

IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY
AT DAR ES SALAAM

APPEAL CASE NO 30 OF 2015-16
BETWEEN

M/S SUPERCOM LIMITED.....APPELLANT

AND

PERMANENT SECRETARY, PRESIDENT'S OFFICE
PUBLIC SERVICE MANAGEMENT.....RESPONDENT

INFOTECH PRIVATE LIMITED } INTERESTED
M/S SCI TANZANIA LTD } PARTIES

DECISION

CORAM

1. Hon. Vincent K.D Lyimo, J. (rtd) - Chairman
2. Mrs. Rosemary A. Lulabuka - Member
3. Mr. Louis P. Accaro - Member
4. Ms. Florida R. Mapunda - Ag. Executive Secretary

SECRETARIAT

1. Ms. Violet S. Limilabo - Legal Officer
2. Mr. Hamis O. Tika - Legal Officer

FOR THE APPELLANT

1. Ms. Bella Canevich - Chief Legal Officer
2. Ms. Cleopatra Mukangara - Technical Director
3. Mr. Alnoor M. Nkya - Operations Manager
4. Mr. Atugonza Banyenza - administrator

FOR THE RESPONDENT

1. Mr. Samson Akyoo - Director of PMU
2. Ms. Lilian D. Francis - Senior Legal officer
3. Ms. Hamida John Mduma - Senior ICT officer
4. Mr. Elias Nyabusani - Director of ICT – Lands
5. Mr. Peter S. Mabale - Supplies Officer
6. Mr. Mulembwa Munaki - Project Coordinator RCIP – PO
PSM
7. Mr. Jones S. Mapunda - Procurement Expert RCIP - PO
PSM

FOR THE 1ST INTERESTED PARTY - **INFOTECH PRIVATE LIMITED**

1. Mr. Muhammad Bilal Saeed - Pre – Sales Consultant

FOR THE 2ND INTERESTED PARTY - M/s SCI (TANZANIA) LTD

1. Mr. Andrew Mbagga - Head of Projects
2. Mr. James Dotto - Head of Sales
3. Mr. Biseko Nyagabona - Head of Sales
4. Mr. Timothy Maina - Architect
5. Mr. Sanjai Brosw - COO

FOR THE OBSERVER - COMPUTECH LIMITED

1. Mr. Robert Mushi - Head of Sales
2. Mr. V Jayatheerthan - Managing Director

This decision was scheduled for delivery today 17th June 2016 and we proceed to do so.

The Appeal was lodged by the M/s SuperCom Limited (hereinafter referred to as "the Appellant") against the Permanent Secretary, President's office Public Service Management (hereinafter referred to as "the Respondent"). M/s Infotech Private Ltd, the successful tenderer joined this Appeal as an Interested Party so as to protect its interest in event issues will be raised against them.

For the reasons to be found herein below, an appeal by M/s SCI Tanzania Limited was relegated to the status of an Interested Party.

The Appeal is in respect of Tender No. ME/005/RCIP/2014/2015/G/04 for System Design, Development, Configuration, Supply, Installation and Commissioning of Hardware and Software for RITA's Birth and Death Registration Systems (hereinafter referred to as "the tender").

After going through the record of proceedings submitted to the Public Procurement Appeals Authority (hereinafter referred to as "the Appeals Authority"), the facts of the Appeal may be summarized as follows:-

The Respondent, advertised through the Daily News and the Guardian newspapers dated 16th and 17th September 2015 respectively, inviting tenderers to participate in the tender. The tender was also advertised

through dgMarket, UNDB online and Utumishi website. The tender was under the International Competitive Bidding (ICB) procedures specified in the World Bank Guidelines: Procurement under IBRD loans and IDA Credits, Edition of January 2011, revised edition July 2014 (hereinafter referred to as 'World Bank Procurement Guidelines'), and was open to all tenderers from eligible Source Countries. Tenderers were required to quote their bid prices in US dollars. The deadline for submission of the tenders was set for 20th October 2015 but was later extended to 3rd December 2015 whereby twelve (12) tenders were received.

During the official opening of the tenders, it was noted that bidders Nos. 1, 4, 7, 9 and 11 quoted respective bid prices VAT Inclusive while bidders Nos. 2, 3, 5, 6, 8, 10 and 12 did not indicate whether or not their respective bid prices were VAT inclusive or VAT Exclusive.

After the tender opening ceremony, the tenders were subjected to evaluation which was conducted in four stages namely; Preliminary Evaluation, Financial Evaluation, Technical Specification Compliance and Post-Qualification. During Preliminary Evaluation two (2) tenders were disqualified for being non-responsive. The remaining ten (10) tenders were subjected to Financial and Technical evaluation. At the Financial Evaluation stage, three (3) tenders were found with arithmetical errors and the same were corrected. Furthermore, all tenders were subjected to price additions and adjustments followed by ranking, in which the tender submitted by the proposed successful bidder was ranked first, followed by that of the Appellant. Upon the conclusion of the Financial Evaluation process, there followed Technical Evaluation, and all ten

tenders were found to be compliant. Thereafter, both financial and technical scores were combined, whereby M/s InfoTech Private Limited was found to be the lowest evaluated tenderer and was recommended for award. At its meeting held on 9th March 2016, the Tender Board approved award of the tender to M/s InfoTech Private Limited at a contract price of USD 4,753,330.28 VAT Inclusive.

On 6th April 2016, the Respondent notified all tenderers of its intention to award the tender to M/s InfoTech Private Limited. By the same letter, each of the unsuccessful bidders was notified of the reasons for being unsuccessful. The Appellant was informed that its tender was not recommended for award as it was the *second lowest evaluated* tender.

Dissatisfied, the Appellant by his letter dated 19th April 2016 applied for administrative review to the Respondent's Accounting Officer challenging its disqualification. The Appellant asserted that its tender was the lowest evaluated and should have been awarded the tender.

On 05th May 2016, the Respondent by his letter Ref. No. SA 46/301/02/64 dismissed the application for lack of merits. The Respondent informed the Appellant that the award to the proposed successful bidder had been fairly made.

Aggrieved, on 20th May 2016 the Appellant lodged his Appeal to the Appeals Authority. Upon receipt of this Appeal, the Appeals Authority notified the Respondent and all tenderers about its existence. Upon being notified on the existence of the Appeal, M/s InfoTech Private

Limited opted to join in as an Interested Party while M/s SCI Tanzania Limited in JV with Indra Sistemas SA joined as the 2nd Appellant.

SUBMISSIONS BY THE APPELLANT

The Appellant listed three main grounds of Appeal which could be summarized as follows-

1. That, the Respondent's intention to award the tender to M/s InfoTech Private Limited was wrong since the said proposed successful bidder had quoted higher price of USD 4,578,322.00 as against USD 3,921,840.00 quoted by the Appellant. And after the evaluation process, it is not possible for M/s InfoTech Private Limited to emerge as the lowest evaluated tenderer.
2. That the Respondent erred in effecting arithmetical corrections when evaluating the Appellant's tender. The Appellant argued that its tender clearly quoted prices for all items except wherein it was indicated as blank, insisting that the costs for items in blank were already included in other items. In that respect, the Respondent erred when conducting financial evaluation by adding cost to the items that were marked '0' and also in making price adjustment for failure to consider the unit price quoted for some of the items. The Appellant pointed out that the Respondent erred in adding a total of 28 Units at USD 263,195.00 for WAN customer Premises Routers, instead of USD 3,250 per unit as quoted by the Appellant. The Appellant submitted further that if it was necessary to effect adjustments, only USD 317,650.00 could have been added to the read out price, such that the revised price

should be USD 4,293,490.00 against the tender price of the proposed successful tenderer which was USD 4,753,330.28. The Appellant then concluded by arguing that the tender submitted by M/s InfoTech Private Limited was the highest evaluated tender.

3. Addressing issues of VAT, the Appellant argued that the Respondent erred in law for adding VAT to the Appellant's tender while the read out price of USD 3,921,840.00 was inclusive of VAT and other charges. The Appellant's tender price was quoted in accordance with Clarification No. 3 issued by the Respondent on 13th October 2015 (Question No. 15) which indicated that the project was not tax exempted; hence the quoted price has to include amongst others, all taxes, levies and duties. The Appellant in complying with such a requirement quoted its price including VAT.

Finally the Appellant prayed for the following;

- Declaration that the Appellant is the lowest evaluated tenderer hence entitled for the award of the tender.
- Award the tender to them.

REPLIES BY THE RESPONDENT

In reply to the Appellant's grounds of Appeal, the Respondent submitted that, the Appellant's tender was not the lowest as contended. The Respondent stated that the Appellant had not only failed to comply with Clause 14.3 of the Instructions to Bidders (hereinafter referred to as "ITB") but also erred in quoting the unit prices of some items. Clause 14.3 requires tenderers to provide a breakdown of any

composite or lump-sum items included in the cost tables. The Appellant was required to quote in full for all items so as costs for the whole project could be determined. The Respondent pointed out that since the Appellant had quoted partially for some items while omitting to quote for others, it had to conduct price adjustments as per Clause 28.6(c)(iii) of the ITB. Areas in which price adjustments were conducted were as follows:

- a) The Appellant indicated to supply application servers (rack mount), but quoted one (1) instead of 14. The Respondent added 13 units and each unit price was USD 15,330.00. Thus the total sum for the said item was USD 199,290.00.
- b) The Appellant did not quote for Search Engine Appliance at RITA Server Room. The Respondent added price for the said item using price quoted at GDC amounting to USD 28,380.00.
- c) The Appellant did not quote for Archiving System at RITA Server Room. The Respondent added price for the said item using price quoted at GDC amounting to USD 228,860.00.
- d) The Appellant quoted eight (8) instead of 20 units required for WAN Customer Premises Router at major Hospitals and did not quote for 16 WAN Customer Premises Router for the District Councils. Therefore 28 units were added at the total costs of USD 91,000.00 (unit price of USD 3,250.00).
- e) The Appellant quoted four (4) licenses for Oracle Edition Solution for Enterprises Relational Database Server Application

at GDC and RSR but did not price them. The Respondent priced the said item using unit price quoted by M/s SCI Tanzania Limited who had the highest price for the item (i.e USD 3,625.00). The total cost of USD 14,400.00 was added.

Thus, the Respondent added to the Appellant's quoted price of USD 3,921,840.00 a total of USD 562,030.00 being adjusted price.

The Respondent submitted further that, during financial evaluation, it was noted that the price quoted by the successful tenderer included recurrent cost amounting to USD 578,076.00. According to Clause 14.1 of the Bid Data Sheet, recurrent costs were not applicable. Hence, USD 578,076.00 was deducted from the successful tenderer's bid and the price changed to USD 4,753,330.28 after correction and addition of VAT, thus becoming the lowest evaluated tender.

The Respondent submitted further that, the Appellant's tender price was VAT exclusive. The Appellant's Bid Submission Form, Grand Summary Cost Table and Supply and Installation Cost Summary Table did not indicate that the price quoted was VAT inclusive.

Therefore, the Respondent prayed for the following reliefs-

- i) Declaration that the Appellant is not the lowest evaluated tenderer;
- ii) An order that the contract should not be suspended since the same may lead to the withdrawal by the World Bank to finance the project and the Government is not in a position to finance the same using own sources;

- iii) Cost of this Appeal and all that may be incurred by the Respondent due to delays in implementation of the project.

ANALYSIS BY THE APPEALS AUTHORITY

Before delving into the merits and issues raised in this Appeal, and as already hinted herein above, the Appeals Authority will first resolve the status of M/s SCI Tanzania Limited who wanted to join in as 2nd Appellant.

Having revisited the documents submitted as well as oral submissions during the hearing, the Appeals Authority noted that, M/s SCI Tanzania Limited had not complied with review mechanism provided for under the Public Procurement Act No. 7 of 2011 (hereinafter referred to as "the Act") read together with Public Procurement Regulations, GN No. 446 of 2013 (hereinafter referred to as "GN 446 of 2013"). According to Section 60(3) of the Act, tenderers are required to file complaint, if any, within fourteen days to the procuring entity after receipt of a Notice of Intention to Award and being dissatisfied with such a notice. Regulation 231(9) of GN 446 of 2013 provides that, if a tenderer fails to exercise his rights provided for under Regulation 231(2) which is in *pari materia* with Section 60(3) of the Act, he will be deemed to have waived his right to lodge complaint. During the hearing M/s SCI Tanzania Limited conceded to have received the Notice of Intention to Award on 6th April 2016 and did not raise any complaint at that time. They decided to join in this Appeal only after the notification from the Appeals Authority. In this regard, the Appeals Authority finds M/s SCI Tanzania Limited to have waived its right of Appeal after receipt of a Notice of Intention to

Award and opted not to challenge it. Never the less M/s SCI Tanzania Limited was allowed to sit in as an Interested Party.

In this Appeal there were three triable issues namely -

- Whether the Appeals Authority has jurisdiction to determine this Appeal;
- Whether the evaluation of tenders was conducted in accordance with the law; and
- To what reliefs, if any, are the parties entitled.

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

1.0 Whether the Appeals Authority has jurisdiction to determine this Appeal

In the process of handling this Appeal, the Appeals Authority *suo moto* deemed it proper to establish its jurisdiction on the subject matter of the Appeal after realising that the tender process was conducted using World Bank Procurement Guidelines.

In reviewing the World Bank Procurement Guidelines, the Appeals Authority noted that Clause 15 gives guidance on the debriefing procedures by the World Bank for any aggrieved tenderer. The said Clause state as follows;

15. "As stated in paragraph 2.65, if, after notification of award, a bidder wishes to ascertain the grounds on which its bid

was not selected, it should address its request to the Borrower. If the bidder is not satisfied with written explanation given and wishes to seek a meeting with the Bank, it may do so by addressing the Regional Procurement Manager for the Borrowing country who will arrange the meeting at the appropriate level and with relevant staff. The Purpose of such a meeting is only to discuss bidder's bid, and neither to reverse the Bank's position that has been conveyed to the borrower nor to discuss the bids of competitors" (Emphasis added)

Based on the above quoted provision, the Appeals Authority observes that, there are two stages of review mechanism, to wit; review by the borrower (procuring entity) and review by the Regional Procurement Manager of the borrowing country. The Appeals Authority noted further that, under review procedures provided therein, tenderers are allowed to file complaint in relation to their own tenders and not in relation to tenders submitted by other competitors (bidders). That means, in the event of unlawful or unfair award the World Bank cannot provide relief to the aggrieved tenderers.

From the documents submitted to this Authority, it is crystal clear that, the Appellant is challenging the award to the proposed successful tenderer. The Appellant argues that the successful bidder quoted the highest price compared to his. Thus, since the Appellant challenges the award made to the successful tenderer, and that there is no room under the World Bank Procurement Guidelines which allows the

Appellant to file such a complaint, it is the settled view of the Appeals Authority that, the only avenue for tenderers with such complaint is this Authority which is allowed by the law to cater for all complaints arising from public procurement. The Appeals Authority finds itself with jurisdiction to handle this kind of Appeal because wrongful, unlawful or unfair award cannot be redressed under the World Bank Procurement Guidelines and tenderer's rights to seek legal relief would be curtailed.

In the light of the above observations, the Appeals Authority concludes that, it has Jurisdiction to hear such complaints since the World Bank is not in a position to provide such remedy.

2.0 Whether the evaluation of tenders was conducted in accordance with the law

In resolving this issue the Appeals Authority confines itself to the Appellant's contentions which centred on two points, (i) that the tender has been awarded to a tenderer who quoted the highest price while he had quoted the lowest. (ii) That as the Appellant's tender was VAT inclusive, the Respondent should not have made adjustments for VAT to its quoted tender price.

In order to resolve the above issues, the Appeals Authority deemed it proper to frame the following sub issues;

- Whether the successful tenderer's price was highest compared to that of the Appellant;
- Whether the Appellant's tender was VAT inclusive

Having framed the sub issues, the Appeals Authority proceeded to resolve them as hereunder-

2.1 Whether the successful tenderer's price was highest compared to that of the Appellant

In order to determine the validity of the Appellant's argument on this point, the Appeals Authority revisited the Minutes of the tender opening dated 3rd December 2015 and noted that, the read out prices were USD 4,578,322.00 and USD 3,921,840.00 for the proposed successful tenderer and the Appellant respectively. The Appeals Authority observed that, during evaluation of tenders, corrections, additions and adjustments were done to all tenders. Starting with the successful tenderer's tender, the Appeals Authority noted that, Evaluators corrected the quoted price by deducting the sum of USD 578,076.00 which was quoted as recurrent cost because under Clause 14.1 of the BDS the same was not applicable. After deduction of the aforementioned amount, the price of the successful tenderer came to USD 4,000,246.00. Furthermore, the sum of USD 28,000.00 was added to the successful tenderer's price after it was realized that they did not quote for 40 Payment Receipt Printers.

On the Appellant's side, the Appeals Authority observed that, the quoted price of USD 3,921,840.00 was modified after addition and adjustment made due to the shortfalls stated earlier in the Respondent submissions (supra). As a result the sum of USD 562,030.00 was added to the original price quoted by the Appellant, thus making the Appellant's new price to be USD 4,483,870.

The Appeals Authority revisited the tender submitted by the Appellant *vis-a-vis* the Tender Document and observed that, indeed the items pointed out by the Evaluation Committee were not priced and others were partially quoted. Furthermore, the Appeals Authority noted that addition and adjustment were made in conformity with Clauses 14.2 and 28.6(c)(iii) of the ITB which provides as follows-

14.2"... Items omitted altogether from the cost tables shall be assumed to be omitted from the bid and provided that the bid is substantially responsive, an adjustment to the bid price will be made during evaluation in accordance with ITB Clause 28.6(c)(iii)".
(Emphasis added)

28.6(c)(iii) "Goods and Services that are required for the Information System but have been left out or are necessary to correct minor deviations of the bid will be added to the total Supply and Installation Costs using costs taken from the highest prices from other responsive bids for the same goods and services or in absence of such information, the cost will be estimated at the prevailing list prices..."
(Emphasis supplied)

From the facts above and the quoted provisions, the Appeals Authority is of the settled view that correction, addition and adjustment that have been done to the tender of the successful tenderer and the Appellant

were justifiable and indeed were in accordance with the law. Needless to say, throughout the hearing of this Appeal, the Appellant could not appreciate the meaning of the term “lowest evaluated price” as defined under the Act.

Accordingly, the Appeals Authority’s conclusion in sub issue one is that, the successful tenderer’s price was not the highest as contended by the Appellant.

2.2 Whether the Appellant’s tender was VAT inclusive

In order to substantiate the validity of the Appellant’s arguments that it’s tender was VAT inclusive; the Appeals Authority revisited it’s tender document and observed that both the Appellant’s Bid Form and Grand Summary Cost Table, where silent on whether the tender price quoted was VAT inclusive. This finding is also supported by the Minutes of the Tender Opening.

The Appeals Authority revisited question 15 in the 3rd clarification issued by the Respondent on 13th October, 2015 relied upon by the Appellant and observed that, the said clarification required tenderers to price their tenders in accordance with the Tender Document. The Appeals Authority revisited Clause 14.4 (a) of the ITB which guides on tax issues. The said Clause provides as follows;

- (a) Goods supplied from outside the Purchaser’s country:

“Unless otherwise specified in the BDS, the prices shall be quoted on a CIP (named place of destination) basis, exclusive of all taxes, stamps, duties, levies and fees imposed on Purchaser’s country...” (Emphasis added)

The Appeals Authority revisited Clause 14.4(a) of the Bid Data Sheet (BDS) which modifies Clause 14.4(a) of the ITB and it reads as follows;

“Foreign goods priced on a CIP (named place of Destination) basis:

- (i) The contract of carriage shall include the cost of unloading the goods at the destination, as well as payment by the Supplier of the cost of customs formalities, duties, taxes or other charges payable on the foreign Goods for their transit through any country other than the Purchaser’s Country”.
(Emphasis supplied)

From the quoted provisions the Appeals Authority observed that, tenderers were not required to include taxes, duties and levies imposed in the purchaser’s country since the applicable Incotems was CIP. Tenderers were required to include the said taxes, duties and levies that would be paid for transit of the goods through any country other than the Purchaser’s country. Thus, the imposition of VAT by the Respondent in this tender during evaluation process was not proper. However, taking the adjusted prices by the Appellant which is USD 4,483,870.00 as well as the adjusted price of the proposed successful

tenderer USD 4,028,246.00 without inclusion of VAT, the price quoted by the successful tenderer remains to be the lowest.

The Appeals Authority does not agree with the Appellant's contention that, his price was inclusive of all taxes since it is against the requirement of Tender Document and also his Bid Form does not support his contention. Based on the above findings, the Appeals Authority is of the settled view that the Appellant's tender was VAT exclusive.

Accordingly, the Appeals Authority's conclusion on the second issue is that the evaluation of tenders was properly conducted and the proposed award of tender to the successful tenderer has been fairly made.

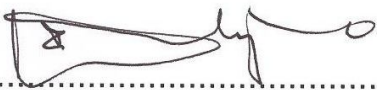
3.0 To what reliefs, if any, are the parties entitled

In determining the prayers, the Appeals Authority took cognizance of its findings made above, that is, the Appellant was the second lowest ranked tenderer and the procurement process was complied with. The Appeals Authority rejects all the prayers by the Appellant and hereby upholds the Respondent's prayer that the Appeal be dismissed for lack of merits. The Appeal is hereby dismissed in its entirety and 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 the Appellant and the Respondent, this 17th June, 2016.


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VINCENT K.D. LYIMO, J. (RTD)
CHAIRMAN

MEMBERS:

- 1. **MRS. ROSEMARY A. LULABUKA.** 
- 2. **MR. LOUIS P. ACCARO** 