

IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY
AT DAR ES SALAAM
CONSOLIDATED APPEAL CASES NO. 28 AND 29 OF 2017-18
BETWEEN
M/S NANDHRA ENGINEERING AND CONSTRUCTION
COMPANY LIMITED..... APPELLANT
AND
SONGEA MUNICIPAL COUNCIL.....RESPONDENT

DECISION

CORAM

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

SECRETARIAT

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

FOR THE APPELLANT

1. Mr. George M. Kilindu - Advocate
2. Mr. Nimesh Barmeda - General Manager
3. Mr. John Joseph Dafa - Quantity Surveyor

FOR THE RESPONDENT

1. Ms. Tina Sekambo - Municipal Director
2. Mr. Alto A. Liwolelu - Municipal Legal Council
3. Mr. David K. Mayira - Head Procurement Management Unit

The two Appeals were lodged by M/S Nandhra Engineering and Construction Company Ltd (hereinafter referred to as "the Appellant") against SONGEA MUNICIPAL COUNCIL (hereinafter referred to as "the Respondent"). The Appeals are in respect of two Tenders; namely, Tender No. LGA/103/2017/2018/W/43 for Construction of New Bus Terminal at Tanga Ward in Songea Municipal Council and Tender No. LGA/103/2017/2018/W/54 for Rehabilitation of Roads to Asphalt Concrete Standard (10.3 km) respectively (hereinafter referred to as "the Tenders").

Due to similarities of the grounds of appeals the two Appeals are consolidated and argued together.

According to the documents submitted to the Public Procurement Appeals Authority (hereinafter referred to as "the Appeals Authority"), the facts of the Appeals may be summarized as follows:-

The Respondent invited tenderers to participate in the Tenders through the Daily News and Uhuru Newspapers dated 11th November, 2017. The deadline for the submission of the tenders was set for 24th November 2017, whereby four firms submitted their tenders in respect for Tender No. 43 and five firms for Tender No. 54.

The tenders were then subjected to evaluation which was conducted in three stages namely; preliminary, detailed and post qualification evaluation. At the preliminary evaluation, three tenders for Tender No. 43 and four tenders for tender No. 54 were disqualified, the Appellant inclusive, for being non responsive to the Tender Documents.

The remaining tender by M/s China Sichuan International Co-operation Company Ltd in both Tenders was subjected to Detailed Evaluation and Post Qualification, respectively. Upon completion of the evaluation process the Evaluation Committees recommended award of the contracts to M/s China Sichuan International Co-operation Company Ltd at a contract price of TZS. 6,189,340,930.00 for Tender No. 43 and for TZS. 10,960,078,225.00 for Tender No. 54 both VAT exclusive. The Tender Board meeting held on 1st December, 2017 approved award of the Tenders as recommended subject to successful negotiations. On 8th December 2018 negotiations were conducted and the same were approved by the Tender Board and later on approved by the Finance Committee.

On 12th December 2017, the Respondent issued the respective Notices of Intention to award the Tenders to all tenderers, the Appellant inclusive.

The Notice also informed the Appellant that his tender was disqualified for two reasons namely;

- i. That he submitted photocopies of Electronic Fiscal Device (EFD) that was not certified by the Tanzania Revenue Authority (TRA); and
- ii. That he submitted Tax Clearance Certificate also not certified by TRA as required by the Tender Document.

Dissatisfied, on 5th January 2018 the Appellant applied for administrative review, challenging his disqualification and the awards proposal to the successful tenderers.

On 18th January 2018, the Respondent issued his written decisions by dismissing the complaints for lack of merits. Consequently, on 25th January 2018, the Appellant lodged these Appeals.

SUBMISSIONS BY THE APPELLANT

The Appellant's grounds of Appeals as well as submissions during the hearing may collectively be summarized as follows;

- i. That, the Appellant was disqualified because his Tax Clearance certificate was certified by an advocate and not TRA as per the requirements of Clause 24.3 of the Tender Document.

Arguing that, the reasons for the Appellants disqualification are not tenable in law, the Appellant's counsel cited Section 10 of the Notary Public and Commissioners for Oaths Act, Cap 12. That, it is only advocates who are mandated to certify documents apart from Judges

and Magistrates. Thus, TRA does not have mandate to certify documents, even if the Respondent's wanted them to do so, but they cannot exclude advocates who have been mandated by the Act of Parliament. That in any case, Clause 28.1 of the Instructions To Tenderers (ITT) allows the Respondent to satisfy itself on compliance of the Tender Document, which the Respondent should have done through TRA.

The Appellant's counsel insisted that, the Appellant's tenders were substantially responsive as they complied with the requirements of Clauses 28.1 and 28.2 of the ITT. If the Respondent thought that there was any omission, then the same could have been easily rectified without affecting the tender process.

- ii. That, the Respondent intends to award the Tender to the highest quoted tenderer that is TZS. 6,189,340,930.00 for Tender No. 43 and TZS. 10,960,078,225.00 for Tender No. 54. The difference between the Appellant's prices and the proposed tenderer are about TZS 877,986,175.50 for Tender 43 and TZS. 1,265,729,820.00 for Tender No. 54 as opposed to the Appellant's quoted prices TZS.5, 311,354,754.50 and TZS. 9,694,348,405.00 respectively. Thus, the Respondent should have taken into account the difference of the amounts tendered by the parties.
- iii. That, there was no negotiation between the Respondent and the proposed tenderer in respect to price reduction.

Finally, the Appellant prayed for the following reliefs:-

- i. Nullify the Appellant's disqualification in both Tenders; or
- ii. The Appellant be awarded both Tenders as they complied with all the requirements provided for in the Tender Documents.

REPLIES BY THE RESPONDENT

The Respondent's replies to the grounds of Appeals may be summarized as follows:-

- i. That, the evaluation criteria were clearly stated in the Tender Document under Clause 11. 1 (h) of the ITT and Clause 8 of the Bid Data Sheet ("BDS") which specified documents to be submitted by tenderers including certified copies of Tax Clearance from TRA.

The Respondent submitted that the Appellant's documents were not certified as required. The Tax Clearance Certificate and confirmation letter from TRA on use of EFD machines were neither certified by TRA nor advocate as claimed by the Appellant.

The purported Tax Clearance Certificate and confirmation letter from TRA were submitted by the Appellant on 28th November, 2017 four days after opening of the Tenders. Thus, the said documents could not be considered in the evaluation process as part of the Appellant's tender.

- ii. That, the awards were proposed to the successful tenderer after establishing that the firm complied with requirements of the Tender Documents after completing the evaluation process.
- iii. That, the Tenders were properly awarded to the proposed tenderers, as they found to be substantially responsive to the Tender requirements. Hence, the Appellant's allegations that the Government could have saved TZS. 877,986,175.50 and TZS. 1,265,729,820.00 are not tenable in law.

Finally the Respondent prayed for the following reliefs:-

- i. A declaration that the Tender was fairly awarded to the proposed tenderer;
- ii. That there is no additional money of TZS. 877,986,175.50 and /or TZS. 1,265,729,820.00 to be spent by the Government;
- iii. That the Respondent complied with procedures provided in the Act and its Regulations; and
- iv. Dismissal of the Appeals for lack of merits.

ANALYSIS BY THE APPEALS AUTHORITY

The Appeals Authority is of the view that, the Appeals have three issues calling for determination and these are;

- 1.0 Whether the Appellant's disqualification is proper in law;

- 2.0 Whether the awards of the Tenders to the proposed successful tenderers are justified; and
- 3.0 What reliefs, if any, are the parties entitled to.

Having identified the issues in dispute the Appeals Authority proceeded to resolve them as follows:-

- 1.0 Whether the Appellant's disqualification is proper in law

To ascertain the validity of reasons given for the Appellant's disqualification, the Appeals Authority revisited Clause 11. 1 (h) of the ITB which was modified by Clause 8 of the BDS, which provides that;

ITT11.1 "(h) the Tender submitted by the Tenderer shall comprise the following:

(a)...

(h) and any information or other materials required to be completed and submitted by Tenderers, as specified in the Tender Data Sheet.

BDS(8) "Other information or materials required to be completed and submitted by tenderers:

(a)

(h) Original Tax Clearance certificate from Tanzania Revenue Authority (TRA) or a copy certified by TRA.

(i)

(l) Original Written confirmation of acquiring and using of EFD machine from TRA."

The above quoted provisions clearly entail that tenderers were required to submit either original tax clearance or a copy certified by TRA, and original confirmation from TRA on the use of EFD machine. During the hearing, the learned council for the Appellant insisted that, indeed the said documents were duly certified by advocate as per the requirement of the law and attached to the tenders. He firmly insisted that the Tender Documents by all means cannot override the law.

The Appeals Authority revisited the Appellant's tender and observed that, he had attached copies of Tax Clearance Certificate and confirmation letter of acquiring and use of EFD machine, which were neither certified by TRA nor advocate as contended by his advocate.

When asked by Members of the Appeals Authority whether the Appellant thinks that his tender had been tempered with; he denied any tempering but insisted that his memory tells him that the documents were certified.

Furthermore, the Appeals Authority perused the letter by the Appellant referenced No. NCC/SMC-RV/RR-ACS/06/2017 dated 24th November 2017 which submitted the documents after tenders were opened and part of it reads as follows:-

"We hereby draw your attention that the original documents from Tanzania Revenue Authority Morogoro was issued on 23rd November 2017, therefore we had to submit the scanned copies instead, as to allow qualifying for the criteria required."

"We wish to submit the original together with certified true copies for your kind reference."

Going with the content and facts of the Appellants letter mentioned herein the Appeals Authority is of the firm view that, the Appellant's tenders were submitted with copies of Tax Clearance Certificate and confirmation of acquiring and using EFD machine without certification by neither TRA nor advocate as required by the Tender Documents and/or the law.

In addition, the Appeals Authority finds that, the Appellant's act of submitting documents after the time and date of the tender opening contravened Clause 24.3 of the ITT which inter alia prohibits modification of the tender after the deadline for submissions. Further to that, the Appellant contravened the Requirements of Clauses 11.1(h) of the ITT and 8 of the BDS mentioned above, which mandatorily provide that tenders shall comprise original or certified Tax Clearance certificate by TRA and confirmation of acquiring and using EFD machine also by TRA.

We are of the firm view that, the Respondent's acts of disqualifying the Appellant tender complied with Clause 28.3 of the ITT which requires conformity of documents with Clause 11 of the ITT. If any of the information is missing or not in accordance to the instructions given then the tender has to be rejected.

We are of the firm view that, the Appellant's disqualification complied with Section 72(1) of the Public Procurement Act No. 11 of 2011 ("the Act") and Regulation 203 of the Public Procurement Regulations GN.No.446 of 2013 ("GN.No.446 of 2013") which require the basis for the tender evaluation to be clearly specified in the Tender Document and evaluation to be conducted in compliance with the specified criteria.

Therefore, the Appellant's argument that, the Respondent ought to have treated the said defects of failure to submit original or certified documents as minor deviation are not tenable in law, since the said requirements were clearly and explicitly stated in the Tender Documents.

The Appeals Authority further considered the Appellant's advocates submission that, the Respondent's requirements that TRA should certify copies of the Tax Clearance Certificate and written confirmation on acquiring and use of EFD machine could not be used to override the law which confers power to advocates to certify documents. The Appeals Authority could have considered the advocates argument if and only if the said documents attached to the Appellant's tenders were indeed certified by advocate. Unfortunately, this is not the case. The certified documents were submitted at a later stage four days after tenders were opened.

From the above observation, the Appeals Authority concludes the first issue in the affirmative that, the Appellant's disqualification was proper in law.

2.0 Whether the awards of the Tenders to the proposed successful tenderers are justified;

In resolving this issue, the Appeals Authority considered the Appellant's contention that; the Tenders were awarded to the highest quoted tenderers, and thus causing loss to the Government.

The Appeals Authority revisited Regulation 212(a) of GN. No.446 of 2013 which provides clearly that the successful tender shall be the tender with

the lowest evaluated tender price which may not necessarily be the lowest quoted price. The said provision reads as follows:-

Reg. 212 "The successful tender shall be-

(a)The tender with the lowest evaluated tender price in case of goods, works or services ... but not necessarily the lowest submitted price, subject to any margin of preference applied."

The above quoted provision entails that to be successful in any tender process does not mean having the lowest or highest price rather it depends on compliance with all requirements provided in the Tender Document. The Appellant could have been the lowest evaluated tenderer if he had complied with all the requirements of the Tender Document. Since he had been fairly disqualified at the preliminary evaluation stage, then he could not be considered for price comparison with the proposed successful tenderers.

The Appeals Authority took cognizance of the Appellant's contention that, there was no negotiation made in respect of price reduction and the proposed bidder being the lowest evaluated, we find it prudent for the Respondent to call for negotiation pursuant to Regulation 225 of GN. No. 446 of 2013, as amended.

The Appeals Authority therefore, concludes the second issue in the affirmative that the awards of the Tenders to the proposed successful tenderers are justified.

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

Taking cognizance of the findings above, we dismiss the Appeals for lack of merits. The Respondent is hereby free to proceed with Tender processes. 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.

This Decision is delivered in the presence of the Respondent and absence of the Appellant today, this 7th day of March 2018.


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Ms. MONICA P. OTARU
Ag. CHAIRPERSON

MEMBERS:

1. ENG. FRANCIS MARMO


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2. MR. LOUIS ACCARO


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