

IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY
AT DAR ES SALAAM

APPEAL CASE NO. 147 OF 2013

BETWEEN

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

AND

NATIONAL BOARD OF ACCOUNTANTS

AND AUDITORS.....RESPONDENT

DECISION

CORAM

- | | |
|--------------------------------|----------------|
| 1. Hon. A.G. Bubeshi, J. (rtd) | -Chairperson |
| 2. Mr. H.S. Madoffe | -Member |
| 3. Mr. K.M. Msita | -Member |
| 4. Mrs. N.S.N. Inyangete | -Member |
| 5. Ms. F.R. Mapunda | -Ag. Secretary |

SECRETARIAT

- | | |
|----------------------|-----------------|
| 1. Ms. Violet Simeon | - Legal Officer |
| 2. Mr. Hamisi Tika | -Legal Officer |

FOR THE APPELLANT

1. Mr. Burton K. Mwakisu- Advocate, Burton Law Chambers
2. Mr. Andrew Mwaisemba- Managing Director, Cool Care Services Limited
3. Mr. Wilfred Sikamba- Director of Operations

FOR THE RESPONDENT

1. Ms. Agnes A. Kessy- Chief Legal Officer
2. Mr. Robert .D. Luganda- representative of Chief Executive Officer
3. Mr. Fidelis Ngamka – representative Project Manager
4. Mr. Remi. P. Urio - Chairman, Tender Board
5. Mr. Faiza Mussa- Head PMU
6. Mr. Menye.D.Manga- Interconsult.

This decision was scheduled for delivery today 05th June, 2013, and we proceed to deliver it.

The Appeal at hand was lodged by M/S COOL CARE SERVICES LTD (hereinafter referred to as "the Appellant" against the NATIONAL BOARD OF ACCOUNTANTS AND AUDITORS, commonly known by its acronym, NBAA (hereinafter referred to as "the Respondent").

The said Appeal is in respect of Tender No. PA/052/2011-12/W/4B for the Supply, Installation, Testing and Commissioning of Air Conditioning and Ventilation (HVAC) Systems at the Proposed Accountancy Professional Centre-Phase II at Bunju - Dar es salaam (hereinafter referred to as "the tender").

According to the documents submitted to this Authority, as well as oral submissions by parties during the hearing, the facts of the Appeal may be summarized as follows:

The Respondent vide the Daily news paper of 08th February, 2013 invited eligible Sub- Contractors to submit their Bid in respect of the tender under Appeal.

The deadline for the submission of the said tenders was initially set for 11th March, 2013 but it was later on extended to 27th March, 2013.

Having purchased the Tender Document and being dissatisfied with the conditions provided therein, the Appellant vide their letter referenced CCSL/TA/06/13 dated 12th February, 2013, wrote to the Respondent requesting for clarification on some of the provisions contained in the Tender Document.

The Respondent vide their letter referenced NBAA/CF/TB.1/XI/25 dated 12th February, 2013 responded to the Appellant's request by providing clarifications sought.

Upon being dissatisfied with the clarifications given by the Respondent in the letter mentioned above, the Appellant vide their letter referenced CCSL/TA/10/13 dated 04th March, 2013, sought for an administrative review from the Respondent's Accounting Officer.

The Respondent vide their letter referenced NBAA/CF/T.B.1/XI/87 dated 19th March, 2013 upheld the complaint by the Appellant and issued clarifications of all issues raised together with an Addendum to complement their responses. The Respondent further extended the deadline for submission of the tenders so as to accommodate the said changes.

The Appellant being yet dissatisfied with the response given by the Respondent, on 26th March, 2013, vide their letter referenced CCSL/TA/15/13 opted to file their application for an administrative review to the Public Procurement Regulatory Authority (hereinafter referred to as "the PPRA") requesting them to order the Respondent to do the following;

- a. Issue terms and conditions of the main contract
- b. Include in the Sub-contract agreement percentages of amount of money which will be paid for each activity as stated in the BOQ after completion of each work

- c. Include in the General Conditions of sub-contract, a clause which state as to how the Employer will compensate the sub-contractor in the absence of the contract between the Employer and the sub-contractor.
- d. Make amendments in the General Conditions of sub-contract which will safeguard all the rights of the sub-contractor.
- e. To extend the deadline for the submission of tenders for two weeks in order for tenderers to take into consideration the decision to be issued by PPRA.

The PPRA delivered its decision on 25th April, 2013 whereby it partly upheld the complaint but advised the Respondent to proceed to the next stage of the tender process on grounds that the Appellant's prayers had been overtaken by events since the tenders submitted were already opened by the Respondent and some of

the issues raised were new and were not raised before the Accounting Officer.

Upon being dissatisfied by the decision of the PPRA, the Appellant on 02nd May, 2013, lodged an appeal to the Public Procurement Appeals Authority (hereinafter to be referred to as "the Authority")

SUBMISSIONS BY THE APPELLANT

The Appellant's documentary, oral submissions as well as responses from the questions raised by the Members of the Authority during the hearing may be summarized as follows:

That, they were aggrieved by the decision of the Respondent of refusing to attach the contract of the Main Contract to be part of the Tender Document while the law under Regulation 83(1)(e) of the Public Procurement (Goods, Works, Non Consultant Services and Disposal of Public Assets by Tender) Regulations of 2005 (hereinafter referred to as "GN. No. 97/2005")

allows the tenderers to be provided with the terms and conditions of the Main Contract.

That, they were dissatisfied with the PPRA's decision which validated the decision of the Respondent who ruled that the Project Manager would decide at the site, the percentage of the amount to be paid to sub-contractors after completion of an activity.

That, for the tenderer to price their tenders properly, procedures and conditions of payments of each activity had to be known before submission of tenders as clearly stated in Clause 16.4(a) to (e) of the Instructions to Bidders (hereinafter referred to as "the ITB"), to the contrary, the Respondent ignored it.

That, the Respondent's failure to include payment conditions in the Tender Document created risks to tenderers as the payment modality would not be known.

That, Clause 16.4 of the ITB indicated that the Schedules would be appended so that tenderers could

provide details and breakdown of their prices. To the contrary, the said Schedules were not appended in the Tender Document and there were no justifiable reasons for such an omission.

That, in their complaint to the Accounting Officer, they requested the Respondent to order their Tender Board to modify Clause 19.1 of the General Condition for Contract (hereinafter referred to as "the GCC") and include a statement on compensation which would be made to Sub-contractors, but the same was not done.

That, the Respondent's failure to issue terms and conditions of the Main Contract prevented them from submitting their tender and therefore curtailing their rights to tender.

Therefore, the Appellant prayed that the Respondent be ordered to do the following;

- i. To restart the tender process in observance of the law.

- ii. To compensate the Appellant the sum of Tshs. 5,120,000/= as per the following breakdown;
 - a. Tshs. 120,000/= filing fees
 - b. Tshs. 5,000,000/= legal fees
- iii. Any other relief the Authority may deem just and fit to grant.

SUBMISSION BY THE RESPONDENT

The Respondent's arguments as deduced from the documents availed to this Authority, as well as oral submissions and responses to questions raised by the Members of the Authority may be summarized as follows:

That, the terms and conditions of the main contract were not provided to the Appellant because their request was an abstract. That is, it did not indicate which provision of the law the Respondent had breached.

That, the Appellant misdirected themselves as far as the status of the Sub-contractor is concerned. They seem to believe that they had already become the Sub-contractor at the tendering stage, while in actual sense they were not.

That, the Sub-contract document which was attached in the Tender Document contained terms and conditions related to prominent Sub –contractor, they wondered as to which other terms the Appellant wanted to be given.

That, the tenderer could not request for the Main Contractor's terms and conditions at the tendering stage since they were not privy to the contract. The said terms and conditions were to be availed once the contract had been awarded to one of them pursuant to Clause 2.1 and 2.2 of the Tender Document.

That, all matters which were not clear in the Tender Document, could have been clarified during negotiation stage with the Successful tenderer pursuant to Regulation 95 of GN. No. 97/2005.

That, the Appellant's failure to submit their tender was occasioned by their own act of demanding a document which was not entitled to at the tendering stage.

That, the issue of payments on variations disputed by the Appellant was determined by Public Procurement Regulatory Authority (PPRA) during its administrative review process but their request would have not changed the substance of the tender under Appeal.

That, the Appellant was confused by the method of procuring the Sub-contractor whereby the one applied in this case was Nominated Sub-Contractor as opposed to the traditional one which was Domestic Subcontractor. In the later method a sub-contractor is appointed directly by the Main contractor while in the former method a sub contractor is appointed by the employer. In both cases the Sub-contractor must sign the contract with the Main Contractor.

That, the issue of percentages was not applicable because in the preamble to the Bills of Quantities

(BoQ's) which was part to the contract, it categorically stated that the quoted price shall be lump sum and not in percentage wise as per the Appellant's request.

That, if the Appellant had sufficient knowledge and experience in this field, they ought to have been able to prepare the cost estimates without actual knowledge of the percentages of payment for each activity.

That, the percentage of the amount to be paid for each activity, would have been determined by the Project Manager before issuance of the certificates depending on the extent of work performed and not otherwise.

That, Project Manager is appointed by the Respondent in order to verify the work done by both the Main Contractor and Sub-contractors, so the Appellant's right would have been protected.

It is in the above context, that both PPRA and the Respondent thought it prudent for the percentage of the amount to be paid to the Sub-contractor to be

determined by the Project Manager after inspection of an activity is completed.

That, the nature of the project – HVAC, cannot be broken down into small activities since it is a work system which is deemed to have been accomplished after testing and commissioning to ensure that the system is working. The Respondent is definitely interested in the working system rather than piece meal works proposed by the Appellant.

That, the Standard Bidding Document for Supply, and Installation of Plants and Equipment relied upon by the Appellant is not relevant for this project since, this is the work system and not the plant.

That, the Agreement for Sub-Contract document which the Respondent used for this tender, was issued by the National Construction Council (hereinafter referred to as "the NCC") and approval of using the same was granted by PPRA. Hence, there was no need of having another document.

That, the Respondent avers that the endless requests from the Appellant has caused the project to delay for about three months, which in essence shall cost variation to the project for keeping the Main Contractor on hold until such time when the services of the Sub-Contractor for HVAC has been procured.

That, the Appellant has decided to frustrate the project deliberately by keeping on submitting new issues in their requests for review rather than compiling them together so that they can be determined at once.

That, the Appellant's Appeal has no valid grounds to stop the tender which has already been awarded to the Successful tenderer.

The Respondent therefore prayed for the following:

- (i) The Appeal be dismissed in its entirety
- (ii) The Respondent requests the Authority to invoke the provisions of S.84 (4) of Public Procurement Act of 2004 Cap 410 (hereinafter referred to as the Act) as the suspension of this tender will cause irreparable loss to the Government and

the public as whole and the contract has already been awarded to the lowest evaluated tenderer

- (iii) The Appellant be ordered to pay the Respondent all direct costs associated with the project delays and the cost of attending this Appeal.
- (iv) Any other orders that the Authority feels will protect the Respondent from being a victim due to lack of the appropriate Tender Document for sub-contracting works.

ANALYSIS BY THE AUTHORITY

Having gone through the documents and having heard the oral arguments by the parties, the Authority is of the view that the Appeal is centred on three main issues, namely;

- Whether the Respondent was under an obligation to avail a copy of the main contract to the Appellant.
- Whether the Respondent's failure to include in the Tender Document Schedules mentioned

under Clause 16.4 of the ITB was detrimental to the Appellant

- To what reliefs, if any, are parties entitled to.

Having identified the issues in dispute, the Authority proceeded to resolve them as follows;

- 1.0. Whether the Respondent was under an obligation to avail a copy of the main contract to the Appellant.

In resolving this issue the Authority considered the Appellant's contention in this regard that, the Respondent has violated Regulation 83(1) (e) of GN 97/2005, in that, their failure to include the terms and conditions of the main contract had prejudiced their right since they were not in a position to determine what was contained therein and the risks they are going to encounter.

In reply thereof, the Respondent submitted that, the terms and conditions of the main contractor were to be

availed to the sub contractor who would sign the contract with the former after being established that they were successful. The Respondent contended further that, it was not possible for them to issue the contract of the main contractor to all tenderers as they were still at the tendering stage. Moreover, the Respondent contended that, if the Appellant had a genuine issue to be clarified in relation to the provision of the main contract; the same would have been taken into consideration during negotiation stage and not at the tendering stage.

In resolving the conflicting argument by the parties, the Authority revisited the definition of the sub contractor relied upon by the Respondent in substantiating that the Appellant was not entitled to be given the contract of the main contractor as they were not the sub-contractors. The said definition of sub contractors from Blacks' Law Dictionary reads as follows;

“Subcontractor – one who is awarded a portion of an existing contract by contractor, a general

contractor. For example a contractor who builds houses typically retains sub contractors to perform speciality work such as installing, plumbing..... each contractor is paid a somewhat lesser sum than the contractor receives for the work”.

The Authority revisited Section 3 of the Act and noted that the word Sub-contractor has not been defined. However, the Act contains the definition of the word Contractor which covers wide range of service providers including the Sub-contractors under the phrase “potential party”. For purposes of clarity, the Authority reproduces the said definition of contractor as hereunder;

“Contractor means a firm, company, corporation, organisation, partnership or individual person engaged in civil, electrical or mechanical engineering or in construction or building work of any kind including repairs and renovation, and who is, according to the context, a potential party or the part to a procurement contract with the procuring entity” (Emphasis added).

From the above provision of the law, the Authority is of the considered view that, much as the Appellant participated in the tender process by purchasing the Tender Document; they fall under the category of the potential party to the procurement contract as they intended to participate in the disputed tender process.

Furthermore, the Authority revisited Regulation 83(1) (e) of GN. No. 97/2005 relied upon by the Appellant that it was not complied by the Respondent when issuing the Tender Document. The said regulation provides as follows;

83(1)“the solicitation documents shall include the Instruction to tenderers with at minimum the following information:

(e) the terms and condition of the procurement or disposal contract, to the extent they are already known to the procuring entity, and the contract form, if any, to be signed by the parties.” (Emphasis added).

From the above quoted provision, the Authority is of the settled view that the terms and conditions of the contract which the Appellant ought to have known was that related to the tender they were tendering for, namely HVAC. The said provision does not infer to the Main contract terms, as the contract mentioned therein is one which relates to a specific tender, which means for the tender under Appeal it is the contract for HVAC.

Moreover, the Authority revisited Clause 2.1 of the NCC agreement which was relied upon by both the Appellant and the Respondent in their submissions. The said clause states as follows;

2.1“the Sub-Contractor shall be deemed to have clear understanding of all the provisions of the Main Contract except the detailed prices of the Main –Contractor included in the Schedule of Rates and Bills of Quantities” (Emphasis added).

Based on the above provision, the Authority is of the considered view that, the Appellant cannot conceivably use this Clause as the basis of demanding the terms and conditions of the Main contract. The said clause

relates to legal presumption of knowledge, that is to say all Sub-contractors are presumed to have knowledge of the Main contract during tender process.

This presumption is made on the premises that the Main Contract is a standard PPRA document which is Public a document. Consequently, all Sub-contractors are deemed to be cognizant of the same.

Therefore, the Authority disagree with the Appellant that, the Respondent was obliged to avail terms and conditions of the Main contract because the law presumes that he has such knowledge.

Accordingly, the Authority's conclusion with respect to issue number one is that, the Respondent's failure to avail a copy of the main contract to the Appellant did not prejudice them.

2.0. Whether the Respondent's failure to include in the Tender Document Schedules mentioned under Clause 16.4 of the ITB was detrimental to the Appellant

In resolving this issue, the Authority revisited Clause 16.4 of the ITB relied upon by the Appellant that was not complied by the Respondent, in that, the Schedules mentioned therein were not attached as a result they were not able to quote for the prices and percentages which would be paid for each of the activity listed as it was required. For purposes of clarity the Authority reproduces Clause 16.4 as hereunder;

16.4" In the Schedules, bidders shall give the required details and breakdown of their prices as follows:

(a) plant and equipment to be supplied from abroad (Schedule No.1) shall be quoted on CIF-named place of destination as specified in BDS....

(b) plant and equipment manufactured or fabricated within the Employer's country (Schedule No. 2) shall be quoted on an EXW....

- (c) Local transportation to the named place of destination as specified in BDS....

- (d) Installation Services shall be quoted separately (Schedule No. 4) and shall include rates or prices for all...

- (e) Recommended spare parts shall be quoted separately (schedule No. 6)....

Based on the above provision the Authority agrees with the Appellant that, tenderers were required to give details and breakdown of their prices as per the Schedules indicated therein. The said clause further, segments the tender into portions of various tasks and the manner of payments upon completion of each activity.

The Authority observes and the Respondent conceded that they did not provide the said Schedule.

The above notwithstanding, the Respondent submitted that they opted for Clause 16.1 of the Main tender document which provides as follows;

“unless otherwise specified in the Technical Specifications, Bidders shall quote for the entire facilities on a “single responsibility” basis such that the total bid price covers all the contractor’s obligations mentioned in or to be reasonably inferred from the bidding document in respect of the design, manufacture, including procurement and sub-contracting (if any), delivery, construction, installation and completion of facilities. This includes all requirements under the Contractor’s responsibilities for testing, pre commissioning and commissioning of the facilities and...” (Emphasis added)

In addition to the clear contents of the provision above, the Authority observes Despite these clear explanations contained in the above provision, the Authority noted that, the Preamble to the Bill of Quantities (hereinafter

referred to as the BOQ) contained in the Tender Document, Section VI, also supports the Respondent's action in this regard.

The said Preamble reads in part as follows;

3. "prices given in the BOQ against each item shall be for the complete work covered by that item shall be for the complete work covered by that item as detailed in the technical specifications, drawings or elsewhere in the bid document.

5. the lump sum prices in the "Priced Bill of Quantities" shall be inclusive of all costs, risks and expenses, overhead and profit related to the satisfactory performance and.....

From the above provisions, the Authority is of the considered view that, the tender document provided two avenues in the alternative. Since the Respondent

opted not to use Schedules, and since, all activities to be performed were already in the single responsibility basis as stated under clause 16.1, then, there was no need of having such schedules as contended by the Appellant.

That said, the Authority concurs with the Respondent that there was no need of issuing Schedules since the Respondent opted for the single responsibility basis avenue as provided for under Clause 16.1 of the ITB.

Consequently, the Authority's conclusion with respect to this issue is that Respondent's failure to include in the Tender Document Schedules mentioned under Clause 16.4 of the ITB was not detrimental to the Appellant.

3.0. To what reliefs, if any, are parties entitled to.

Having resolved the issue in dispute, the Authority proceeded to address the prayers by parties.

To start with, the Authority considered the Appellant's first prayer that, the Respondent be ordered to restart

the tender process in observance of the law. The Authority is of the view that the Respondent did not violate any law in the disputed tender process; therefore, the said order cannot be issued.

With regard to the Appellant's second prayer for compensation of Tshs. 5,120,000/= being Appeal filling fees and Advocates fees, the Authority observes that the Appellant does not deserve compensation as their Appeal has no merits.

The Authority also considered the prayers by the Respondent. The Respondent's first prayer that the Appeal be dismissed is hereby upheld as the Appeal has no legs to stand on.

With regard to the Respondent's Second prayer that the Appellant be ordered to compensate the Respondent for the direct costs arising from pursuing this Appeal, the Authority cannot grant it for want of jurisdiction as per Section 82(4) (f) of the Act. According to the afore-cited provision, payment of

compensation is confined to tenderers only and not procuring entities.

On the basis of the aforesaid conclusions, the Authority dismisses the Appeal and orders the Respondent to proceed with the project. It is also ordered that each party should bear their own costs.

Right of Judicial Review as per Section 85 of the PPA/2004 explained to parties.

Decision delivered in presence of the Appellant and the Respondent this 05th June, 2013.



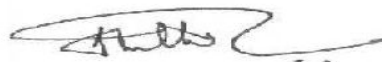
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JUDGE (rtd) A. BUBESHI
CHAIRPERSON

MEMBERS

1. Mr. H.S. Madoffe



2. Mr. K.M. Msita



3. Mrs.N.S.N. Inyangete

