

IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY
AT DAR ES SALAAM

APPEAL CASE NO. 29 OF 2015-16

BETWEEN

M/S MUWA TRADING (TZ) LTD.....1ST APPELLANT

M/S TANGANYIKA WATTLE COMPANY LTD.....2ND APPELLANT

AND

TANZANIA ELECTRIC SUPPLY COMPANY LTD.....RESPONDENT

DECISION

CORAM

- | | | | |
|----|------------------------|---|-----------------|
| 1. | Ms. Monica P. Otaru | - | Ag. Chairperson |
| 2. | Eng. Aloys J. Mwamanga | - | Member |
| 3. | Eng. Francis T. Marmo | - | Member |
| 4. | Ms. Florida Mapunda | - | Ag: Secretary |

SECRETARIAT

- | | | | |
|----|------------------------|---|---------------|
| 1. | Ms. Violet S. Limilabo | - | Legal Officer |
|----|------------------------|---|---------------|

FOR THE 1ST APPELLANT

1. Mr. Badru Issa Badru - Managing Director
2. Mr. Julius Kihyo - Director

FOR THE 2ND APPELLANT

1. Mr. Rajeev Singh - Chief Executive Officer
2. Mr. Edmund Manubi - F.A.A
3. Mr. Iraenes Kasimbazi - Company Secretary

FOR THE RESPONDENT

1. Eng Daniel Raphael - Procurement Officer
2. Mr. Epafra Anthony - Legal Officer
3. Mr. Nsajigwa Simpilu - Accountant
4. Ms. Elimamba Tenga - Principal Procurement and Compliance Officer

FOR THE OBSERVERS

1. Mr. William G Marealle - Low's Creek Timber Ltd Agent
2. Mr. Galy A. Wessels - Director Low's Creek Timber Ltd

This Decision was scheduled for delivery today, 06th May 2016 and we proceed to do so.

The Appeal was lodged by M/s MUWA TRADING (TZ) LTD (hereinafter referred to as "the 1st Appellant") against the TANZANIA ELECTRIC SUPPLY COMPANY LTD known by its acronym TANESCO (hereinafter

referred to as "the Respondent"). Upon notification of the existence of the Appeal by the Appeals Authority to other tenderers who participated in the tender process, M/s TANGANYIKA WATTLE COMPANY LTD opted to join this Appeal as the 2nd Appellant.

The Appeal is in respect of Tender No. PA/001/15/HQ/G/001 for Supply of Wooden Poles for the year 2015 under Framework Contract (hereinafter referred to as "the Tender"). The said Tender had 7 Lots. While the 1st Appellant disputes their disqualification in relation to Lot 6, the 2nd Appellant does so in relation to 6 Lots he participated in, save for Lot 4.

The Respondent vide the Guardian and Daily News newspapers dated 8th June 2015 invited tenderers to participate in the Tender. The deadline for submission of Tenders was set for 24th July 2015 whereby twenty three (23) tenders were received altogether.

The tenders were then subjected to evaluation which was conducted in three stages namely; preliminary, technical and financial evaluation. At the preliminary evaluation, seventeen (17) tenders, the Appellants' inclusive were found to be non responsive to the tender requirements hence were disqualified. The remaining six tenders were subjected to technical evaluation whereby one tenderer was found to be non responsive for failure to comply with Technical Specifications. The remaining five tenders were subjected to financial evaluation. Price Schedules of all qualified tenders were checked for arithmetical errors and necessary corrections were made. After completion of financial evaluation, tenders were ranked and award was recommended to M/s Sao Hill Limited for Lot 1, M/s Vuka

Timbers PTY LTD for Lot 2, M/s Treated Timber Product for Lot 3, M/s Rousant International Ltd for Lot 4, M/s Maqhilika Timbers (Pty) Ltd for Lot 5, M/s Low's Creek Timber Ltd for Lot 6 and M/s Sao Hill Limited for Lot 7. The Tender Board in its meeting held on 9th October 2015 approved award of tenders as recommended by the Evaluation Committee.

On 8th January 2016, the Respondent informed the 1st Appellant of its intention to award the Tender for Lots 1 and 7. The said letter was received by the 1st Appellant on 10th March 2016 informing them that their tender was disqualified for the reason that they had submitted a Bid Security in the form of Insurance Bond instead of a Bank Guarantee from a reputable bank as specified in the Bid Data Sheet (hereinafter referred to as BDS).

Dissatisfied with the reason for disqualification, on 12th March 2016, the 1st Appellant applied for administrative review to the Respondent.

On 29th March 2016, the Respondent dismissed the 1st Appellant's complaint for lack of merits. Aggrieved, on 11th April 2016, the 1st Appellant filed this Appeal to the Public Procurement Appeals Authority (hereinafter referred to as "the Appeals Authority").

SUBMISSIONS BY THE 1ST APPELLANT

The 1st Appellant listed two main grounds of Appeal which could be summarized as follows;

First, that they were unfairly disqualified on the ground that they failed to submit a Bid Security from a reputable bank as required by the Tender Document. In disputing the reason given for their disqualification the 1st Appellant submitted that, according to Clause 18 of the Instructions To Tenderers (hereinafter referred to as "ITT") tenderers were required to submit Bid Security in the alternative, namely; Bid Securing Declaration, Bank Guarantee or an Insurance Bond, therefore tenderers were at liberty to submit either a Bid Security provided for in the ITT or in the BDS.

The 1st Appellant insisted that Clause 23 of the BDS did not modify the ITB instead it provided for additional forms of Bid Security and the amount of 1.5 %; thus, if the Respondent intended to use Clause 23 of the BDS as a base of evaluation criteria then the checklist provided for in the Tender Document at pages 43 and 44 was made purposely to mislead the tenderers. This is due to the fact that the checklist states clearly that Bid Security was to be in accordance with Clause 18 of the ITT; hence it cannot be argued that BDS prevails over the checklist. Thus, the Respondent's act contravened Section 47 of the Public Procurement Act of 2011 (hereinafter referred to as "the Act") which requires equal treatment of and fairness to tenderers; and Regulation 203 of the Public Procurement Regulation of 2013 (hereinafter referred to as "GN No. 446/2013") which

requires evaluation of tenders to be done by using criteria provided for in the Tender Document.

Second, the 1st Appellant argued that, they were the lowest tenderer for Lot 6 with the quoted amount of TZS. 9,830,580,000.00 compared to the proposed successful tenderer M/s Low Creek Timber Ltd with quoted amount of TZS. 16,969,521,640. Thus, value for money will not be attained if the award would be made to the proposed successful tenderer.

Finally, the 1st Appellant prayed for the following reliefs;

- i) Halt the decision to disqualify the Appellant's tender based on unfounded basis;
- ii) Award the Tender to the 1st Appellant since they had quoted lowest price compared to the proposed successful tenderer M/s Low Creek Timber Ltd.
- iii) Failure of the above reliefs the 1st Appellant be compensated 25% of the total amount of their tender price.

SUBMISSIONS BY THE 2ND APPELLANT

The 2nd Appellant was among the tenderers who participated in the Tender. Having received notification of the Appeal from the Appeals Authority, they opted to join in the proceedings and submitted as follows;

That, they were disqualified on the ground that, they are not financially viable or have no ability to liquidate their current liabilities. The 2nd Appellant disputes the said reason for disqualification by stating that, their

financial statement as at 31st December 2013 shows crystal clear that it comprises five (5) production lines that is; Wattle Factory, Power Plant, Saw Mill Pole Plant and Plywood Plant, the financial status of which would not at all affect the production of poles which was the subject matter of the Tender. Further, in the year 2012 the 2nd Appellant got a loan of USD 6 million to install Plant and they are still servicing the same through regular installments, therefore their financial capabilities should not be doubted.

The 2nd Appellant submitted further that, the current liabilities consist of trade and payables, provision for post retirement benefits and borrowing. Under trade and other payable amount to TZS. 3.892 Million, out of that, 1.414 Million is due to related machinery supplied for installation of new plywood plant. While under borrowing TZS 4.395 Million is the current position of the borrowing including principal payment in the following year against term loan of plywood plant. Thus, there could not be any impact on pole availability basing on the fact that the 2nd Appellant has its own natural forest for pole production comparing to other tenderers who depend on buying. Furthermore, the 2nd Appellant contended that, they had also provided Bid Bond showing the capability to cover risk as per Clause 18 of the ITT.

That, the 2nd Appellant also disputes award proposed to M/s Vuka Timbers PTY LTD for Lot 2, M/s Treated Timber Product for Lot 3, M/s Maqhilika Timbers (Pty) Ltd for Lot 5 and M/s Low's Creek Timber Ltd for Lot 6 on

the reason that they had quoted higher prices than the prices quoted by them; hence, it is not fair for them to be awarded the tender.

Finally, the 2nd Appellant prayed for the following reliefs;

- i. The decision which disqualified their tender be quashed as it lacks legal basis;
- ii. Be awarded the tender for the Lots they had contested for since they were the lowest tenderer; and
- iii. Compensation amounting to 25% of the total amount of their tender price in case the decision is not altered.

SUBMISSIONS BY THE RESPONDENT

The Respondent's submission in reply to the 1st Appellant's ground of Appeal may be summarized as follows;

That, the 1st Appellant's tender was disqualified for failure to comply with Clause 23 of the BDS which modified Clause 18.1 of the ITT. The said Clause 23 of the BDS states that "The amount of Tender Security is 1.5 % of tender value in the form of Banker's Cheque or Bank Guarantee from a reputable Bank". Thus, the required Bid Security was to be in the form of Banker's Cheque or Bank Guarantee. However, the 1st Appellant submitted bid security in the form of an Insurance Bond contrary to the requirement of the Tender Document.

That, according to Regulation 184(4) of GN No 446 of 2013, procuring entities are not allowed to modify ITT as issued by the Public Procurement

Regulatory Authority (PPRA); instead, they are required to modify BDS by inserting specific requirements of the particular tender. The same was done by the Respondent in this Tender. Additionally the preamble to the BDS states clearly that, if there is conflict between ITT and BDS, then BDS will prevail. Thus, the 1st Appellant was required to comply with requirements of BDS; hence, their non compliance resulted to disqualification of their tender.

With regard to the grounds of Appeal raised by the 2nd Appellant, the Respondent submitted as follows;

That, the 3 years Financial Statements submitted by the 2nd Appellant clearly showed that, they had more current liabilities than current assets. The standard formula that is used to calculate the financial viability of the company requires the current ratio to be more than 1 if the Current Assets are being divided by Current Liabilities. From the Audited Financial Statements submitted by the 2nd Appellant, it was crystal clear that the current ratio was less than 1; hence, it was observed that the firm was not financially viable, as a result they were disqualified. The 2nd Appellant's argument that the company is stable as it has several lines of credit and a natural forest for pole production cannot be accepted at this juncture since their financial viability was to be shown in the Financial Statements submitted.

Finally, the Respondent prayed for dismissal of the Appeal since both Appellants were fairly disqualified from the tender process.

ANALYSIS BY THE APPEALS AUTHORITY

In this Appeal there were two triable issues namely;

1. Whether the Appellants were fairly disqualified
2. What reliefs, if any, are the parties entitled to

Having identified the issues, the Appeals Authority proceeds to determine them as hereunder –

1. Whether the Appellants were fairly disqualified

In resolving this issue the Appeals Authority deemed it proper to frame the following sub issues;

- Whether the 1st Appellant complied with Bid Security requirement
- Whether the 2nd Appellant complied with financial requirements as provided in the Tender Document

Having framed sub issues the Appeals Authority proceeds to resolve them as follows;

Whether the 1st Appellant complied with Bid Security requirement

In order to substantiate if the 1st Appellant complied with the requirement of the Bid Security, the Appeals Authority deemed it necessary to review the Tender Document so as to satisfy itself of the type of Bid Security that was required in this Tender. In the course of so doing, the Appeals Authority noted that Clause 18.1 of the ITT states clearly that the required

Tender Security form, amount and currency will be specified in the Tender Data Sheet (BDS). The Appeals Authority revisited Clause 23 of the BDS and noted that the same modified Clause 18.1 of the ITT and it contains the following words;

"The amount of Tender security is 1.5% of the tender value in the form of banker's cheque or bank guarantee from the reputable bank". (Emphasis added)

Furthermore, the Appeals Authority revisited preamble to the BDS which provides as follows;

"The following specific data for the goods to be procured shall complement, supplement, or amend the provisions in the Instructions to Tenderers (ITT). Whenever there is a conflict the provisions herein shall prevail over those in the ITT". (Emphasis supplied)

From the above quoted provisions the Appeals Authority is of the firm view that, the required Bid Security in this tender was either Banker's Cheque or Bank Guarantee.

The Appeals Authority considered the 1st Appellant's argument that according to Clause 18.3(a) of the ITT the required bid securities were Bid Securing Declaration, Bank Guarantee or an Insurance Bond and observes that the said provision provides general guidance on Bid Securities. The required Bid Securities for this Tender was specifically provided for in the BDS as quoted herein above. The Appeals Authority wishes to enlighten the 1st Appellant that according to Regulation 184 (3) of GN No 446 of 2013 Procuring Entities when conducting tender processes are required to

use standard bidding document issued by PPRA. Procuring Entities are not allowed to modify Instruction to Tenderers (ITT) instead specific requirements of the tender are to be inserted in the Tender Data Sheet (BDS) as per Regulation 184(4) of GN No 446 of 2013 which states as follows;

"Any changes to the standard tender documents shall be introduced only through tender data sheets or through special conditions of contract". (Emphasis added)

Having reviewed the Tender Document, the Appeals Authority noted that the Respondent correctly modified the standard bidding document by inserting amongst others the specific Bid Security for this Tender in the BDS.

With regard to the 1st Appellant's argument that Regulation 23(5) of GN No 446 of 2013 allows tenderers to submit the Bid Security at their option, the Appeals Authority observes that the 1st Appellant had read the said provision in isolation of others. Regulation 23(5) relied upon by the 1st Appellant was to be read together with Regulation 23(1)(b) and (6) which provide as follows;

23(1) "Where the procuring entity requires tenderers submitting tenders to provide a tender security-
(b) the solicitation document shall stipulate that issuer of the tender security and the confirmer, if any, of the tender security, and the form and terms of the tender security have to be acceptable to the procuring entity".

23(6) "The procuring entity shall specify in the solicitation document, any requirements with respect to the issuer and the nature, form

amount and other principal terms and conditions of the required tender security".

The above quoted provisions clearly indicate that the required Bid Security had to be specified in the Tender Document and the same was done by the Respondent in this particular Tender as it was so specified in the BDS. Tenderers were required to submit bid security as stated in the BDS and if the allowed forms of bid securities were several, then tenderers had an option to choose any among the specified. The Appeals Authority wishes to enlighten the 1st Appellant that, Regulation 23(5) comes into play if the specified bid securities are more than one. In this Tender, the specified bid securities were Banker's Cheque or Bank Guarantee, hence tenderers had an option of submitting any amongst the two.

Based on the above findings, the Appeals Authority is of the settled view that the 1st Appellant's act of submitting Bid Security in the form of an Insurance Bond had contravened the requirement of the Tender Document. Therefore, the Respondent's act of disqualifying the 1st Appellant is in accordance with Clauses 18.6 and 28.1 of the ITT read together with Regulation 204(2)(c) of GN No.446 of 2013 which states that any tender not accompanied by the required tender security should be rejected. For purposes of clarity the Appeals Authority reproduces Regulation 204(2) (c) as hereunder;

"Material deviations to commercial terms and conditions which justify rejection of a tender shall include the following;

(c) failure to submit a tender security as specified in the tendering documents" (Emphasis supplied)

The Appeals Authority considered the 1st Appellant's contention that, they deserve to be awarded the tender since their price is lower than that of the successful tenderer and states that the 1st Appellant was disqualified at the preliminary evaluation stage for failure to comply with bid securities requirement; hence its tender did not reach the financial evaluation stage where prices were compared. The Appeals Authority wishes to remind the 1st Appellant that the lowest price is not the basis for award of tender, tenderers are required to comply with tender requirements before their prices are being compared.

Therefore, the Appeals Authority's conclusion in relation to sub issue one is that, the 1st Appellant failed to comply with Bid Security requirement hence they were fairly disqualified.

Whether the 2nd Appellant complied with financial requirements as provided in the Tender Document

In resolving this sub issue, the Appeals Authority revisited the Tender Document and noted that financial requirements were provided for under Clause 14 of the BDS which modified Clause 13.3(b) of the ITT. For purposes of clarity Clause 14 of BDS is reproduced as follows;

"The Bidder shall furnish documentary evidence that it meets the following financial requirement(s):

- (i) Average annual turnover over the last three years shall be at least USD 50,000*
- (ii) Audited financial statements (including balance sheets) for the last three complete financial years (2011, 2012 and 2013)*
- (iii) The Total amount of liquid Assets shall be at least 150% of the bid price". (Emphasis supplied)*

Having noted the financial requirements for this tender, the Appeals Authority revisited the tender submitted by the 2nd Appellant in order to substantiate if all financial requirements were complied with. In the course of so doing, the Appeals Authority noted that the 2nd Appellant complied with items (i) and (ii) herein above. It was noted further that, the balance sheets attached to each financial statement clearly showed that the company had more current liabilities than current assets. Overall the amount of liquid assets is only 135% of the bid price which is less than 150% stipulated. As such, any explanations or clarifications by the 2nd Appellant that they are financially viable are contrary to the documentation submitted.

Further, according to Regulation 206(1) of GN No 446 of 2013 determination of responsive tenders is to be based on the contents of the tender itself without recourse to the extrinsic evidence. That means, in evaluating financial capabilities, only audited financial statements were to be considered so as to establish if the firm is financially viable or not.

According to Clause 28.3 of the ITT, procuring entities are allowed to reject tenders if they fail to comply with amongst other things requirements provided for under Clause 13 of the ITT. In the Appeal at hand it is crystal clear that the 2nd Appellant had failed to comply with financial requirements as per Clause 13.3(b) of the ITT read together with Clause 14 of the BDS. Thus, their tender had been rightly rejected by the Respondent.

With regard to the 2nd Appellant's argument that they ought to have been awarded the tenders for Lots 2, 3, 5 and 6, the Appeals Authority observes that, since their tender was fairly disqualified at the Preliminary Evaluation Stage, the 2nd Appellant could not be considered for award of the Tender.

Accordingly, the Authority's conclusion is that both Appellants were fairly disqualified for failure to comply with Tender requirements.

TO WHAT RELIEFS, IF ANY, ARE THE PARTIES ENTITLED

In determining the prayers, the Appeals Authority took cognizance of its findings made above, that is, both Appellants have been fairly disqualified and therefore rejects all the prayers by the Appellants and grants the Respondent's prayer that the Appeal be dismissed for lack of merits. The Appeal is hereby dismissed in its entirety. Each Party to bear own costs.

This Decision is binding upon the parties and may be enforced in any court of competent jurisdiction in terms of 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 both Appellants and the Respondent, this 06th May, 2016.


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Ms. MONICA P. OTARU
Ag. CHAIRPERSON

MEMBERS:

1. ENG. F. T. MARMO 

2. ENG. A. J. MWAMANGA 