

IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY
AT DAR ES SALAAM
APPEAL NO. 12 OF 2017-18

BETWEEN

M/S COOL CARE SERVICES LTD.....APPELLANT

AND

MUHIMBILI ORTHOPAEDIC INSTITUTE.....RESPONDENT

DECISION

CORAM

- | | | |
|----------------------------|---|-----------------|
| 1. Ms. Monica P. Otaru | - | Ag. Chairperson |
| 2. Eng. Francis T. Marmo | - | Member |
| 3. Eng. Aloys J. Mwamanga | - | Member |
| 4. Mr. Ole-Mbille Kissioki | - | Secretary |

SECRETARIAT

- | | | |
|------------------------|---|----------------------|
| 1. Ms. Florida Mapunda | - | Senior Legal Officer |
| 2. Ms. Violet Limilabo | - | Legal Officer |

EXPERT WITNESSES

- | | | |
|----------------------------|---|----------------------------|
| 1. Eng. Kimwaga Mfutakamba | - | Mechanical Engineer-TEMESA |
| 2. Eng. Zuhura Said | - | Mechanical Engineer-TEMESA |

FOR THE APPELLANT

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| 1. Mr. Andrew Mwaisemba | - | Managing Director |
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FOR THE RESPONDENT

- | | | |
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| 1. Mr. Suleiman J. Mgerwa | - | Legal Officer |
| 2. Mr. Reginald J. Kimambo | - | Director of Technical Services |
| 3. Mr. Peter J. Bulube | - | Procurement Manager |
| 4. Mr. Said B. Mahupa | - | Civil Technician 1 |

This Decision was set for delivery today 29th September 2017, and we proceed to deliver it.

The Appeal was lodged by M/s Cool Care Services Ltd (hereinafter referred to as "the Appellant") against the Muhimbili Orthopaedic Institute, commonly known by its acronym MOI (hereinafter referred to as "the Respondent"). The Appeal is in respect to Tender No. P-008/2016/2017/G/45 for Supply of Chiller for Operating Block (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 through the Daily News newspaper dated 1st June 2017 invited tenderers to participate in the Tender. The deadline for submission of tenders was initially set for 14th June 2017 but was later extended to 28th June 2017, whereby two tenders were received. One from M/s Cool Care Services Ltd and the other from M/s Shenk Electromechanical Co. Ltd.

Tenders were subjected to evaluation which was conducted in two stages, namely; preliminary and detailed evaluation. During preliminary evaluation, at the stage of determining commercial responsiveness M/s Shenk Electromechanical Co. Ltd was disqualified for being non responsive to the requirements of the Tender Document. The remaining bid by the Appellant was subjected to technical evaluation but it was disqualified for failure to comply with the Technical Specifications provided for in the Tender Document. As a result, the Evaluation Committee recommended for re-advertisement of the Tender.

On 7th August 2017, the Respondent vide a letter with Ref. No. PA-008/2016/2017/G/45 informed the Appellant that his tender was disqualified as it was found to be non-responsive at the preliminary

evaluation stage for failure to comply with technical specifications. The said letter was received by the Appellant on 16th August 2017.

Dissatisfied with his disqualification, on the same date, that is 16th August 2017 the Appellant applied for administrative review, challenging reasons given for disqualification of his tender. On 22nd August 2017, the Respondent issued a decision which dismissed the Appellant's application stating amongst others that the Appellant's Technical Specifications were above the standard. Consequently, on 29th August 2017, the Appellant lodged this Appeal.

SUBMISSIONS BY THE APPELLANT

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

1. That, in executing his duties relating to this Tender the Respondent was required to observe the highest standard of equity in order to obtain the best value for money in terms of price, quality and delivery. The Respondent was required to comply with requirements of Section 4A(3)(c) of the Public Procurement Act, No. 7 of 2011, as amended, (hereinafter referred to as "the Act"). As such, since the Appellant's specifications were above the standard specified in the Tender Document, the best value for money could only be obtained if they were to be awarded the Tender. Thus, the Respondent's act of rejecting the Appellant's tender contravenes the requirement of Section 4A of the Act.
2. That, tenderers were not compelled to quote the brand of goods specified in the Tender Document, since the scope of requirements clearly stated that the required chiller was Trane Model RTAB 209 or its equivalent. Thus, the specifications quoted by the Appellant were equivalent to those stated in the Tender Document.

3. That, the Tender Document is defective as some of the information provided in it differs from what is specified in the installation, operation and maintenance Manual of RTAB model 209.
4. That, the Appellant is a sole distributor of York Air Conditioning system in Tanzania and that York chillers are number one in the world in terms of performance and quality. In substantiating this point the Appellant listed a number of characteristics and advantages over the specified model.
5. That, operating theatres require a reliable cooling system, thus the chiller to be installed must be efficient with correct cooling capacity and which can withstand the unstable power supply within the country that is caused by frequent voltage fluctuation. The Appellant quoted to supply chiller that has cooling capacity of 150KW different from what was specified by the Respondent.
6. That, the Respondent accepted York type, ID YLCA0150 but rejected data specified under that model. The technical data indicated by the Appellant are part and parcel of York Model thus acceptance of York Model means acceptance of all its technical data.
7. That any person conversant with design and performance of the chiller air conditioning system would be interested to see equipment data sheet report. The literature of the equipment which the Respondent had indicated that were not complied with by the Appellant are of no technical importance in evaluating efficiency and performance of the equipment. Thus, it was not proper to disqualify the Appellant based on such ground.
8. That, with regard to additional information, the Appellant submitted that the Tender Document was not clear on what was to be done by the tenderers in relation to additional information.

Finally the Appellant prayed for the following orders;

1. The Respondent be ordered to re-evaluate all tenders afresh in observance of the law to reach a lawful decision;
2. Costs of filing this Appeal; and
3. Any other relief the Appeals Authority deems necessary to grant.

REPLY BY THE RESPONDENT

The Respondent's submission on the grounds of the Appeal may be summarized as follows;

1. That, the law requires the best value for money to be achieved having regard to the specifications and criteria stated in the Tender Document. The Appellant did not comply with the specified technical requirements; hence, his disqualification is justified pursuant to Clauses 29.2 and 29.3 of the Instructions to Tenderers (ITB).
2. That, the specifications above the required standard provided by the Appellant in his bid did not amount to value for money as the offered chiller would be expensive to run and would cause unnecessary costs to the Respondent, as a result the principle of value for money would be violated.
3. That, the Respondent conducted this Tender in accordance with the law, thus, the Appellant could not be awarded the Tender as he failed to comply with the requirements of the Tender Document. The Appellant's argument that his Technical Specifications were above the required standard do not hold water as they were supposed to comply with requirements of the Tender Document; otherwise there would be no need of having procurement laws that provide for procedures, criteria and other related matters.
4. That, the Respondent specified under Section VII-Technical Specifications for chiller Trane Model RTAB 209 or a chiller with

equivalent specifications and that the Appellant's Technical Specifications were nothing close to what was required. In fact, the chiller offered by the Appellant is not suitable for the required purpose, as a result it was disqualified pursuant to Clauses 29.2 and 29.3 of the ITB and Regulations 205, 206 and 210 of the Public Procurement Regulations (GN. No 446 of 2013 as amended) (hereinafter referred to as GN. No. 446 of 2013).

Finally, the Respondent prayed for the following reliefs;

1. Dismissal of the Appeal for lack of merits; and
2. Any other relief the Appeals Authority deems fit to grant.

ANALYSIS BY THE APPEALS AUTHORITY

From the above submissions, the Appeals Authority is of the opinion that there are two (2) triable issues to be determined. These are:-

- Whether the Appellant's disqualification was proper in law; 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 Appellant's disqualification was proper in law

In order to ascertain the legality of the Appellant's disqualification, the Appeals Authority revisited the Tender Document and observed that Section VII provided for Technical Specifications to be complied with by the tenderers. The said Specifications were preceded with the following statement;

"Air cooled rotary liquid chiller made by TRANE model RTAB 209 or *Equivalent*. Comprising of the following:....."

Without doubt the tenderers were required to submit Technical Specifications of a chiller made of TRANE Model RTAB 209 or its *equivalent*. The Appellant offered to supply chiller made by YORK ID

YLCA0150, whose Technical Specifications were above those specified in the Tender Document.

At some point the Respondent stated that they already have a TRANE Model RTAB 209 chiller with all its equipment; however, they wanted a replacement without affecting existing facilities, for it has been running for over 15 years now. Thus, the chiller offered by the Appellant would not be compatible with the existing facilities as it contained different specifications.

Evidently, from the Parties' submissions and experts' opinions, the Appellant offered a brand of chiller with specifications different from what was required that could not be compatible with the existing facilities.

On the other hand, as the Respondent required TRANE Model RTAB 209 chiller for purposes of replacing the existing one, we fail to comprehend the Respondent's motive of advertising this Tender the way they did by indicating that they wanted to be supplied a chiller with same or *equivalent* specifications.

The Appeals Authority is of the further view that, since the Respondent wanted to replace the existing chiller with the same model, they ought to have procured the same chiller from the same manufacturer by using an ideal and acceptable method of procurement and not open national competitive bidding method they had used. In the alternative, the Tender Document should have been clear that the *equivalent* chiller should be compatible with the existing facilities by the TRANE Model RTAB 209.

Further to the above, the Appeals Authority reviewed TRANE Model RTAB 209 Manual and observed that some of the chiller's specifications contained in the Respondent's Tender Document were different from what has been provided for in the said manual. For example, the manual indicates that the cooling capacity (output power) is 146Kw while the Respondent has

specified 55Kw per compressor, hence per two compressors the required cooling capacity is 110Kw.

Further, the full load current specified in the Tender Document per each compressor is 90Amps, thus for two compressors it is 180Amps while the manual specified 137Amps for all compressors. These few examples indicate that the Respondent's requirements were not compatible with the manual for TRANE Model RTAB 209, thus it is the Appeals Authority's view that it was not possible for the Respondent to get the bidder who would comply with their Tender requirement while the specifications issued were not in accordance with manufacturer's specifications.

The Appeals Authority observed further that, the Appellant's tender was also disqualified for not complying with additional information provided in the Technical Specifications, to wit; warranty of twelve months, service contract after warranty period is completed, in-house training of two technical staff and availability of spare parts at any time required.

Having reviewed the Tender Document the Appeals Authority observed that, save for the requirement of availability of spare parts which was clearly stipulated under Clause 12 of the ITB and Bid Data Sheet (BDS), the remaining additional information were not quantifiable or measurable. The Tender Document was not clear on what was to be shown or complied with by the tenderers in relation to the additional information. The said requirements were vague and unclear.

Thus, from the shortfalls of the Tender Document pointed out above, the Appeals Authority is of the settled view that, the Respondent's Tender Document did not conform to the requirements of Section 70 of the Act and Regulation 184 of GN No. 446 of 2013 which require the Tender Document to be worded in a clear and precise manner that will encourage competition.

The above notwithstanding, Clause 12.4 of the ITB read together with Clause 12 of the BDS required bidders to provide list of available spare parts for a period of five years and its current prices. The Appellant's tender lacked the list of spare parts to be supplied. The Appeals Authority reviewed Clause 12 of the ITB and observed that the requirement was clear with no ambiguity whatsoever. Therefore, the Appellant ought to have complied with such a requirement and if he thought that such a requirement was not clear, he ought to have sought for clarification pursuant to Regulation 13 of GN. No 446 of 2013 and Clause 8 of the ITB. Therefore, the Appellant's tender had been fairly disqualified.

From the above analysis, much as the Respondent's Tender Document was not properly drafted pursuant to the requirements of the law, it is the Appeals Authority's conclusion that the Appellant was fairly disqualified for failure to provide the list of available spare parts and its prices.

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

Taking cognizance of the findings above, the Appeals Authority finds that despite the fact that the Appellant's disqualification was proper for failure to provide the list of spare parts and prices, the said disqualification was based on defective Tender Document. Therefore, the Appeals Authority finds the Appeal partly to have merits and if the Respondent is still interested to procure the chiller, they are hereby ordered to re-start the Tender process in observance of the law. Each Party to bear own costs.

It is so ordered.

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

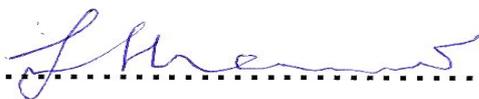
The Right to Judicial Review as per Section 101 of the Act is explained to the Parties.

This Decision is delivered in the presence of the Respondent and in the absence of the Appellant this 29th September, 2017.



Ms. MONICA P. OTARU
Ag:CHAIRPERSON

MEMBERS:

1. ENG. FRANCIS MARMO.....

2. ENG. ALOYS MWAMANGA.....