity of the information provided by the tenderers. Thus, the Respondent disputes the Appellant's contention that after communication of an award letter due diligence cannot be conducted.

That, according to Regulation 9(10(b) of GN. No. 446 of 2013, if one of the partners in the JV is deemed to be ineligible for whatever circumstances, the whole JV would be declared ineligible. Based on the fact that M/s MF Electrical Engineering Limited is a class one contractor and qualifies for the award of the Tender does not change the position that M/s GESAP Engineering Group Ltd had submitted a forged certificate, thus the whole JV is ineligible and disqualified from the tender process.

Finally the Respondent prayed for dismissal of the Appeal with costs since the Appellant in this tender process had conducted fraudulent practices.

ANALYSIS BY THE APPEALS AUTHORITY

In this Appeal, there are two (2) triable issues to be determined. These are:-

- Whether the rejection of the award of contract after issuance of letter of acceptance is justified; and

- What reliefs, if any, are the parties entitled to.

Having identified the issues, we proceed to determine them as hereunder:-

1.0 Whether the rejection of the award of contract after issuance of letter of acceptance is justified

In resolving this issue the Appeals Authority revisited the documents submitted and observes that the Appellant's Pre-qualification document was attached with a certificate indicating that M/s GESAP Engineering Group Ltd is registered as Class one Electrical Contractor. From the facts and submissions by the parties it was observed that, on one hand the Respondent claimed that the said certificate was a basis for the rejection of Appellant's award as it was not issued by CRB, while on the other hand, the Appellant denied to have attached it to its Pre-qualification document; instead, they claimed that their document might have been tempered with while in the Respondent's custody.

The Appeals Authority observed further that, the Respondent reached a decision that a class one certificate attached by the Appellant's partner (M/s GESAP Engineering Group Ltd) is invalid after inquiring about its registration status from CRB who in reply thereof through their letter dated 24th May 2017, indicated that the said certificate had not been issued by them.

From the facts, the Appeals Authority observed that it is undisputed that CRB denies to have issued a class one certificate attached to the

Appellant's pre-qualification document. On the other hand, the Appellant strongly denied to have attached the said certificate to its pre-qualification document and the Respondent denies to have tampered with the Appellant's document asserting as it were, that it had no reason to do so. During the hearing of this Appeal, both parties indicated that there were other separate contracts in execution and they both had good business relations.

In view of the above, the Appeals Authority is of the considered view that, on the balance of probabilities, there was reason to hold that the Respondent had tampered with the Appellant's document. It is a fact that the Appellant, whose partner in the JV was qualified to be awarded the tender, stood to gain nothing by attaching a certificate depicting a higher qualification.

The above notwithstanding, the Appeals Authority reviewed the Tender Document and observed that it requires an award to be made to a registered Class one Electrical Contractor. It also allows bidders to participate as joint ventures, associations or consortium. The Appeals Authority observed that, the Appellant participated in this Tender in a JV formed by M/s MF Electrical Engineering Ltd and M/s GESAP Engineering Group Ltd. Having inquired from CRB the Appeals Authority noted that M/s MF Electrical Engineering had been properly registered as Class one Specialist Electrical in Electric Power Lines & Systems and M/s GESAP Engineering Group Ltd is registered as class two Electrical Contractor. Also the CRB letter to the Respondent dated 24th May 2017 apart from

confirming the classes the JV partners' possess, it went further by indicating that the JV qualifies to be registered as class one electrical contractors. Based on that fact, the Appeals Authority is of the view that the Appellant's JV qualifies for the award of the Tender.

Furthermore, the documents submitted by both parties indicate that M/s GESAP Engineering Group Ltd in JV with other companies had been executing other similar projects with the Respondent when it was registered in classes four and three. The projects were of a similar nature and almost of a similar value to the one under Appeal. Taking cognizance of this fact, the Appeals Authority is of the further firm view that, the Appellant's qualification for award in this tender cannot be doubted. Thus, the rejection of the Appellant's award based on the disputed certificate was not proper.

The Appeals Authority considered the Appellant's contention that the Respondent's act of conducting due diligence after the award of the contract had been communicated contravened the law. In substantiating the validity of the Appellant's contentions the Appeals Authority revisited Sections 3, 53(4) and 83(2) of the Act which provides as follows;

"S.3 Post-qualification means a due diligence procedure applied after tenders have been evaluated prior to award of the contract, to determine whether or not the lowest evaluated tenderer has the experience, capability and resources to carry out the contract effectively".

“S.53(4)A procuring entity shall require a tenderer who has submitted a lowest evaluated tender in case of procurement or highest evaluated tender in case of disposal by tender to demonstrate again its qualification before the award of contract is confirmed”. (Emphasis supplied)

“S.83(2)Where a procuring entity is satisfied after due diligence, that any person or firm to which it is proposed that a tender be awarded, has engaged in fraudulent, collusive, coercive or obstructive practices, the procuring entity shall;

a) reject a proposal for award of such contract”
(Emphasis added)

The above quoted extract clearly indicate that Post-qualification or due diligence has to be conducted before the award of contract is confirmed. However, Section 19 of the Law of Contract Act Cap 345 (R.E) 2002 prohibits any diligent party to a contract from asserting fraud, cohesion or misrepresentation if he had a means of discovering the truth using ordinary diligence. Therefore, the Appeals Authority is of the settled view that, much as Section 53(4) of the Act requires Post-qualification to be conducted prior to confirmation of an award, the Contract Act allows more diligence to be conducted if need be, before signing of the contract. Thus, the Respondent cannot be faulted for conducting due diligence after issuing award letters.

Regarding the Appellant's argument that they were found to be compliant during Pre-qualification hence there was no need of Post-qualification, the Appeals Authority observes that Regulation 224(8) of GN No. 446 of 2013 allows procuring entities to conduct Post-qualification despite tenderers being pre-qualified in order to verify if a bidder still complies with pre-qualification requirements. Thus, the Respondent's Post-qualification process cannot be faulted as it is in accordance with the law.

Furthermore, the Appeals Authority considered the Appellant's argument that they were not accorded an opportunity to demonstrate their capacity and observes that it is not necessary for Post-qualification to be conducted physically; it can also be conducted by using documents attached to the bid. Procuring entities may seek for more clarification from the issuer of the documents attached to the tenderers' bid for purposes of verifying the authenticity of the same.

From the above, it is the Appeals Authority's conclusion with regard to the first issue that, the rejection of the award made to the Appellant was not justified. In view of the fact that the lead partner is Class one and that M/s GESAP Engineering Group Ltd is class two, it means the JV is capable of being registered as class one to perform the works as correctly said by CRB.

2.0 What reliefs, if any, are the parties entitled to

Taking cognizance of the findings above, the Appeals Authority hereby upholds the Appeal and quashes the Respondent's decision to reject the award and in the absence of any intervening process order the Respondent to formalize the contract between the parties. Each party to bear own costs.

This Decision is binding on the parties and can be enforced in accordance with Section 97(8) of the Act.

The Right of Judicial Review as per Section 101 of the Act is explained to the Parties.

This Decision is delivered in the presence of the parties this 31st July 2017.

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

MEMBERS:

1. MRS. ROSEMARY LULABUKA 

2. ENG. FRANCIS MARMO 