

IN THE PUBLIC PROCUREMENT APPEALS AUTHORITY

AT DAR ES SALAAM

APPEAL CASE NO. 32 OF 2017-18

BETWEEN

M/S MEK ONE GENERAL TRADERS LTD.....APPELLANT

AND

TANZANIA ELECTRIC SUPPLY COMPANY LTD.....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 |

This Appeal was lodged by M/S Mek One General Traders Ltd (hereinafter referred to as "the Appellant") against Tanzania Electric Supply Company Ltd commonly known by its acronym TANESCO (hereinafter referred to as "the Respondent").

The Appeal is in respect of Tender No. PA/001/2017-2018/HQ/G/40 for Supply of Lubricant Oil (Shell Mysella S3 N40 and Shell Tellus S2 100) for Ubungo 1 and Tegeta Gas Plant under Framework Contract (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 by his letter dated 12th October 2017 invited three (3) tenderers to participate in the Tender. The deadline for submission of bids was 27th October 2017 whereby all of them submitted their bids.

Tenders were then subjected to evaluation which was conducted in three stages, namely; Preliminary, Technical and Financial Evaluations. At the Preliminary Evaluation, two tenders were disqualified, the Appellant inclusive, for being non responsive to the requirements of the Tender Document.

The remaining tender by M/s Prime Regional Supplies Ltd was subjected to Technical Evaluation, whereby it was found responsive, hence subjected to Financial Evaluation. After completion of the evaluation process, the Evaluation Committee recommended award of the Tender to M/s Prime Regional Supplies Ltd, subject to successful negotiations and on 28th December, 2017 the Tender Board approved award of the Tender as recommended. On 23rd January 2018, negotiation was conducted and the

same was approved by the Tender Board through Circular Resolution No. 058/01/2018.

On 29th January 2018, the Respondent issued Notice of Intention to award the Tender. The Notice informed the Appellant that his tender was disqualified for two reasons, namely;

- i. That he did not comply with Bid Securing Declaration contrary to Clause 21 of the Tender Data Sheet (TDS); and
- ii. That he did not comply with Bid Validity period of 120 days, as he offered 28 days.

Dissatisfied, on 20th February 2018, the Appellant applied for administrative review, challenging his disqualification and award made to the proposed successful tenderer.

On 27th February 2018, the Respondent issued a decision whereby the complaint was dismissed for lack of merits. Consequently, on 8th March 2018, the Appellant filed this Appeal which was argued by way of written submissions.

SUBMISSIONS BY THE APPELLANT

The Appellant's grounds of Appeal are summarized as follows;

1. That, the Appellant disputes his disqualification on the ground that he had not submitted the Tender Securing Declaration. Arguing that his tender was attached with Tender Securing Declaration as provided for in the Tender Document.

He further submitted that, during the Tender opening, the Appellant was represented and the Tender securing declaration was seen by the Respondent's opening committee. After receiving the Notice of Intention, he requested to be availed with the Minutes of the Tender opening; however, the same has not been issued to him to date. Therefore, the Appellant believes that his tender was tempered with.

2. That, the Respondent intends to award the Tender to M/s Prime Regional Supplies Ltd, who had quoted their price in United States Dollars (USD) contrary to the Tender Data Sheet (TDS) which required prices to be quoted in Tanzanian Shillings.

In support of this ground, the Appellant submitted that Clause 16.1(a) of the Instruction To Bidders (ITB) provides in clear terms that for goods supplied from within Tanzania, the price to be quoted is Tanzania Shillings, unless specified in the BDS. As the word used is "shall", it means that the Respondent was mandatorily required to comply with such provision as per Section 51 of the Interpretation of Laws Act, Cap 1 which provides that the word shall means a "function that need to be performed".

Apart from that, Clause 18 of the BDS provides in clear terms that the currency to be used is TZS. Further to that, the Respondent vide his letter dated 24th October, 2017 issued clarification to all tenderers, that the currency of the Tender is Tanzanian Shillings. According to the requirement of the law clarification issued by the Respondent forms part of the Tender Document. Thus by quoting the price in USD instead

of the Tanzania Shillings amounts to contravention of the Tender Document, hence the Respondent ought to have disqualified M/s Prime Regional Supplies Ltd.

The Appellant submitted further that, by the Respondents admission, M/s Prime Regional Supplies Ltd was approved for award subject to negotiation regarding the change of currency as well as price reduction. However, Regulation 225 of the Public Procurement Regulations GN. No. 446 of 2013, as amended, (hereinafter referred to as "GN. 446 of 2013") does not allow negotiation on change of currency, therefore even the award made is unjustifiable.

In support of this point the Appellant cited a Decision by this Appeals Authority in Appeal Case No. 59 of 2009 between Mputa Security Services Guards Co. Ltd and Full Time Security Ltd vs. the Institute of Rural Development Planning-Dodoma, whereby, parties negotiated on price reduction which was not allowed by the law. At page 16 the Appeals Authority decided that, the alleged correction and modification of prices did not fit anywhere in the ITT and the Regulations. It was finally concluded that the tender process was marred by irregularities and the award made to a successful tenderer was nullity in the eyes of the law. In relating the case cited with this Appeal the Appellant stated that, the negotiation made on change of currency from USD quoted by M/s Prime Regional Supplies Ltd to a currency instructed by the Respondent contravened Clause 16 of the

ITB, Clause 18 of the TDS and Regulation 225(2) of the GN. No. 446 of 2013.

Finally, the Appellant prayed for the following reliefs:-

- i. A Declaration that the intended award of the Tender to M/s Prime Regional Supplies Ltd is invalid and unlawful; and
- ii. Restart the tender process afresh for lack of responsive tenderer.

REPLIES BY THE RESPONDENT

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

1. That, the Appellant was disqualified for his failure to attach the Tender Securing Declaration which was contrary to the requirement of Clause 21 of the TDS.
2. That, the Appellant was also disqualified for quoting a Tender validity period of 28 days instead of 120 days provided for under Clause 20 of the TDS.
3. That, although M/s Prime Regional Supplies Ltd quoted the price in USD contrary to the requirement of the Tender Document, but Regulation 225 of the GN. No. 446 of 2013 allows negotiation on the same. Furthermore, the Respondent submitted that the noted discrepancy is not among the issues or reason capable of rejecting the tender pursuant to Regulation 204(1) and (2) of the GN. No. 446 of 2013, hence the deviation was treated as minor.

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

ANALYSIS BY THE APPEALS AUTHORITY

After going through Written Submissions by the parties, the Appeals Authority is of the view that, there are three issues calling for determination and these are;

- 1.0 Whether the Appellant's disqualification is proper in law;
- 2.0 Whether the award of the Tender to the proposed tenderer is 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 the reasons for the Appellant's disqualification based on failure to attach Tender Securing Declaration, we revisited Sub-Clauses 18.1 and 18.3(c) of the ITB which are modified by Clauses 21 and 22 of the BDS. The said Clauses provide as follows;

ITB 18.1 "Pursuant to ITT Clause 11, unless otherwise specified in the Tender Data Sheet, the Tenderer shall furnish as part of its Tender, a Tender Security in original form and in the amount and currency specified in the Tender Data Sheet or Tender Securing Declaration as

specified in the Tender Data Sheet in the form specified in Section VIII." (Emphasis added)

ITB 18.3 "The Tender Security shall be denominated in the currency of the tender or in another free convertible currency, and shall be in one of the following forms;

(a) N/A

(b) N/A

(c) Another security if indicated in the Tender Data Sheet." (Emphasis added)

BDS 21 "Tender Securing Declaration is: Required"

BDS 22 "Other forms of security are: Not Applicable".

The above quoted provisions entail that, tender security was a mandatory requirement which was to be furnished in the form of Tender Securing Declaration and not otherwise.

The Appeals Authority revisited the Appellant's tender and observed that, he had only attached the Declaration of Interest Form.

Furthermore, the Appeals Authority observed that, the Minutes of the Tender opening indicates that the Appellant submitted his tender attached with a declaration letter and the said minutes were signed by members of the opening committee.

From the above facts and findings, the Appeals Authority is satisfied that, the only Form attached to the Appellant's tender was a Declaration of

Interest Form. The Tender Securing Declaration Form was not attached as correctly submitted by the Respondent and indeed the Appellant contravened the requirements of Clauses 18.1, 18.3 of the ITB and 21 and 22 of the BDS quoted above.

The Appeals Authority finds that, the Respondent's act of disqualifying the Appellant's tender was proper in law as it complied with the Requirements of Regulation 204(1)(2)(c) and (k) of the GN. No. 446 of 2013 which reads as follows;

- Reg.204(1) "All tenders shall be checked for substantial responsiveness to commercial terms and conditions of the tendering documents.
- (2) "Material deviations to commercial terms and conditions, which justify rejection of a tender, shall include the following:
 - (a).....
 - (b).....
 - (c) failure to submit a tender security as specified in the tendering documents."
 - (d).....

From those facts, it is crystal clear that the Appellant failed to comply with Clauses 18.1, 18.3 of the ITB and Clauses 21 and 22 of the BDS.

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

2.0 Whether award of the Tender to the proposed tenderer is justified

In resolving this issue, the Appeals Authority considered the Appellant's contention that, the Respondent intended to award the Tender to M/s Prime Regional Supplies Ltd whose tender price was quoted in USD contrary to the requirement of the Tender Document.

The Appeals Authority revisited Clause 16 of the ITB that was modified by Clause 18 of the BDS, which state in clear terms that, for goods and services that the tenderer will supply from within Tanzania, prices shall be quoted in Tanzanian shillings unless specified in the BDS. For purposes clarity the said provisions are quoted hereunder:

ITB 16.1 "Prices shall be quoted in the following currencies:

(a) For goods and services that the tenderer will supply from within the United Republic of Tanzania, the prices shall be quoted in Tanzanian Shillings, unless otherwise specified in the Tender Data Sheet."

BDS 18 "The Tender shall be quoted in Tanzanian Shillings."

Furthermore, the Appeals Authority reviewed the clarification made by the Respondent in responding to one of the tenderer and observed that, the Respondent consistently and emphatically insisted the bidder to quote their Tender price in Tanzania Shillings currency. This is evidenced by the Respondent's letter with ref. No. SMP/MP/PMU/17/18/504 dated 24th October 2017 whereby he issued a clarification in relation to the use of Clause 16.1 (a) and (b) of the ITB that,

“The currency to be applicable in this Tender is Tanzanian Shilling only as described in the TDS Clause 18 of the bidding document.”

The Appeals Authority observed further that, the Respondent is not disputing the fact that the proposed bidder quoted his price in USD contrary to the Tender Document requirements therein, but rather conceded to have treated this glaring discrepancy as a minor deviation.

The Appeals Authority noted with dismay the Respondent’s conduct, since his own Tender Document categorically required tenderers to mandatorily quote their tender price in Tanzanian shillings only.

The Appeals Authority does not buy the Respondent argument that, the noted discrepancy was a minor deviation because it has the potential way of changing competitive bidding and it is contrary to their own Tender Document.

In addition to the reasons mentioned above, the currency is not amongst the items capable of being negotiated as per Regulation 225(1) of the GN. No. 446 of 2013. Further to that Clause 28.5 of the ITB states in clear terms that, a tender which is not responsive will be rejected and may not subsequently be made responsive by correcting the non conformity.

It is the views of the Appeals Authority that, the Respondent ought to have disqualified the proposed bidder for his failure to comply with the requirements of the Tender Document.

The Appeals Authority accepts the Appellant's argument in Appeal Case No. 59 of 2009, that negotiation can only be conducted on matters that are covered by the law. In the case cited by the Appellant the parties negotiated on price reduction which at that time was not allowed. The negotiation in question is on the change of currency, a matter which is not capable of being negotiated pursuant to Regulation 225(1) of the GN. No.446 of 2013.

The Appeals Authority sees the Respondent's act of negotiating with the proposed bidder as the effort of making a bidder who was nonresponsive to be responsive, contrary to the Clauses mentioned herein above.

Therefore, the Appeals Authority is of the settled view that, M/s Prime Regional Supplies Ltd ought to have been disqualified for being non responsive to the Tender Document.

From the above findings, the Appeals Authority concludes the second issue in the negative, that the award of the Tender to the proposed tenderer was not justified.

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

Taking cognizance of the findings above, the Appeals Authority finds that the Appeal partly has merits, as the award made to the proposed tenderer was not justified. We hereby nullify the proposed award made to M/s Prime Regional Supplies Ltd and order the Respondent to re-start the tender process afresh, if he is still interested. 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 of Judicial Review as per Section 101 of the Act is explained to the parties.

This Decision is issued today, this 11th day of April, 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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