

IN THE  
PUBLIC PROCUREMENT APPEALS AUTHORITY

AT DAR ES SALAAM

APPEAL NO. 21 OF 2018-19

BETWEEN

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

AND

MUHIMBILI ORTHOPAEDIC INSTITUTE (MOI) .....RESPONDENT

DECISION

CORAM

- |                                     |   |             |
|-------------------------------------|---|-------------|
| 1. Hon. Justice (rtd) Sauda Mjasiri | - | Chairperson |
| 2. CPA Fredrick Rumanyika           | - | Member      |
| 3. Adv. Rosan Mbwambo               | - | Member      |
| 4. Mr. Ole-Mbille Kissioki          | - | Secretary   |

SECRETARIAT

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

FOR THE APPELLANT

- |                          |   |                   |
|--------------------------|---|-------------------|
| 1. Eng. Andrew Mwaisemba | - | Managing Director |
|--------------------------|---|-------------------|

FOR THE RESPONDENT

- |                         |   |                                |
|-------------------------|---|--------------------------------|
| 1. Mr. Suleiman Mgerwa  | - | State Attorney                 |
| 2. Mr. Reginald Kimambo | - | Director of Technical Services |
| 3. Ms. Mariam Kasangala | - | Ag. Procurement Manager        |
| 4. Mr. Tareto Afraely   | - | Mechanical Engineer            |

The Appeal was lodged by M/s Cool Care Services Limited (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 of Tender No. PA-008/2016/2017/G/45 for Supply, Installation and Commissioning of Chiller (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 background of the Appeal can be summarized as follows:-

The Tender process was conducted through the Public Procurement Act of 2011, as amended (hereinafter referred to as "the Act") and the Public Procurement Regulations GN. No 446 of 2013 as amended (hereinafter referred to as "the Regulations").

On 28<sup>th</sup> May 2018 the Respondent through restricted tendering procurement method invited three eligible firms to submit their bids for the above named Tender. The deadline for submission of bids was set for 12<sup>th</sup> June 2018 and by that date only two bids were received.

The bids were subjected to evaluation process and after its completion the Appellant was recommended for the award of the Tender. However, the records indicate that the intended award to the Appellant was reversed after the Respondent had noted some technical shortfalls on the Appellant's bid; thus, M/s Samfrost (EA) Ltd was then recommended for the contract award. On 22<sup>nd</sup> June 2018 the Respondent informed the Appellant of its intention to award the Tender to M/s Samfrost (EA) Ltd. The said letter contained reasons for the Appellant's disqualification. Dissatisfied, the Appellant applied for administrative review to the Respondent on 25<sup>th</sup> June 2018. Having considered the Appellant's complaint the Respondent upheld it and nullified the proposed award to M/s Samfrost (EA) Ltd and awarded the Tender to the Appellant. The

Notice of Intention to award the Tender to the Appellant was issued on 20<sup>th</sup> July 2018. The Appellant accepted the award and submitted the Performance Security on 23<sup>rd</sup> August 2018.

Before signing the contract the Appellant was invited for negotiation which took place on 4<sup>th</sup> September 2018. During the negotiation process, the Appellant was informed that the existing chiller had broken down, thus a new one was urgently required. The Appellant was required to confirm if it would be able to supply a new chiller within the shortest period of time, due to the emergency situation. Having consulted the manufacturers, the Appellant informed the Respondent that the earliest time the chiller could be supplied was within 16 weeks. Having considered the Appellant's proposal, the Respondent's Tender Board approved termination of negotiation and approved rejection of the Appellant's tender.

On 19<sup>th</sup> September 2018 the Respondent informed the Appellant that their tender had been rejected. Dissatisfied with the rejection, the Appellant on 25<sup>th</sup> September 2018 applied for administrative review to the Respondent. On 27<sup>th</sup> September 2018, the Respondent issued its decision which dismissed the Appellant's complaint for lack of merits. Aggrieved further, the Appellant filed this Appeal on 2<sup>nd</sup> October 2018.

### SUBMISSIONS BY THE APPELLANT

The Appellant's submissions may be summarized as follows:-

1. The Appellant was among the tenderers who were invited to participate in this Tender after the initial floated tender was nullified by this Appeals Authority through its decision in Appeal Case No. 12 of 2017/18.
2. The Appellant submitted that, prior to the issuance of the invitation to tender it was requested by the Respondent to prepare technical specifications for this Tender. The said request was accepted and the said specifications were prepared. The Appellant contended

further that it interpreted some technical specifications which were included in the original tender as requested and forwarded the same to Respondent via email on 2<sup>nd</sup> May 2018.

3. The Appellant argued that its bid was submitted according to the deadline set and after the finalization of the internal processes they were awarded the Tender. The Appellant accepted the award and fulfilled all the conditions that were required before signing of the contract including submission of the performance security.
4. The Appellant submitted further that, having fulfilled all the conditions required prior to the signing of the contract, the Respondent wrongly rejected its Tender. According to the Appellant the Respondent acted contrary to its own Tender Document as well as the letter of award which specifically indicated that the contract period was six months starting from 15<sup>th</sup> August 2018 to 30<sup>th</sup> January 2019. The Appellant stated further that, the reasons adduced by the Respondent that the breakdown of the chiller had rendered the Appellant's contract impossible was unacceptable.

The Appellant contended that, the Respondent was aware that the existing chiller was old and required to be replaced urgently. Having such knowledge the Respondent was expected to replace the same by conducting procurement process within the shortest possible time in order to obtain a new chiller. The Respondent ought to have commenced this Tender process immediately after the decision of this Appeals Authority in Appeal Case No. 12 of 2017/18 issued on 29<sup>th</sup> September 2017. To the contrary, the process was commenced on May 2018. Thus, the Respondent cannot use the breakdown of the chiller in order to proceed with emergency procurement.

5. In support of its argument, the Appellant cited Section 4A of the Act as amended and Regulation 233(1) of the Regulations as amended. Given the stage the Tender process had reached, the Respondent should not have rejected the Appellant's Tender. It should have proceeded with signing of the contract. According to the Appellant,

even though negotiations were conducted after the award had been communicated, its results did not affect the Appellant's tender and the award made.

6. The Appellant challenged the rejection of its tender on the ground that the Respondent's conduct was intended to fulfill personal interests.
7. Finally, the Appellant prayed for the following orders:-
  - a) The Respondent be ordered to proceed with the process of contract signing with the Appellant;
  - b) The Respondent be ordered to compensate the Appellant the sum of TZS 300,000/- being Appeal filing fees; and
  - c) Any other orders the Appeals Authority may deem fit and just to grant.

#### REPLY BY THE RESPONDENT

The Respondent's submissions may be summarized as follows:-

1. The Appellant was the successful tenderer in this Tender and after notification of the award it submitted a performance security as required.
2. Before signing the contract, the Respondent's existing chiller broke down and as such it invited the Appellant for negotiations on the changes to be made on the delivery schedules. The Respondent wanted to be supplied with a new chiller within a shorter period than the one stipulated in the Tender Document. After consultations with manufacturers, the Appellant offered to supply the chiller within sixteen weeks. The Respondent argued further that due to breakdown of the existing chiller, it could not have waited for sixteen weeks, since all the six theaters, ICU, the analogue X-ray and sterilization services were not operating. Therefore, the Respondent

opted to reject the Appellant's tender as the breakdown of the chiller rendered the performance of the contract impossible.

3. The Respondent argued further that, several measures were taken to rescue the situation including ordering spare kits from South Africa and signing a contract with a new supplier for delivery of a new chiller within two weeks. The Respondent stated further that despite the fact that the Appellant challenged the rejection of its tender; the Respondent proceeded with the Tender process after obtaining a certification to proceed from the Public Procurement Regulatory Authority (PPRA).
4. The Respondent stated that under the emergency circumstances, it was forced to take immediate measures in order to save the lives of patients at the Hospital. Therefore, the Respondent's act did not contravene the requirements under section 4A 3(b) of the Act as contended by the Appellant since all tenders were rejected. It was argued that the issue of unfairness did not arise. Further, the Respondent had not contravened the requirements under Regulation 233(1) and (2) of the Regulations as amended since there was no contract signed between the parties. The Respondent was still at the negotiation stage and was therefore justified to reject the tenders.
5. In winding up its submissions, the Respondent stated that, the act of rejecting the Appellant's tender was in compliance with Regulations 16 (1) and (2)(d) and 228 (2)(c) of the Regulations. The Appellant's tender was rejected after unsuccessful negotiations. The Appellant was unable to supply the chiller within a shorter period in order to rescue the emergency situation.
6. Finally the Respondent prayed for the following orders:-
  - i. Dismissal of the Appeal; and
  - ii. Any other relief the Appeals Authority deems fit and just to grant.

## ANALYSIS BY THE APPEALS AUTHORITY

The Appeals Authority having gone through the appeal record, Tender proceedings including various documents and the oral submissions by the parties, is of the view that the Appeal is centred on three main issues, which were agreed by the parties, as follows:-

- 1.0 Whether the Appellant was eligible to participate in this Tender;
- 2.0 Whether the rejection of the Appellant's tender award was justified; and
- 3.0 What reliefs, if any, are the parties entitled to.

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

- 1.0 Whether the Appellant was eligible to participate in this Tender

Having reviewed the documents submitted before the Appeals Authority, it was observed that the Appellant admitted in its pleadings that it was involved in the preparation of the technical specifications relating to the Tender.

The Appeals Authority noted that, under Item 3(b) (ii) and (iii) of the Appellant's statement of Appeal, the Appellant had indicated that they were involved in the preparation of technical specifications for this Tender. During the hearing Members of the Appeals Authority asked the Appellant to substantiate the basis of such an argument. In reply thereto, the Appellant denied to have participated in the preparation of the technical specifications. It submitted that it was only involved in the interpretation of the technical specifications of the existing chiller. When further asked about its communication with the Respondent via email dated 2<sup>nd</sup> May 2018, the Appellant reiterated its earlier position that it assisted the Respondent to interpret the specifications. Members of the Appeals Authority asked the Appellant to explain whether or not its involvement in

the preparation and/ or the interpretation of the technical specifications did not give them an advantage over the other bidders in this Tender, thus creating a conflict of interest. The Appellant left the matter to be determined by the Appeals Authority.

In reply to the Appellant's contentions the Respondent denied to have requested the assistance of the Appellant on the interpretation or the preparation of the technical specifications. Upon being asked by the Members of the Appeals Authority to substantiate its refusal to accept the technical specifications sent to them via email by the Appellant, the Respondent conceded that they did not have any written communication on the matter.

In order to substantiate the validity of the argument by the parties on this point, the Appeals Authority revisited the Appellant's statement of appeal. Under Item 3(b)(iii), It is stated as follows:-

*"on 2<sup>nd</sup> May 2018, the Appellant sent by e-mail to the head of PMU the specifications (Appendix 20,20A,20B) which was promised by the Appellant on the meeting stated in paragraph 3(b)(ii) above; the specifications mentioned above were the simplest specifications of modern chiller which can be manufactured by any reputable chiller manufacturer in the world, such simple specifications had advantage of attracting more tenderers who would wish to participate in the tender and supply chillers of other brands..."*

The Appeals Authority further revisited the attachment to the Appellant's Statement of Appeal and noted that Appendix 20 is an email dated 2<sup>nd</sup> May 2018 from one Andrew Mwisemba (the Appellant's Managing Director) to Mr. Peter Bulube. The said email is reproduced herein below:-

*"Dear Peter,  
The basic specifications are as shown below:  
York Air cooled Scroll chiller model: YLAA0262HE from Mexico factory*

*Technical Data*

*Cooling Capacity: 245 kW*

*Total input Power: 79.9kW*

*Refrigerant: R 410A*

*Design conditions:*

*Evaporator water inlet temperature: 12C*

*Evaporator water outlet temperature: 7C*

*Ambient temperature: 35C*

*Regards*

*Andrew Mwaisemba"*

The Appeals Authority noted that, the said email was attached with Design Conditions Data Sheet for YORK (Appendix 20B).

Having reviewed Appendix 20B together with the Respondent's technical specifications, it was observed that, under Chiller Specifications, Bill No.1-Supply Install Test and Commission Air Cooled Rotary Liquid Chiller – one Unit, the description provided for Nominal cooling capacity, compressor type, compressor RLA, high LRA, Nominal voltage, fluid volume and refrigerant type, just to mention a few, were the same as those contained in the Appellant's email and its attachment dated 2<sup>nd</sup> May 2018 sent to one Mr. Peter Bulube.

Furthermore, the name Peter Bulube appearing in the Appellant's email, had also appeared in the Respondent's various internal correspondences. The same person had identified himself as the Secretary to the Tender Board.

From the above facts, the Appeals Authority is of the settled view that, the Appellant's email mentioned above indeed contained technical specifications which formed part of the Tender Document issued to the tenderers. The Appeals Authority finds the Respondent's act of involving the Appellant in the preparation and/or the interpretation of the technical

specifications and at the same time inviting it to bid for the Tender to have contravened Clause 3.4 (g) of the Instruction to Tenderers (ITB) read together with Regulation 6(3)(b) GN. No. 446 of 2013 as amended. For purposes of clarity the said ITB and the Regulation are respectively reproduced herein below:-

*"3.4 A bidder may be considered to have a conflict of interest with one or more parties in the bidding process, if they:*

*(g) participated as a consultant in the preparation of the design or technical specifications of the supplies and related installations that are subject of the bid".*

*"6(3)(b) a tenderer who is engaged by the 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 a continuation of earlier contract) or acquiring assets from the same project".*

[Emphasis provided]

In view of the above mentioned provisions and given the fact that the Appellant was involved in the preparation of the technical specifications, the Appellant should not have participated in this Tender. The Appeals Authority is of the considered view that the Appellant was not eligible to bid for this Tender as there is a conflict of interest. The participation as bidders by parties involved in the design of the tender process is likely to generate a major negative impact on competition. In the Appeals Authority's view, this contravenes the principle of equal treatment to tenderers. Therefore, the Appeals Authority answers the first issue in the affirmative.

2.0 Whether the rejection of the Appellant's tender award is justified

In relation to the second issue, given the Appeals Authority findings on the first issue that the Appellant was not eligible to participate in the Tender, the Appeals Authority will not delve on it.

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

In view of the above findings, the Appeals Authority hereby dismisses the Appeal and makes no order as to costs.

Order accordingly.

This Decision is binding on the parties and may be executed in terms of Section 97 (8) of the Act.

The Right of Judicial Review is available to the parties as per Section 101 of the Act.

This Decision is delivered in the presence of the Respondent and in the absence of the Appellant this 16<sup>th</sup> November 2018.



HON. JUSTICE (rtd) SAUDA MJASIRI  
CHAIRPERSON

MEMBERS:

1. CPA FREDRICK RUMANYIKA.....
2. ADV. ROSAN MBWAMBO.....