

IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY
AT DAR ES SALAAM
APPEAL CASE NO. 38 OF 2018-19
BETWEEN
M/S WASION GROUP (TANZANIA) LIMITED.....APPELLANT
AND
TANZANIA ELECTRIC SUPPLY COMPANY LIMITED.....RESPONDENT

DECISION

CORAM

- | | |
|-------------------------------------|----------------|
| 1. Hon. Justice (rtd) Sauda Mjasiri | - Chairperson |
| 2. CPA. Fredrick Rumanyika | - Member |
| 3. Eng. Stephen Makigo | - Member |
| 4. Ms. Florida Mapunda | - Ag.Secretary |

SECRETARIAT

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

FOR THE APPELLANT

- | | |
|-----------------------------|--|
| 1. Ms. Lucy Kiangi | - Advocate- KKB Attorneys at Law Advocate |
| 2. Ms. Victoria Simon Ngowi | - Advocate – KKB Attorneys at Law Advocate |
| 3. Mr. Bokun Wu | - Managing Director |

THE RESPONDENT

1. Ms. Elimamba R.Tenga - Zonal Procurement Specialist
2. Mr. Fratern Michael - Zonal Procurement Officer
3. Mr. Aliko Mwamkinga - Zonal Procurement Specialist – South West Highland

This Appeal was lodged by M/s Wasion Group (Tanzania) Limited (hereinafter referred to as “the Appellant”) against the Tanzania Electric Supply Company Limited commonly known by its acronym TANESCO (hereinafter referred to as “the Respondent”). The Appeal is in respect of Tender No. PA/001/2018-19/CZN/G/45-A for Supply of Meters for Central Zone under Framework Contract, Lots 1, 2, and 3 for Dodoma, Morogoro and Singida for single and three phase meters respectively (hereinafter referred to as “the Tender”).

The Tender was conducted using Restrictive National Competitive Bidding method specified under the Public Procurement Act, No. 7 of 2011 as amended (hereinafter referred to as “the Act”) and the Public Procurement Regulations GN. No. 446 of 2013 as amended (hereinafter referred to as “GN. No. 446 of 2013”).

After going through the record of appeal submitted to the Public Procurement Appeals Authority (hereinafter referred to as “the Appeals Authority”), the background of the Appeal may be summarized as follows:

The Respondent through the Daily News newspaper dated 15th November 2018, invited eligible local manufacturers to participate in the Tender. The deadline for the submission was set for 5th December 2018. Four tenders were received in respect of single-phase meters and three tenders for three-phase meters. The Appellant herein submitted tenders for three Lots of both phases.

Tenders were then subjected to evaluation which was conducted into three stages namely; preliminary, technical and detailed evaluation. During preliminary evaluation three tenders were disqualified for being non responsive to the requirements of the Tender Document. The remaining two tenders in both phases M/s Wasion Group (T) Ltd and M/s Inhemeter (T) Ltd were subjected to technical and detailed evaluation. All were found to be substantially responsive and were ranked according to their evaluated price. The tender by M/s Wasion Group (T) Ltd was ranked the first followed by M/s Inhemeter (T) Ltd. The Evaluation Committee based on Clause 5 of the Invitation For Tenders (IFT) that contract may be awarded to the first two lowest evaluated bidders, it then recommended award of the contract to both the Appellant and M/s Inhemeter (T) Ltd.

The Tender Board at its meeting held on 21st December 2018 approved the award as recommended subject to successful negotiations and due diligence. It is on record that negotiation with M/s Inhemeter (T) Ltd was conducted on 18th January 2019 and was successful. On the side of the Appellant, negotiation was conducted on 5th February 2019 and was considered unsuccessful in relation to single phase meters since the

Appellant's price was higher compared to the negotiated price by the proposed bidder.

Thereafter both bidders were subjected to Post-Qualification evaluation which was conducted through physical visitation of the factory. During post qualification, the Evaluation Committee observed that the tender by M/s Inhemeter (T) Ltd was found to be responsive, thus it was recommended for award of the contract in respect of single-phase meters. The said recommendation was approved by the Tender Board at its meeting held on 23rd January 2019. On the side of the Appellant, the Evaluation Committee observed that its tender was non responsive for the reason that its factory had not started its operations though some of the machines were installed. On 8th February 2019, the Tender Board disapproved the award.

On 4th March 2019, the Respondent informed all the tenderers, including the Appellant its intention to award the Tender to M/s Inhemeter (T) Ltd at negotiated unit price of TZS. 134,249.54 VAT inclusive for single phase meters in all 3 Lots. The said letter also informed the Appellant that its tender was not successful because its unit price for the Single Phase meter is higher than that of the proposed bidder.

Dissatisfied with the reason provided, the Appellant submitted application for administrative review to the Respondent on 9th March 2019. On 15th March 2019, the Respondent informed the Appellant that it had suspended the procurement process pending determination of the complaint. However, the Respondent did not issue a decision within the time

prescribed by the law. Consequently, on 26th March 2019, the Appellant filed this Appeal.

SUBMISSIONS BY THE APPELLANT

The Appellant's grounds of Appeal may be summarised as follows: -

1. That, the Respondent Tender Advertisement was for the bid of three Lots that is; Dodoma, Morogoro and Singida, whereby, a successful bidder of a Lot or Lots shall supply both single and three phase meters to the respective Lot(s). Surprisingly, the Respondent awarded M/s Inhemeter (T) Ltd to supply single phase meters for all Lots and up to date a supplier of three phase meters has not been announced.
2. That, the Appellant had the lowest evaluated bid compared to other bidders in all Lots. However, the Respondent proposed award of the Tender to M/s Inhemeter (T) Ltd for the reason that the said proposed bidder had the lowest negotiated bid with a difference of TZS. 200/- compared to the Appellant's negotiated price in single phase meter.

The Appellant's counsel argued further that, the Respondent asserted that the Appellant's bid was disqualified after being found that its factory had not started production of meters. However, the reason stated in the Notice of Intention to award was that the Appellant had a higher price compared to that of the proposed bidder. The Appellant wondered as to what was the basis for its disqualification.

The Appellant's counsel expounded further that, since the Appellant was the lowest evaluated bidder, it negotiated with the Respondent and both agreed on the price for all lots in respect of both single and three phases meters.

3. That, the Appellant is a local manufacturer incorporated and licensed to operate in mainland Tanzania since June 2018. The firm has a factory located at Plot No. 46 Kisemvule Industrial Area, Mkuranga District, Coast Region and is capable of production. The Respondent's team verified the same through due diligence conducted on 5th February 2019. The Respondent issued a report indicating that the Appellant's factory is fit for production (Letter dated 18th February 2019). But the Appellant's tenders have been disqualified for the reason that the factory is not ready.
4. That, the Appellant has been a supplier of the Respondent for a long period and had made investments by establishing a factory for electronic meters in Tanzania, but it has been disqualified for tenders floated by the Respondent without any justifiable reason. This has caused a loss to the factory since the Respondent had been its main client and the main reason for the investment in Tanzania.
5. Finally, the Appellant prayed for the following orders: -
 - i. To declare that there was unfairness in awarding the tender;
 - ii. To annul the proposed award to M/s Inhemeter (T) Ltd;

- iii. To declare that a Tender be awarded per Lots that is single phase and three phases for same Lot (s) as per the Tender Document;
- iv. To reinstate the Appellant in the tender process;
- v. To re-evaluate and re-negotiate the tender reasonably;
- vi. To declare a breach of terms and conditions of the Tender Document as the same were changed without informing the bidders;
- vii. The Respondent to compensate the Appellant a sum of TZS. 6,000,000/-
- viii. Interest on the item (vii) above at the commercial rate of 22% from March 2019 until the date of the award;
- ix. Legal fees to the tune of TZS. 10,000,000/-
- x. Filing fees and other costs amounting to TZS. 500,000/-
- xi. Any other reliefs the Appeals Authority may deem fit and fair to grant.

REPLY BY THE RESPONDENT

The Respondent's reply to the grounds of Appeal may be summarised as follows: -

1. That, Item 5 of the Invitation For Tender (IFT) provided clearly that contract may be awarded to more than two bidders who would be the first lowest evaluated bidders. Orders will be given at first to both successful bidders and next orders to a bidder who will complete the

delivery of the first order. Further that the Respondent has not awarded the Tender for single phase rather it issued the Notice of intention to award the same.

2. That, the Appellant was the lowest evaluated bidder, however when post qualified, it was found to be non responsive to the required specifications, among them is that the factory had no power supply.
3. That, the Respondent after conducting post qualification process, observed that the Appellant's factory had defects and the Appellant was issued with a report which required it to correct the same. The Appellant had not informed the Respondent about any rectification made to the factory. The Respondent argued that, it could have not awarded the Tender to the Appellant, since its factory was yet to start production.
4. That, with regard to the Appellant's argument that it was a supplier of meters to the Respondent, the Respondent contended that, the Appellant has never supplied meters to it, after the incorporation of its company in Tanzania. Thus, it cannot be blamed for the loss suffered by the Appellant.

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

ANALYSIS BY THE APPEALS AUTHORITY

The Appeals Authority having gone through the appeal record, Tender proceedings including various documents and the oral submissions by the

parties, is of the view that the Appeal is centred on two main issues and these are:-

1. Whether the Appellant's disqualification was justified; and
2. What reliefs, if any, are the parties entitled to

Having identified the issues in dispute the Appeals Authority proceeded to determine them as hereunder:-

1. Whether the Appellant's disqualification was justified

In resolving this issue, the Appeals Authority revisited the Notice of Intention to award the Tender issued to the Appellant and observed that the Appellant's tender was disqualified for having a higher unit price compared to the proposed bidder. The reason given by the Respondent in its statement of reply that the Appellant's factory was yet to commence its production was not indicated in the said Notice. The Appeals Authority is of the considered view that if the Respondent relied on the ground that the factory was not ready for production, it ought to have included the said ground in the Notice of intention issued to the Appellant pursuant to Regulation 231 (4) of GN. No. 446 of 2013, unfortunately this was not included in the Notice of Intention to award. Regulation 231(4) provides as follows:-

"Reg. 231(4) the Notice referred to in sub-regulation (2) shall contain

(a) name of the successful tenderer;

(b) the contract sum and completion or delivery period;

and

(c) reasons as to why the tenderers were not successful."

(Emphasis added)

According to the record, the Appellant is the lowest evaluated bidder and was recommended for award subject to successful negotiation and post qualification. The Appeals Authority considered the Respondent's argument that due to the nature of the contract, Item 5 of the IFT allowed them to award a contract to the first two lowest evaluated bidders. It was observed that during negotiation the Appellant's unit price was found to be higher compared to the negotiated unit price of M/s Inhemeter (T) Ltd. The Appeals Authority is of the view that if the award was intended to be made to the two lowest evaluated bidders, then it was not proper for the Respondent to do a price comparison between the Appellant and the proposed bidder after negotiation.

The Appeals Authority revisited Regulation 225(1) (g) and (5) of the GN. No. 446 of 2013 and observed that it allows negotiations with the lowest evaluated bidder. The proviso reads: -

"Reg. 225 (1) Negotiations may be undertaken with the lowest evaluated tenderer relating to-

(g) the reduction of price in case of procurement of goods, works or non-consultancy services."

(5) Negotiations shall only be held with the lowest evaluated tenderer for goods, services or

works, or the highest evaluated tenderer for revenue collection for national and international competitive tendering.”

(Emphasis Added)

From the above analysis, the Appeals Authority concludes that the Appellant’s disqualification was not justified.

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

Taking cognizance of the findings on the first issue above, the Appeals Authority finds that the Appeal has merits. However, as there is no conclusive report that the Appellant’s factory is ready for production or not, the Appellant should only be issued with a notice of intention to award if the criteria required under the Tender Document is met. Therefore the Respondent is hereby ordered to conduct a fresh post qualification to the Appellant’s factory using another independent team in order to determine whether the Appellant’s factory meets the criteria required under the Tender. The Appeal is allowed to that extent. We make no order as to 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 delivered in the presence of the Appellant and the Respondent this 2nd day of May 2019.



HON. JUSTICE (RTD) SAUDA MJASIRI

CHAIRPERSON

MEMBERS:

1. CPA. FREDRICK RUMANYIKA 

2. ENG. STEPHEN MAKIGO 