

IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY
AT DAR ES SALAAM
APPEAL CASE No. 41 OF 2016-17

BETWEEN

M/S J.E CONSTRUCTION CO. LTDAPPELLANT

AND

PANGANI BASIN WATER BOARDRESPONDENT

DECISION

CORAM

- | | |
|------------------------------------|----------------|
| 1. Hon. Vincent K.D Lymo, J. (rtd) | - Chairman |
| 2. Eng. Francis Marmo | -Member |
| 3. Mr. Louis Accaro | - Member |
| 4. Ms. Florida Mapunda | -Ag: Secretary |

SECRETARIAT

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

FOR THE APPELLANT

- | | |
|---------------------------|-------------------|
| 1. Mr. Sixtus Basil Kessy | -Project Manager |
| 2. Mr. Simon Kessy | -Telecom Engineer |
| 3. Mr. Peter Kessy | -Engineer |

FOR THE RESPONDENT

1. Mr. Haji Nandule -Advocate, ministry of water and Irrigation
2. Mr. Simon Nkanyemka -Advocate, ministry of water and Irrigation
3. Vendelin Z. Basso -Accounting Officer
4. Mr. Ghoyela C. Mpangala -Procurement Officer
5. Ms. Maria N. Shauri -Procurement Officer
6. Mr. Freddy Mbeyella -Procurement specialist

This Decision was scheduled for delivery today 16th June 2017, and we proceed to do so.

This Appeal was lodged by M/s J.E Construction Co. Limited (hereinafter referred to as "the Appellant") against Pangani Basin Water Board (hereinafter referred to as "the Respondent"). The Appeal is in respect of Tender No. AE/061/2016-2017/HQ/W/03 for the Proposed Rehabilitation and Construction of PBWB Head Quarter in Moshi, Rehabilitation of Nyumba ya Mungu Field Office in Mwanga (near Moshi), and Construction of UWAMAMI WUA Office in Moshi (hereinafter referred to as "the Tender").

After going through the records submitted by the respective parties to the Public Procurement Appeals Authority (hereinafter referred to as "the Appeals Authority"), the facts of the Appeal can be summarized as follows:-

The Respondent vide the Daily News newspapers dated 20th December 2016 invited tenderers to participate in the above named Tender in accordance with the Public Procurement Act of 2011 (hereinafter referred to as "the Act") and the Public Procurement Regulations, GN.

No. 446 of 2013 (hereinafter referred to as "G.N. No. 446 of 2013"). The deadline for submission of the Tenders was initially set on 24th January 2017 but it was later on extended to 16th February 2017, whereby seven (7) tenders were received.

The tenders were subjected to evaluation which was conducted in three stages namely; Preliminary, Detailed and Post-qualification Evaluation. During Preliminary Evaluation five (5) tenders the Appellant's inclusive, were found to be non-responsive and were disqualified. The remaining two (2) tenders by M/s Nordic Construction Co. Ltd. and M/s Group Six International Ltd. were subjected to Technical evaluation and Detailed Evaluation. During detailed evaluation arithmetic errors were corrected and thereafter tenders were ranked. The tender by M/s Nordic Construction Co. Ltd. was ranked first and was subjected to Post qualification. During Post qualification the tender was found with shortfalls and was disqualified. The Evaluators post-qualified the second lowest evaluated tenderer - M/s Group Six International Ltd and was recommended for award at a contract price of TZS 2,977,287,070.26. The recommendations of the Evaluation Committee were approved by the Tender Board at its meeting held on 25th April 2017.

On 2nd May 2017 the Respondent issued the Notice of Intention to Award the Tender to all tenderers. The said Notice indicated that the Appellant's tender was disqualified for failure to insert price of Electrical Installation Builders works and failure to initial on erasures in Bill No. 9 Item M.

Dissatisfied, on 5th May 2017 the Appellant filed an application for administrative review challenging the grounds given for their disqualification. The Respondent on 10th May 2017 issued his written decision dismissing the Appellant's complaint for lack of merits. Dissatisfied with the responses, on 17th May 2017 the Appellant lodged this Appeal.

SUBMISSIONS BY THE APPELLANT

In this Appeal, the Appellant raised two grounds of Appeal which can be summarized as follows;

- i) That, the Respondent erred in disqualifying their tender based on assertion of partial filling of the BOQ – Price for Electrical Installation Builders Works was missing.
- ii) Bill No. 9 Item M erasure was not initialed.

In arguing the first ground of the Appeal, the Appellant submitted that Builders works for electrical installation were filled in under Item A which also covers items B, C and D as it reads "allow for all builder's work in connection with the whole of electrical installation" and the unit is a lump sum. In addition Items C, D and E did not have their respective quantities and therefore would amount to zero.

He further argued that the Respondent's act of disqualifying their tender based on the ground of partially filled BOQ contravened Section 74(1) of the Act, Regulations 202(3), 203(1) of GN No. 446 of 2013 and Clause 14.2 of the Instruction to tenderers (ITT) which requires all tenders to be evaluated on the common basis.

He contended further that even the proposed successful tenderer did not price for all of the items from page 1 to page 28 in Bill No. 1- Preliminaries. Thus, the Respondent should have also disqualified the Tender of the proposed successful tenderer for partial quoting.

The Appellant submitted further that, the Respondent had erred in law by relying on Regulation 205(b) of GN No. 446 of 2013 since in this Tender Builder's work was not a major item but rather the Electrical Installation works. According to Standard Methods of Measurement of Building works for East Africa Section R26 if the sub-contractor is a domestic firm builder's work may be included in the electrical installation works; thus, the Respondent erred in law for disqualifying the Appellant for partial quoting.

Arguing in support of the second ground the Appellant submitted that, all pages in their submitted bid were initialed as per the requirement of Clause 19.2 of the ITT. Further, that the corrected Item which the Respondent claimed that it was not initialed had a value of TZS.52,000/- that was carried forward to the Grand General Summary which was signed and stamped. Thus, failure to initial the erasures could not be the basis for the Appellant's disqualification. Even if the correction were not initialed, the anomaly could not be the basis for overspending close to TZS 1 billion. According to Regulation 207 the Respondent ought to have waived minor deviations which do not depart from the requirement of the Tender Document for purposes of saving public funds. The Appellant is concerned with the Respondent's act in this regard as it contravened Regulation 4(2) (a) of GN No. 446 of 2013 which

emphasizes the need for economy and efficiency in the use of public funds.

Finally, the Appellant prayed for the following Orders:-

- a) Annulment of the Respondent's decision which disqualified the Appellant's tender;
- b) Declaration that the Appellant's tender is substantially responsive
- c) Re-evaluation of the second stage-detailed evaluation and price comparison
- d) Compensation of the sum of TZS 1,820,000/- as per the following breakdown;
 - i) Appeal filing fees 200,000/-
 - ii) Documentation charges 1,500,000/-
 - iii) Transport Costs 120,000/-
- e) Any other relief which the Appeals Authority shall deem just, proper or equitable.

REPLIES BY THE RESPONDENT

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

In relation to the first ground of Appeal the Respondent submitted that, the Appellant had not inserted the price in Electrical Installation Builder's work in all Bills as per the BOQ. The Respondent refuted the Appellant's argument that the price quoted under Item A also covered items B, C and D. According to the Respondent Items A, B, C and D are independent from each other and the price quoted for Item A was not inclusive of cost price in items B, C and D.

Furthermore, the Respondent disputed the Appellant's submission that builder's work is not a major item for this Tender because the Addendum issued changed the scope of work separating major and minor works.

The Respondent further argued that, the Appellant's tender failed to comply with Clause 15.2 of the ITT which requires tenderers to fill in rates and prices for all items of the works described in the BOQ. During Evaluation process the Respondent evaluated all the tenders on common basis as per the requirement of Section 74(1) of the Act and Regulation 202(3) of GN. No. 446 of 2013.

With regard to the argument that the proposed successful tenderer failed to quote for Bill No. 1, the Respondent submitted that Bill No. 1- Preliminaries contain narrative information about the project in which some items do not attract any costs while others were priced in lump sum. Thus, it was not necessary for tenderers to price each of the items in Bill No. 1 – Preliminaries.

Regarding the second ground of Appeal the Respondent submitted that, the Appellant erased the contents in Bill No. 9 Item M and the same was not initialed. According to Clause 20.3 of the ITT all interlineations, eraser or overwriting would be regarded valid only if they are initialed by the person signing the tender. The Appellant failed to comply with such requirement hence his tender was found to have contravened the requirement of Clause 20.3 of the ITT.

Finally, the Respondent prayed for the dismissal of the Appeal and they be allowed to proceed with the procurement process.

ANALYSIS BY THE APPEALS AUTHORITY

In dealing with this Appeal, the Appeals Authority having gone through the tender proceedings including various documents submitted by both parties and oral submissions during the hearing, it is of the view that the Appeal has been centred on three main issues calling for determination; and these are:-

1. Whether the disqualification of the Appellant was proper in law;
2. Whether the award to the proposed successful tenderer is justified;
3. What reliefs, if any, are the parties entitled to.

Having framed the above issues, the Appeals Authority proceeded to resolve them as follows;

1. Whether the disqualification of the Appellant was proper in law

In resolving this issue, the Appeals Authority revisited the Tender Document in which Terms of Reference were provided, the Evaluation report vis-a-vis the applicable law. In the course of doing so, the Appeals Authority observed that the Appellant was disqualified at the Preliminary evaluation stage on two major reasons;

- i. Failure to insert price of Electrical Installation Builder's works, Bills No. 8, Element 9, items B,C and D; and
- ii. Failure to initial on erasures in Bill No. 9 item M.

To ascertain the validity of the the Appellant's disqualification based on the above grounds, the Appeals Authority revisited the Appellant's bid and observed that Bills No. 8, Element 9, items B, C and D were not

quoted as rightly observed by the Respondent. However, considering the Appellant's argument that they did not quote for such Items since the same were part and parcel of Item A; the Appeals Authority revisited Electrical Installation requirement in the BOQ; and the same reads;

A. "Allow for builders work in connection with the whole of the Electrical Installation

Cut away for; make good after electricians installation; allow for checking that switch boxes are set truly square; cutting away necessary chases or holes in block, concrete and finishing for conduits and boxes in connection with concealed electrical system comprising the following;

B. Lighting and fan point with associated switch points

C. Power points

D. meters; isolator switches, switch fuses, distribution boards and the like

From the above, it is the Appeals Authority's firm view that the wording of the Bills clearly indicates that Items B, C and D are part and parcel of item "A" since they are directly related to it and are not distinct as purported by the Respondent.

The Appeals Authority also revisited Bill No. 1- Preliminaries and General Conditions of Contract Item A, that provides for the guidance on the pricing and correction of BOQ; and the same reads-

"Pricing and correction of Bills of Quantities

Costs relating to items which are not priced will be deemed to have been included elsewhere in these Bills of Quantities" (Emphasis added)

It was further observed that, the above requirement is a replica of Clause 15.2 of the ITT which states-

"The tenderer shall fill in rates and prices for all items of then works described in the Bill of Quantities. Items for which no rate or price is entered by the tenderer will not be paid by the procuring entity when executed and shall be deemed covered by the other rates and prices in the bills of quantities." (Emphasis supplied)

From the above quoted provisions, it is crystal clear that failure to quote for any of the items in the BOQ would not have amounted to disqualification of the tender. Instead, the un priced items would have been taken as covered in other rates. The Appeals Authority is of the firm view that, the Appellant's failure to quote for Bills No. 8, Element 9, items B, C and D would not have caused their bid to be disqualified.

Assuming that the Respondent had used the requirement provided for under item A of the Preliminary Clause in disqualifying the Appellant, the Appeals Authority is also of the firm view that the Respondent would have equally disqualified the proposed successful tenderer for failure comply with the requirement since he had also partially quoted on the Preliminary Bills.

For purposes of clarity the Appeals Authority reproduces the said clause hereunder-

Pricing of Preliminary Bill

The contractor shall price out individually and in detail all items in this and any other section of the Bills of Quantities as required and under no circumstances will lump sum be allowed." (Emphasis Added)

The Appeals Authority revisited the proposed successful tenderer's Tender and observed that out of twenty eight pages of Preliminary section which he ought to have indicated their respective prices, he had indicated prices for only six items, which according to the above quoted Clause, renders his tender unresponsive. To the contrary, the Respondent did not disqualify this tender.

In view of the above, the Appeals Authority is of the settled view that the Respondent did not evaluate the tenders on a common basis as provided for under Section 74(1) of the Act. Accordingly, the Appellant's disqualification based on this criterion was not justified. At this juncture we should point out just in passing that the Appellant made reference to Clause 14.2 of the ITT which does not exist.

Reverting to the Appellant's second ground of his disqualification, the Appeals Authority revisited the Tender Document and observed that Clause 20.3 of the ITT requires bidders mandatorily to initial their documents after doing interlineations, erasures or overwriting. The Clause reads-

"any interlineations, erasures, or overwriting shall be valid only if they are initialled by the person or persons signing the Tender..."(Emphasis Added).

The Appeals Authority revisited the Appellant's tender and observed that Item M of Bill No. 9 of the BOQ was altered in which figure 9 had been overwritten to read 4 and the said overwriting was not initialed. When asked by the Members of the Appeals Authority regarding this glaring anomaly, the Appellant admitted to have made such alteration without initialing the same as required stressing that the alteration was so trivial such as to warrant his disqualification.

The Appeals Authority having revisited Regulation 207(1) of GN.NO.446/2013 relied by the Appellant would like to distance itself from the Appellant's propositions since Clause 20.3 of the ITT is self explanatory. The Appeals Authority is satisfied that the Appellant's disqualification based on this requirement was justified. Accordingly, the Appeals Authority's conclusion with regard to the first issue is that the Appellant's disqualification was proper at law.

2. Whether the award to the proposed successful tenderer is justified

In resolving this issue, the Appeals Authority took cognizance of part of its findings on the first issue above that the evaluation of the tender was contrary to the provisions of the Tender Document. The Appeals Authority has observed that since some bidders, namely; M/s Dema Construction Company Ltd., the Appellant and M/s J.S. Khambaita Construction Ltd. were also wrongly disqualified at the preliminary stage for partial quoting, it is not proper to conclude that the award of the tender to the proposed successful tenderer is justified at law. Accordingly, the Appeals Authority's conclusion with regard to the

second issue is that the award of the tender to the proposed successful tenderer is not justified.

Last but not least, the Appeals Authority has observed that the threshold within which the Respondent intends to award this tender falls under the margin of exclusive preference for works under Regulation 30 of GN.No.446 of 2013 read together with the 7th Schedule to the Regulations. The law requires the Respondent to grant margin of preference over foreign participants. The Evaluation process was conducted in ignorance of the provisions of Section 55D of the Act and new Regulation 43 of GN No. 446 of 2013.

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

In resolving this issue, the Appeals Authority took cognizance of its findings on the first and second issues above and observed that since evaluation of the tender was seriously flawed; the Appeals Authority observes that the Appeal partly has merits. Therefore, the Respondent's decision to award is quashed and it is hereby ordered that the Evaluation process be conducted afresh as shown herein above.

It is so ordered. Each party to bear its own costs.

This Decision is binding and may be enforced in accordance with Section 97(8) of the Act, as amended.

Right of Judicial Review as per Section 101 of the PPA/2011 explained to parties.

This Decision is delivered in the presence of the Appellant and the Respondent this 16th June, 2017.

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HON. VINCENT K.D.LYIMO, J (rtd)

CHAIRMAN

MEMBERS

1. ENG. FRANCIS T.MARMO

2. MR. LOUIS ACCARO