

IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY
APPEAL CASE NO. 31 OF 2015-16

BETWEEN

M/S SIVAN DESIGN D.S. LTD (ISRAEL)

REPRESENTATIVE OF JOINT VENTURE.....APPELLANT

AND

PERMANENT SECRETARY

PRIME MINISTER'S OFFICE.....RESPONDENT

DECISION

CORAM

- | | |
|-------------------------------------|------------|
| 1. Hon. Vincent K.D Lyimo, J. (rtd) | -Chairman |
| 2. Mrs. Rosemary J. Lulabuka | -Member |
| 3. Ms. Monica P. Otaru | -Member |
| 4. Mr Ole-Mbille Kissioki | -Secretary |

SECRETARIAT

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

FOR THE APPELLANT

- | | |
|---------------------|---------------------------|
| 1. Mr. Shloms Sivan | - Chief Executive Officer |
|---------------------|---------------------------|

2. Mr. Ngassa Dindi - Advocate-Law Castles
3. Mr. Moses Kwelukilwa - Advocate- Law Castles
4. Mr. Oscar Mfinanga - Legal Officer

FOR THE RESPONDENT

1. Mr. Barney Laseko - Project Coordinator -PSCP- PMO
2. Mr. Andrew Kapilima - Procurement specialist - PSCP
3. Mr. Juvenalist Motete - Legal Specialist - PSCP
4. Mr. Hussein Kandoro - Legal Officer
5. Mr. Thomas Mwijarubi - Procurement Specialist
6. Mr. Elias Nyabusani - Director of ICT

This decision was set for delivery today 27th June 2016, and we proceed to deliver it.

The Appeal was lodged by **M/s SIVAN DESIGN D.S. LTD (ISRAEL)** a **representative of the joint venture** (hereinafter referred to as “**the Appellant**”) against the **PERMANENT SECRETARY, PRIME MINISTER’S OFFICE** (hereinafter referred to as “**the Respondent**”).

The Appeal is in respect of Tender NO. ICB/LAND/NC/6 for Design, Supply, Installation and Commissioning of Integrated Land Management Information Systems (ILMIS) (hereinafter referred to as “**the Tender**”).

According to the documents 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 vide the Daily News, the Citizen and Mwananchi newspapers dated 16th February 2015 and United Nations Development Business (UNDB) website DB Ref. No. WB750-02/15 dated 17th February 2015, invited bidders to participate in the tender. The tender was conducted using the International Competitive Bidding (ICB) procedures specified in the World Bank’s Guidelines: Procurement of Goods, Works, and non Consulting Services: under IBRD Loans and IDA Credits, (hereinafter referred to as ‘**the World Bank Procurement Guidelines**’). The deadline for submission of tenders initially set for 26th March 2015 was extended to 16th April 2015 whereby seven tenders were received.

After the tender opening ceremony, tenders were subjected to evaluation which was conducted in four stages namely; Preliminary Evaluation, Detailed Evaluation, Technical Evaluation and Post-qualification. After completion of the evaluation process, M/s Techno Brain Global FZE JV was recommended for the award of the tender and the Evaluation Report was submitted to the Procurement Management Unit (PMU) on 18th May 2015. In reviewing the said report, the PMU noted some anomalies and returned the report to the Evaluation Committee to re-evaluate. The Committee re-evaluated the tenders as directed and came up with new recommendations of award to M/s Trimple Europe B. V. and M/s Sivan Design D. S. Ltd pending clearance of the risk outlined in the project.

The said re-evaluation report was submitted to the Permanent Secretary of the Prime Minister’s Office on 8th July 2015. Upon receiving the re-evaluation report, the Permanent Secretary appointed another review team of six (6) members who, upon reviewing the report, noted various irregularities and directed that the new findings be incorporated into the report. Following the completion of

that exercise, the Evaluation Committee conducted a second re-evaluation in which M/s Sivan Design D. S. Ltd. was recommended for award of the tender.

The Tender Board at its meeting held on 15th to 19th September 2015, deliberated on the Evaluation Report as presented and disapproved the recommendation due to some serious irregularities and ordered for re-evaluation of the tenders under a new independent Evaluation Committee. Further, the said Board directed the Respondent to request for extension of the bid validity period from the World Bank.

On 8th October 2015, the Project Implementation Unit (PIU) requested the World Bank to grant “No Objection” for extension of Bid Validity Period as directed by the Tender Board. In support of the said request, the PIU submitted the third Evaluation Report to the World Bank. The World Bank on 20th October 2015 responded to the Project Coordinator Unit (PCU) with emphasis on specific areas of the Evaluation Report to be reviewed without necessarily conducting total re-evaluation as directed by the Tender Board.

Upon receiving the World Bank’s responses, the PIU and experts from the Ministry of Lands, Housing and Human Settlements, (Ministry of Lands) incorporated the World Bank comments and re-submitted the fourth Evaluation Report to the World Bank on 16th November 2015. On 23rd November 2015, the World Bank issued yet other comments to be incorporated in the Evaluation Report for “No Objection”. Working on the comments issued by the World Bank, the PIU, Ministry of Lands and the procurement experts from the World Bank incorporated the comments given and the fifth Evaluation Report was resubmitted on 3rd December 2015.

On 8th December 2015, the World Bank for the third time issued another set of comments to be incorporated in the Evaluation Report. The comments were incorporated and the sixth revised Evaluation Report was submitted to the World Bank on 10th December 2015 with proposal to award the tender to M/s Trimple Europe B.V. This proposal was turned down by the World Bank on 23rd

December 2015 because the proposed successful tenderer did not comply with Post-qualification criteria. The World Bank advised the PIU to conduct post-qualification to the remaining tenderers until a qualified tenderer is found otherwise the tender should be re-advertised.

Upon receiving the comments, the PIU and Ministry of Lands revisited the Evaluation Report whereby the second and the third ranked tenderers were disqualified at the post qualification stage for non-compliance. Therefore, the fourth ranked tenderer M/s IGN France International JV was recommended for award of the Tender. The seventh revised Evaluation Report was submitted to the World Bank on 5th January 2016 and “No Objection” was granted by approving award of the Tender to M/s IGN France International JV.

The Tender Board at its meeting held on 25th April 2016, approved the award of the Tender to M/s IGN France International JV basing on “No Objection” granted by the World Bank.

The Respondent vide his letter Ref. No. 2/CEA.349/471/01 dated 30th April 2016, notified all tenderers, the Appellant inclusive, of its intention to award the Tender to M/s IGN France International JV at a contract price of Euro 6,721,800.00 and USD 6,623,600.00. The same letter informed the Appellant that his tender was disqualified for non-compliance with the requirement of experience of similar nature as per Clause 6.1 (a) (i) of the Tender Document.

Dissatisfied, the Appellant applied for administrative review by his letter dated 10th May 2016, challenging the ground for his disqualification on the reason that, they had complied with all necessary requirements, including experience.

On 17th May 2016, the Respondent vide his letter Ref. No. 2/CEA.349/471/01 communicated his decision to the Appellant by dismissing the complaint for lack of merits.

Aggrieved by the Respondent's decision, on 24th May 2016, the Appellant lodged his Appeal to this Appeals Authority.

SUBMISSIONS BY THE APPELLANT

The Appellant raised two grounds of Appeal which may be summarized as follows:-

- i. That, the Respondent erred in law by disqualifying his tender on the reason that he had failed to comply with Clause 6.1 (a) (i) of the Bid Data Sheet (hereinafter referred to as "BDS") on the submission of completed three contracts of similar nature and value.

That, the said clause required only two contracts of USD seven (7,000,000.00) million each due to the fact that a total value indicated on the said Clause was USD 14, 000,000.00 Million. Thus, the Appellant's tender complied with the requirement of Clause 6.1 (a) (i) of the BDS since they had attached two contracts of USD 7,000,000 million and other contracts to demonstrate its experience.

That, tenderers sought for clarification with regard to Clause 6.1 (a) (i) of the BDS but the Respondent did not issue any clarification, which meant that that the said Clause required three contracts of USD seven (7, 000,000) million each as alleged by the Respondent.

That, its tender was evaluated and found to be responsive as a result they were invited for post-qualification. If the Appellant's tender was non responsive, the same ought to have been disqualified as per Regulation 204 (2) (f) of the Public Procurement Regulations G.N. No. 446 of 2013 (hereinafter referred to as "G.N. No. 446/2013").

- ii. Regarding the second ground, the Appellant submitted that, award of the Tender to M/s IGN France International Joint Venture is invalid because, knowing the Joint Venture; it has no or very little experience in Land Information System. Rather the Joint Venture has experience on mapping and surveying projects, which could not be compared as Information System of similar size and complexity.

Finally the Appellant prayed for the following reliefs:-

- (i) A declaration that the Appellant complied with the qualification requirements in Clause 6.1 (a) (i) of the BDS;
- (ii) A declaration that the Appellant is entitled for award of the Tender;
- (iii) Payment by the Respondent of USD 5,000.00 as Attorney's fees and disbursement incurred by the Appellant;
- (iv) Payment by the Respondent of USD 3,900.00 as the Appellant's travelling and hotel costs.

SUBMISSIONS BY THE RESPONDENT

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

- i. In respect to the first ground, the Respondent submitted that all the requirements of the law and the World Bank Procurement Guidelines upon which the tender was issued were complied with.

The Respondent argued that, Clause 6.1 (a) (i) of the BDS had three components to be complied with by tenderers and those include-

(a) a tenderer must have completed three projects; (b) two of which must be of similar nature and (c) the value of each contract not less than seven million USD (7,000,000.00) or above. Briefly put, it only meant that there has to be three contracts each with the value of USD 7,000,000.00. Arguing as he did, that the conditions set out above should be taken cumulatively.

The Respondent submitted further that, the Appellant had a clear understanding of Clause 6.1 (a) (i) of the BDS, because he did not seek for clarification and for those who sought for clarification, responses were provided leading to have no further clarifications.

The Appellant's tender did not meet the requirement of Clause 6.1 (a) (i) of the BDS. The Appellant submitted a list of eight contracts with a total of USD 22.1 million out of which the contract for BGIS/MLH BAYELSA State was for USD 10,518,012 which was ongoing contract. The remaining six contracts were hardly over 2 million USD.

On whether the Appellant had been called for post-qualification, the Respondent submitted that the Appellant was invited to attend the meeting for system demonstration so as to check technical compliance and not for post-qualification.

- ii. On the second ground the Respondent submitted that, the proposed tenderer M/s IGN France International Joint Venture demonstrated to have met experience requirement among others, as stipulated in the Tender Document.

Finally, the Respondent prayed for the dismissal of the Appeal for lack of merits.

ANALYSIS BY THE APPEALS AUTHORITY

In this Appeal there were four triable issues namely -

- **Whether the Appeals Authority has jurisdiction to determine this Appeal;**
- **Whether the Appellant has *locus standi* to file an appeal before the Appeals Authority;**
- **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 determining this Appeal, the Appeals Authority *suo moto* deemed it proper to establish its jurisdiction on the subject matter of the Appeal after tender process was conducted using the 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 states 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. Under the review procedures provided therein, tenderers are allowed to file complaints in relation to their own tenders to the procuring entity and not in relation to tenders submitted by other competitors (bidders).

After being availed with a decision, if the tenderer is still dissatisfied, then he can address his complaint to the Regional Procurement Manager for the Borrowing country. 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 both, its disqualification as well as the award to the proposed successful tenderer. With regard to complaints relating to Appellant's disqualification, the Appeals Authority is of the firm view that, he ought to have complied with Clause 15 of the World Bank Procurement Guidelines, which required him to submit such complaint to the Regional Procurement Manager for the Borrowing country after being dissatisfied with the decision of the Accounting Officer.

On the complaint regarding the proposed successful tenderer the Appellant had no room under the World Bank Procurement Guidelines. The only avenue is to submit such complaint to the Appeals Authority which is allowed by the law to cater for all complaints arising from public procurement. As such the Appeals Authority finds itself with jurisdiction to handle this kind of Appeal.

From the above observations, the Appeals Authority concludes that, it has Jurisdiction to hear such complaints.

2.0 Whether the Appellant has a *locus standi* to file the Appeal before the Appeals Authority;

During the hearing the Respondent submitted that, the Appellant did not submit a Power of Attorney authorizing him to file this Appeal and even the attached Letter of Intent was given by three companies instead of five who formed the Joint Venture (JV).

In determining the Respondents contention, the Appeals Authority revisited the Appellant's tender and observed that, he had attached the letter of Intent dated 17th March 2015, showing an agreement between the parties with names of five companies forming the Joint Venture namely; Sivan Design D. S. Ltd (Israel), Sivan Design D. S. Ltd (Nigeria), Sivan Design D. S. Ltd (Uganda), Ofek Photograph Systems (1995) Ltd, and Data Vision International Ltd.

It was observed further that, from the content of the said JV, which is signed by all five parties, Sivan was appointed to be a lead partner, hence a representative in all transactions relating to this procurement. There is no record that the Respondent doubted the Appellant's role at any point in time; and since this Appeal relates to the Tender in question, the Appellant is authorized to file this Appeal as well.

Therefore, the Appeals Authority concludes the second issue that the Appellant has a *locus standi* to file this Appeal.

3.0 Whether the evaluation of tenders was conducted in accordance with the law.

In resolving this issue the Appeals Authority considered the Appellant's contentions that the proposed successful tenderer M/s IGN France International JV lacked the required experience, hence they did not deserve to be awarded the Tender and deemed it necessary to frame the following sub-issue-

Whether the proposed award of the tender to the successful tenderer was proper at law.

Having framed the sub-issue, the Appeals Authority proceeded to resolve it as hereunder-

3.1 Whether the proposed award of the Tender to the successful tenderer was proper at law.

In order to determine the validity of the Appellant's argument on this point, the Appeals Authority revisited Clause 6. 1 (a) (i) of the BDS, which provides as follows-

Clause 6.1 (a) (i)

“the bidder must have completed at least three contracts of design and development of information systems and system integration during last 10 years of which **at least two (2)** should be a successful contract of Design, Development Installation and Provision of Technical Support for Information Systems of similar size and complexity in the field of Land Management, Land and Property Registry, Cadastre or projects of similar nature in the public sector preferably in a developing country. The value of each contract must be at least United State Dollar seven million (USD\$7,000,000.00), with total value of all contracts equal or more than US\$14 million. The Bidders are required to provide contact details of all projects quoted to be used for references purpose when required”.

Briefly stated, the above quoted provision requires tenderers to submit evidence of three completed contracts, two of which should be of a similar nature with a value of USD 7,000,000 (seven million) each and with a total value equal or above USD 14 million.

The Appeals Authority revisited the Evaluation Report dated 5th January 2016 and noted that, the report shows that the proposed successful tenderer had successfully completed two projects; one in Uganda and another for Modernization of National Base Map amounting to USD10,078,900.0 in Benin. In reviewing the successful tenderer's tender, the Uganda project is on record, but not the Benin one. The Appeals Authority could not establish the source of evaluators' information as it was not included in the successful tenderer's tender. In any case as indicated in the said Evaluation Report, the Benin project

relates to Modernization of National Base Map and not Design, Supply, Installation and Commissioning of Land Management Information Systems. The Appeals Authority is of the firm view that, modernization of national base map is not the same as design of land management information system. Thus these projects are not similar in nature.

Based on the above facts, the Appeals Authority is of the settled view that the proposed successful tenderer indeed did not comply with experience criterion as per Clause 6.1 (a) (i) of the BDS, as they did not have two contracts of similar nature and therefore ought to have been disqualified for lack of experience.

The above notwithstanding, in reviewing the documents submitted, the Appeals Authority noted a number of anomalies in this tender process and find it worth to point them out as herein below-

- i) There were three Evaluation Reports submitted to the Tender Board meeting held on 15th -19th September 2015. Two of them were from the appointed Evaluation Committee, but the third Evaluation Report resulted from the findings of a Review Team appointed by the Accounting officer. After the first evaluation was completed, the report was submitted to the PMU and after reviewing it, they ordered re-evaluation pursuant to Regulation 54(1) of GN 446 of 2013. After re-evaluation was completed, the Report was submitted to the Accounting Officer instead of the PMU in contravention of Section 40(1) of the Act, which requires the Evaluation Report to be submitted to the PMU after completion of evaluation.

The Accounting Officer after receipt of the wrongly submitted re-Evaluation report, appointed a review team which reviewed the report and came up with findings which resulted to the third evaluation of the tenders.

The Appeals Authority finds the Accounting Officer to have erred in law by-

- (a) Receiving an evaluation report which ought to have been submitted to the PMU,
 - (b) Appointing a review team while the same was un-procedural; and
 - (c) Interfering with the function of the Evaluation Committee and PMU contrary to Section 41 of the Act.
- ii) The PIU and experts from the Ministry of Lands turned themselves into Evaluation Committee by conducting review and incorporating the Bank's comments as were issued without submitting them to the PMU that would have worked on them through the Evaluation Committee duly appointed, and later to submit them to the Tender Board for approval. As a result, there are the fourth, fifth, sixth and seventh Evaluation Reports which were the basis for the Bank to grant the "No Objection". All the above specified reports were submitted to the World Bank without the prior approval of the Tender Board.
- iii) Based on the above, the Appeals Authority find the Respondent to have erred in law by contravening Section 33(1) of the Act which requires the Tender Board to approve recommendations of the award before the same is issued. In addition, the Appeals Authority finds the Respondent to have contravened Reg. 11(2) of GN 446 which requires for donor funded projects, internal clearance to be obtained before obtaining external clearance. Also the acts of the PIU and the experts from the Ministry of Lands contravened the provisions of Sect. 41 of the Act, which guides on independence of functions and powers of the Accounting Officer, the Tender Board, the Procurement Management, Unit the user department and the Evaluation Committee.

- iv) In the third Evaluation Report, the evaluators conducted Post-qualification to four tenderers instead of one lowest evaluated tenderer. This anomaly was also noted by the Tender Board at its meeting held on 15th-19th September 2015.

- v) During the hearing of this Appeal the Respondent argued that, post-qualification was not conducted to four tenderers, instead, they were invited for system demonstration meeting. The invitation letter to that meeting and the report issued thereafter clearly indicated that they had conducted post-qualification. Thus, the Appeals Authority finds the Respondent act to have contravened their own Tender Document specifically Clauses 31.1 and 31.2 of the ITB, BDS and Paragraph 2.58 of the World Bank Procurement Guidelines.

- vi) Members of the Evaluation Committee did not sign Personal Covenants before conducting evaluation so as to declare that they do not have any conflicts of interest with any tenderer contrary to Section 40 (6) of the Act.

Despite the various anomalies noted above, the Appeals Authority comments on the good manner in which the Respondent's Tender Board conducted its functions in observance of the law and procedures in this procurement process.

From the above analysis the Appeals Authority is of the settled view that, the evaluation of tenders was not properly conducted and the subsequent award of the tender to M/s IGN France International JV was not proper at law.

Therefore, the Appeals Authority concludes the third issue affirmatively that the evaluation of the tender was not properly conducted.

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

With regard to the Respondent's prayer that the Appeal be dismissed for lack of merits; the Appeals Authority finds that the Appeal has merits and therefore the Respondent's prayer holds no water and it is hereby rejected.

Having answered all the three issues in the positive and particularly issue number 3, whereby the evaluation of tenders was not conducted in accordance with the law thereby reaching an unlawful decision. The Appeals Authority would have quashed the decision by the Respondent but for the provision of Regulation 11(3) of GN No. 446 of 2013 which provides as follows;

Reg.11(3) "To the extent that the clearance or approval of the appropriate internal approving authority conflict with the external clearance or approval of an external approving authority arising out of the loan or credit or grant agreement, the clearance or approval of the external approving authority shall prevail, but in all other respects, the internal clearance or approval shall prevail".

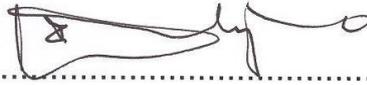
Unhappily the decision by the World Bank prevails.

As the Appeals Authority did not consider whether the Appellant complied with the qualification criteria, neither a declaration of such compliance nor a declaration that the Appellant is entitled for award of the Tender can be issued. As such each party shall bear own costs.

The decision of this Authority is binding upon the parties as per 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 27th June, 2016.



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

CHAIRMAN

MEMBERS:

1. MRS. ROSEMARY A. LULABUKA.....



2. MS MONICA P. OTARU

