

IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY

APPEAL CASE NO. 41 OF 2017-18

BETWEEN

M/s ENSOL TANZANIA LIMITED.....APPELLANT

AND

MPANDA DISTRICT COUNCIL.....RESPONDENT

DECISION

CORAM

1. Ms. Monica P. Otaru - Ag. Chairman
2. Mr. Louis P. Accaro - Member
3. Eng. Francis T. Marmo - Member
4. Ms. Florida R. Mapunda - Ag. Secretary

SECRETARIAT

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

FOR THE APPELLANT

1. Mr. Hamisi S. Mikate - Managing Director
2. Mr. Lauden Mwamelo - Director
3. Ms. Julieth Lucas - Sales Officer

FOR THE RESPONDENT

1. Eng. Ismail M. Nassor - Water Engineer
2. Mr. Harrison H. Temu -Ag. Head-Procurement Management Unit

The Appeal at hand was lodged by M/s Ensol Tanzania Limited (hereinafter referred to as "the Appellant") against Mpanda District Council (hereinafter referred to as "the Respondent").

The Appeal is in respect of Tender No. LGA. 099/2017/2018/W/S/PLANT/01 for Supply and Installation of Submersible Pump and Solar Power Plant at Mwese Village (hereinafter referred to as "the Tender").

According to the documents submitted before the Public Procurement Appeals Authority (hereinafter referred to as "the Appeals Authority"), the facts of the Appeal may be summarized as follows:

The Respondent through Habari Leo newspaper of 5th March 2018, invited eligible tenderers to submit tenders under the National Competitive Tendering procedures (NCB) specified in the Public Procurement Act No. 7 of 2011 (hereinafter referred to as "the Act") and the Public Procurement Regulations G.N. No. 446 of 2013 (hereinafter referred to as G.N. No. 446/2013, both as amended).

The deadline for submission of tenders was set for 21st March, 2018, whereby three tenders from the following firms; M/s Ensol (T) Limited, M/s Masotricity Engineering Limited and M/s Dar Huduma Hardware were received.

The tenders were subjected to evaluation which was conducted in three stages namely; Preliminary, Detailed and Post Qualification. During Preliminary Evaluation, the Appellant's tender and that by M/s Masotricity Engineering Limited were disqualified for being non responsive to the Tender Document. In the case of the Appellant, they were found to have

submitted part of the Tender Document which was not issued by the Respondent, specifically the Bills of Quantities (BoQ) and submission of Manufacturer's Authorization instead of Manufacturer's Certificate.

The remaining tender by M/s Dar Huduma Hardware was therefore subjected to Detailed Evaluation and Post Qualification. It was finally recommended for award of the Contract at the Contract Price of TZS. 280,802,000.00.

The Tender Board at its meeting held on 20th April 2018, approved the award recommendation, whereby on 8th May 2018, the Respondent issued the Notice of Intention to Award the Contract to all tenderers who participated in the Tender.

Dissatisfied with disqualification and the proposed award thereof, the Appellant filed for administrative review by the Respondent's Accounting Officer on 11th May 2018. On 17th May 2018, the Respondent's Accounting Officer delivered a decision in which he agreed with the Appellant on some aspects without mentioning them in detail. The Appellant was however informed that they were not considered for award on the ground that their evaluated bid price was ranked second.

Aggrieved further, on 28th May 2018, the Appellant lodged this Appeal.

SUBMISSIONS BY THE APPELLANT

The Appellant's major ground of Appeal is that the proposed award of Contract to M/s Dar Huduma Hardware is not proper since the said bidder did not comply with the requirement of Clause 19.1 of the Instructions to Tenderers (ITT) read together with Clause 15 of the Bid Data Sheet (BDS)

which require bidders to submit as part of their bids, a bid security of 5% of the Contract Price. As they were the only ones who complied with this requirement, the proposed successful tenderer should have been disqualified at the earliest stage of evaluation for submitting bid securing declaration contrary to Clause 19.6 of the ITT.

Finally, the Appellant prayed for the following;

- i. Declaration that, their disqualification is illegal and unjustified.
- ii. The award of the Tender to be made in their favour.
- iii. The cost of the Appeal as hereunder described;
 - a. Appeal filing fees TZS. 200,000.00
 - b. Legal fees TZS. 4,000,000.00
 - c. Costs incidental to the appeal as shall be justified in the due course.

REPLY BY THE RESPONDENT

The Respondent's reply to the ground of Appeal may be summarized as follows:-

- i. That, they waived the requirement to submit 5% of the Contract Price and considered the Tender Securing Declaration since Clause 29.4 of the ITT allows doing so, taking into account that the value of this Tender was below the threshold for exclusive preference provided for in the ninth and thirteenth Schedules to the Regulations.
- ii. That, the Appellant's disqualification was based on the submitted Tender Document which did not conform to that issued by them. The

Appellant's BoQ contained units of measures and rates different to those provided by them, specifically in items 1, 3, 4, 6, 7 and 9.

Finally, the Respondent prayed for the dismissal of the Appeal and the decision they have made to be upheld.

ANALYSIS BY THE APPEALS AUTHORITY

In dealing with this Appeal, we went through the Tender proceedings including various documents submitted by both parties and their submissions and we are of the view that the Appeal is centred on three main issues calling for determination; these are:-

1. Whether the disqualification of the Appellant's tender is justified.
2. Whether the proposed award of the contract to the proposed bidder is legally proper.
3. What reliefs, if any, are the parties entitled to

Having framed the above issues, we proceeded to resolve them as hereunder;

1. Whether the disqualification of the Appellant's tender is justified

In resolving this issue, we considered the Respondent's argument that the Appellant's bid was disqualified for alteration of the BoQ and submission of Manufacturer's Authorization instead of Manufacturer's Certificate.

In substantiating the validity of the Respondent's argument, we revisited the Appellant's tender and observed that it contained the Manufacturer's Authorization in compliance with the requirement of Clauses 14. 3 (a) of the ITT and 11 of the BDS, which require bidders to submit Manufacturer's Authorization. We are of the considered view that the Appellant's

disqualification based on this criterion was not correct, as rightly admitted by the Respondent during the hearing of the Appeal.

Regarding non-compliance with the BoQ, we revisited the Appellant's tender and observed that the same has been modified by inserting different unit measures of the items contrary to the Tender Document issued by the Respondent. For instance, while the original Tender Document required tenderers to supply a solar power to deliver 52,000 Watts, the Appellant proposed to supply 52,000 pieces. Further, while the Tender Document required bidders to supply and install one (1) set of cooling sleeve for pump protection, horizontal kit; the Appellant proposed to supply one (1) piece. We are in agreement with the Respondent that the Appellant's proposal changed the Tender Document to a great extent.

When asked by the Members of the Appeals Authority regarding this glaring anomaly, the Appellant conceded to have mistakenly altered the units. They however argued that such anomaly would have been rectified during contract negotiation since they considered it as a minor issue.

Having gone through the Tender Document we clearly see that the Appellant contravened Clause 20 (1) of the ITT read together with Clause 16 of the BDS; and by virtue of Regulation 205(c) of G.N. No. 446/2013 they were rightly disqualified.

The referred Clauses read;

Clause 20(1) "Tenderers shall submit offers that comply with the requirements of the Tendering Documents, including the basic Tenderers technical design as indicated in the specifications, Drawings and Schedule of Requirements. Alternatives will not be considered, unless specifically allowed for in the Tender Data Sheet.

BDS (16) "Alternative tender to the requirements of the tendering documents will not be permitted. (Emphasis Added).

In view of the above, we find that the Appellant's disqualification based on the alteration of the BoQ was proper and justified.

2. Whether the proposed award of the contract to the proposed bidder is legally proper

In resolving this issue, we considered the Appellant's arguments that the proposed bidder did not comply with the requirement to submit the bid security of 5% of the Contract Price, therefore they ought to have been disqualified during Preliminary Evaluation stage and that they should have been awarded the contract as they were the only ones who complied with that requirement.

We considered the arguments by both parties and observed that indeed Clause 19.1 read together with BDS Clause 15 requires bidders to submit 5% of the Contract Price as bid security; and that in terms of the said Clauses the proposed bidder ought to have been disqualified. We have observed further that, the Respondent invoked Clause 29.4 of the ITT waiving the said requirement and using the Bid Securing Declaration, which all bidders including the Appellant had submitted.

We are of the considered view that the value of this Tender being below the threshold for exclusive preference prescribed in the ninth and thirteenth Schedules to the Regulations, the Respondent's waiver conforms to the requirement of Regulation 27 of GN. No. 446 of 2013, which reads;

Regulation 27 "Tender Securing declaration shall apply for the procurement the value of which does not exceed the threshold for

exclusive preference as provided in the ninth and thirteenth schedules to these Regulations”.

The Schedules provide for threshold of TZS. 5,000,000,000.00 for procurement of goods, while the Respondent's estimates for the Tender was TZS. 306,850,000.00

According to Clauses 29 and 35 of the ITT, price determination is carried out to the substantially responsive tenders that have passed all evaluation stages specified in the Tender Document. Since the Appellant's tender was not responsive from the beginning; he cannot claim that his price was the lowest evaluated.

All in all, the Appellant's argument that the award ought to have been preferred to them has no merits since it was not possible for the Respondent to compare their bid price to that of the proposed successful tenderer as they were disqualified prior to that stage as clearly shown in the Evaluation Report. Accordingly, our conclusion regarding this issue is that the proposed award of the contract to the proposed bidder is legally proper.

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

Having analyzed the contentious issues above, we revisited the prayers by both parties and observed that the prayers by the Appellant bear no merits since their disqualification is justified and was in accordance with the law. In that view, we accept prayers by the Respondent to dismiss the Appeal and declare that the award of the Tender to the proposed bidder is valid.

The Appeals Authority hereby dismisses the Appeal for lack of merits and declares that the award of the Tender to the proposed bidder is valid. Each party to bear own costs.

It is so ordered.

This Decision is binding on the Parties and may be executed 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.

The Decision is delivered in the presence of both Parties, this 11th day of July, 2018.

M. Otaru
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Ms. MONICA P. OTARU
Ag. CHAIRPERSON

MEMBERS:

- 1. ENG. FRANCIS MARMO** *Francis Marmo*
- 2. MR. LOUIS ACCARO** *Louis Accaro*